ORIGINAL

In the
Supreme Court of Ohio

BEAVER EXCAVATING COMPANY, et al., Plaintiffs-Appellants, v. JOSEPH W. TESTA [RICHARD A. LEVIN], TAX COMMISSIONER OF OHIO, Defendant-Appellee.	: : : : : : : : : : :	Case No. 2011-1536 On Appeal from the Franklin County Court of Appeals, Tenth Appellate District Court of Appeals Case No. 10-AP-581

BRIEF OF APPELLEE
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INTRODUCTION

It is not surprising that taxpayers would wish to avoid paying a tax, and would sue to challenge the imposition of certain taxes. Nor is it surprising that county engineers or roadbuilding contractors, who have an interest in funding highway construction, would sue to insist that certain funds be spent on highways. But it is surprising that the coalition of plaintiffs and amici here—led by Plaintiffs-Appellants Beaver Excavating, et al. ("Beaver"), and including county engineers and highway contractors—would cooperate to disguise this tax-objection case as a crusade to save highway spending.

Whatever the parties' reasons, the mismatch here is undeniable. Beaver purports to champion preservation of highway funding on behalf of every Ohio driver, and it invokes an Ohio constitutional amendment that requires certain revenues to be spent on highways. Yet its *actual* legal claim, and *sole* claim for relief, is a claim to lower its taxes, *not* to have any disputed revenues spent on highways. The mismatch is not just a matter of misleading rhetoric, but it is a legal and logical hole in Beaver's argument. The disconnect leads to several independently fatal flaws in its case: Beaver fails on the merits; it fails to show that the remedy it seeks is available; and it even fails to establish standing as a threshold issue.

The relevant constitutional provision, whatever its precise scope, is plainly a limit on how certain revenues can be *spent*; it does not limit taxation in any way. Section 5a of Article XII says that "[n]o moneys derived from" certain taxes and fees on motorists "shall be expended for other than" highway purposes such as road construction and repair. The amendment applies to "fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles." Beaver claims that Ohio's commercial activity tax, or CAT—which is imposed on the privilege of doing business and is measured by a business's gross receipts—is a tax "relating to . . . [motor] fuels," because some of Beaver's gross receipts were derived from motor fuel sales. That, Beaver says, triggers Section 5a and somehow renders the *tax* invalid. Beaver seeks to enjoin the Tax Commissioner from "levying, collecting, or enforcing the CAT as it relates to motor fuel." Complaint at 6. This claim fails.

First, none of the Beaver plaintiffs has standing to bring the case in its current form. Beaver has limited its claim for relief to a tax-cancellation remedy, but no such remedy is available. Challenges to the *expenditure* of tax revenue, based on "earmarking" or dedicated-use provisions, do not implicate the validity of the tax's *collection*. *State ex rel. Donahey v. Edmondson*, 89 Ohio St. 93, 114 (1913); *see Friedlander v. Gorman*, 126 Ohio St. 163, 168 (1933). Thus, the only remedy available for a Section 5a violation is enforcement of the spending restraint, not invalidation of the tax. That, in turn, undercuts Beaver's standing, because a plaintiff must show that a court could "redress" its purported injury with a legally available remedy. *Clifton v. Vill. of Blanchester,* 131 Ohio St. 3d 287, 2012-Ohio-780, ¶ 25. Because Beaver cannot obtain the tax remedy it seeks, and because restraining the spending would not lower its taxes one cent, it has no standing as an objecting taxpayer.

The County Engineer Plaintiffs might have standing to file a spending-restraint case, but they did not file such a case here. Beaver flirts with suggesting that this case includes a spending-restraint claim, insisting that the County Engineers are "aggrieved" by being "deprived of funds they otherwise would receive if moneys derived from the CAT relating to Motor Vehicle Fuel sales were collected and distributed in the manner mandated by Section 5a." Beaver Br. at 13. But the Complaint seeks *no such spending-restraint relief* to redress that harm. Thus, the Engineers, who probably *could* have had standing if they had sought proper relief, do not have it in *this case.*

Second, if the Court reaches the merits, Beaver's claim fails. Section 5a does not limit taxation, and it is not even triggered unless a tax itself, on its own terms, relates to motor fuels. And the appeals court properly rejected Beaver's claim that the CAT is an excise tax "relating to" motor fuels. As that court explained, the CAT is imposed on the privilege of doing business, with the value of the privilege measured by gross receipts, so including receipts derived from fuel sales does not convert the CAT into a tax on or "relating to" motor fuel. *Beaver Excavating Co. v. Levin* (10th Dist.), 2011-Ohio-3649 ("App. Op."), ¶¶ 33-34 (citing *Ohio Grocers Assn. v. Levin,* 123 Ohio St. 303, 2009-Ohio-4872). This Court already explained in *Grocers*—a case that involved an anti-tax provision, as opposed to a spending restraint—that the CAT may include, in measuring the value of the privilege, even a *tax-exempt* item for which direct taxation would *forbidden.* Here, the core principle is the same: The CAT relates to doing business, and it does not "relate to" motor fuels any more than it relates to selling food, widgets, or anything else.

Moreover, Section 5a's text and history show that it reaches only those special taxes that target motorists specifically; it does not address general taxes that just happen to include gas- or driving-related applications in their sweep. The CAT's predecessor, the corporation franchise tax, also included "gas-related" receipts or income in its formula. Moreover, all general taxes, whether business taxes, sales taxes, employment taxes, or property taxes, might arguably "relate" to driving or to gasoline in some sense, as applied to some taxpayers' facts, but such applications do not trigger Section 5a. For example, the general sales tax, as applied to the purchase of a car or even car-repair parts, would "relate," under Beaver's broad view, to the operation or use of a car on public highways. But no one has ever suggested that such incidents trigger Section 5a. Such absurd results show that Beaver's view is mistaken, because the General Assembly, the Tax Commissioner, and the courts could not apply such an unworkable standard.

Finally, even if Beaver could establish standing and prevail on the merits, it would not be entitled to a tax reduction, but only to enforcement of the spending restraint. As noted above, the Court has held that violations of "earmarking" provisions are remedied only by addressing the misspending, not the revenue *collection*. *Edmondson*, 89 Ohio St. at 114. As *Edmondson* explained, "[i]f perchance other laws in relation to the disbursement of the fund so raised, for the purpose for which it was levied, are unconstitutional, *nevertheless the levy must stand*, leaving it to the legislature to provide constitutional ways and means by which the fund may be applied to the object named in the statutes." *Id.* (emphasis added). Thus, even if Beaver could clear every other hurdle, it could not, in the end, achieve its stated goal of cutting its tax bill.

For these and other reasons below, the Court should reject Beaver's attempt to avoid paying its fair share of the CAT, and it should not allow Beaver to recast Section 5a's spending-restraint mechanism as a ticket to tax reduction. It should reject Beaver's claim for lack of standing, or affirm the appeals court in rejecting the claim on the merits, or even if it finds a violation, limit its remedy to the spending restraint at the heart of Section 5a.

STATEMENT OF THE CASE AND FACTS

Beaver claims that the CAT is invalid to the extent that CAT liability is based on gross receipts, including receipts from selling motor fuel. It claims that such taxation violates Section 5a's earmarking of certain tax revenues for highway purposes. Thus, the relevant background includes the history of Ohio's taxation schemes, both before and after Section 5a's adoption.

A. Beaver's challenge to Ohio's commercial activity tax (CAT) arises against a broader backdrop of Ohio's history of franchise taxes and of excise taxes on gasoline.

Beaver's claim implicates three strands of Ohio tax history: Section 5a's enactment, Ohio's franchise taxes, and Ohio's excise taxes on gasoline (along with other driving-related fees and taxes, such as the license tax).

1. **Before Section 5a was adopted, Ohio had a franchise tax on doing business and had various excise taxes on gasoline.**

Long before Section 5a was enacted, Ohio had adopted general taxes and had adopted excise taxes that targeted gasoline. General taxes included sales and use taxes and personal and real property taxes, and the primary business-focused tax was the corporate franchise tax (CFT).

The CFT was enacted in 1902, and for over a century, it was imposed on most corporate businesses in Ohio, including those in the petroleum, automobile, and highway transportation industries. (Separate industry-specific franchise taxes were imposed on insurance companies and public utilities, which did not pay the CFT.) The CFT, from 1902 until it was phased out for most corporations at the end of fiscal year ("FY") 2009, was imposed annually for the privilege of doing business upon all domestic and foreign corporations (unless specifically exempted), no matter what type of business they conducted. 95 Ohio Laws 124; G.C. 5495, 111 Ohio Laws 471 (All former laws cited are exhibits to the Commissioner's Second Motion for Summary Judgment ("Def. 2d MSJ"), and many are also in Beaver's Appendix). *See also Grocers,* 2009-Ohio-4872, ¶¶ 16, 36-37. CFT liability was measured by the value of a corporation's capital stock, which in turn was based on its net worth. G.C. 5498, 112 Ohio Laws 410, 410-412. The CFT was amended in 1971 to measure a corporation's net income as well. Throughout the CFT's history, most, if not all, CFT revenues were credited to the general revenue fund (GRF). 95 Ohio Laws 124-128; G.C. 5491, 112 Ohio Laws 410, 414; R.C. 5733.12.

Ohio also enacted several special taxes on gasoline, and on automobiles and licenses, before 1947. ("Special taxes" is a term historically used to describe taxes imposed on a narrow basis to fund a particular purpose. *Adler v. Whitbeck,* 44 Ohio St. 539, 571-72 (1886). In 1906, Ohio imposed its first automobile license tax, and the revenue generated by the tax was earmarked for highway purposes. 98 Ohio Laws 320, 320-321, 326; G.C. 6309-2, 108 Ohio

Laws Pt. II 1078, 1083. Ohio enacted its first gasoline tax in 1925, imposing an excise tax of two cents on the sale and use of each gallon of motor vehicle fuel sold or used by any dealer within the state. G.C. 5527, 111 Ohio Laws 294, 295. The tax's purpose was to raise revenue for the construction, maintenance and repair of roads and highways and "for the distributing equitably upon those persons using the privilege of driving such motor vehicles upon such highways and streets a fair share of the cost of maintaining and repairing the same." *Id.* In keeping with the purpose of maintaining "public highways," refunds were available for motor fuel used for other purposes (e.g., farm use). G.C. 5534, 111 Ohio Laws at 298.

In 1927, Ohio imposed an "additional" excise tax on the sale and use of motor fuel (the "additional gasoline tax"). G.C. 5541 *et seq.*, 112 Ohio Laws 508, 508-512. It was earmarked for highway purposes and also gave refunds for fuel bought for uses other than on public roads. G.C. 5541-6, 5541-7, 112 Ohio Laws at 510; G.C. 5541-1, 112 Ohio Laws at 509. In 1931, the General Assembly amended both gasoline taxes, imposing them on the "use, distribution or sale" of motor fuel. G.C. 5527, G.C. 5541, 114 Ohio Laws 482, 483-484, 494.

2. Revenue from gasoline taxes was diverted from road maintenance to other uses, triggering legal battles and new laws in Ohio and across the nation.

Soon after the first gasoline taxes and license taxes were adopted, litigants challenged whether the earmarks were being honored, along with whether the taxes were too high for legitimate highway needs. *See, e.g., Saviers v. Smith,* 101 Ohio St 132, 141-42 (1920). In *Smith,* the Court concluded that legitimate highway needs included items such as police and safety and traffic control. *Id.* The Court also noted that automobile use was growing quickly, so future needs would soon catch up with any revenue growth. *Id.*

Soon battles over "diversion" of such funds were no longer about arguable uses at the margin, as Ohio and other States began openly using gas-tax and license-tax money for general uses completely unrelated to roads. Already in the 1920s, and even more so during the Great Depression, States diverted revenues from automobile registration fees and excise taxes on gasoline to funding social programs for the poor. Karen L. Spinola, *The Road less Traveled—Implications of the Goodman Oil Decision*, 38 Idaho L. Rev. 637, 646 (2002); App. Op. ¶ 3. Ohio redirected license tax revenues for 1932 and 1933 to public libraries and to counties' general funds. G.C. 6309-2b, 114 Ohio Laws 851, 856-857. In 1932, Ohio authorized counties and cities to spend, "for relief of poor," funds from the gas and license taxes, until March 1, 1933. 114 Ohio Laws Pt. II 14, 14-17.

In 1933, the General Assembly reduced the combined amount of the original and additional gasoline taxes from four cents to three cents per gallon, G.C. 5527, G.C. 5541, 115 Ohio Laws 629, 629-630, and it enacted a temporary one-cent "liquid fuel tax," without devoting the revenue to highway purposes, G.C. 5542-2, 115 Ohio Laws 631, 632-633. Apart from an amount set aside for refunds of the tax, the liquid-fuel-tax funds were sent to school districts for the next six years, G.C. 5542-18, 115 Ohio Laws at 641-642, and in 1939, the funds were directed to the GRF, G.C. 5542-18, 118 Ohio Laws 7, 9.

While battles over gas-tax revenue were fought in the States, Congress joined the fray in 1934 and enacted the Hayden-Cartwright Act. It required States to limit their "diversion" of special gas-tax or motorist-fee funds, as a condition for receiving federal funding for highway projects. It applied to "State motor vehicle registration fees, licenses, gasoline taxes, and other special taxes on motor-vehicle owners and operators of all kinds." 48 Stat. 993, 995, Appx. A-333. Specifically, the Act required States to maintain, at a minimum, funding for highways from such sources at pre-Act levels. For Ohio, as of June 1934, all gas-tax revenue and 48% of license-tax revenue were subject to the Act's antidiversion restriction. 115 Ohio Laws 482; 115

Ohio Laws Pt. II 67. In June 1934, more than 70% of total revenue generated by Ohio's special highway user taxes was subject to the Hayden-Cartwright Act's anti-diversion restriction.

Although the Hayden-Cartwright Act limited the amount of special tax revenue that could be diverted to non-highway purposes, many states went further and passed laws to require all gas tax revenues to be used to directly benefit motorists. Owen D. Gutfreund, *Twentieth-Century Sprawl: Highways and the Reshaping of the American Landscape* (2004) (Def. 2d MSJ Ex. 13), 28, 32-33. Moreover, "[w]ithin a few years, twenty states had enacted constitutional provisions to 'protect' highway revenues, and others had amendment procedures underway." *Id.* at 33. "These constitutional provisions were 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." Ohio Constitutional Revision Commission 1970-1977, Proceedings Research, Vol. 4 (Def. 2d MSJ Ex. 36), 1755. Ohio proved to be no exception.

3. Section 5a, enacted in 1947, provides that revenues generated by certain taxes and fees, such as gasoline taxes and driver's license fees, are spent only on specified highway-related purposes.

In 1947, Ohio's voters adopted a constitutional amendment to ensure that revenue from Ohio's special taxes and fees on motorists, such as gasoline taxes and driver's license fees, would be spent only for certain purposes, such as building highways. It provides as follows:

> *No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles, shall be expended for other than costs of administering such laws,* statutory refunds and adjustments provided therein, payment of highway obligations, *costs for construction, reconstruction, maintenance and repair of public highways* and bridges and other statutory highway purposes, expense of state enforcement of traffic laws, and expenditures authorized for hospitalization of indigent persons injured in motor vehicle accidents on the public highways.

Ohio Const., art. XII, § 5a (emphasis added). As noted above, Ohio had initially earmarked funds from the driver's-license tax and the gasoline tax for use in building and maintaining highways, but by the 1930s, "moneys from motor vehicle related taxes [were] used to meet general needs, such as help for the poor during the Great Depression." App. Op. ¶ 3. The new Section 5a restored the principle that money raised from motorists would be spent on highways. It ensured that Ohio would satisfy Hayden-Cartwright, thus "allow[ing] state road money to tie in with the federal highway program." *Id.* *See also id.* ¶ 19 (noting federal incentive). Ohio joined many other States in doing so. *Id.* ¶ 19; *id.* ¶¶ 48-50 (Dorrian, J., concurring).

Ohio had, before enacting Section 5a in 1947, rejected a similar measure in 1934. That proposal would not only have restricted gas-tax revenue to road uses, but would also have capped the gas tax at three cents per gallon. *See* Beaver Br. at 6. Section 5a, while similarly restraining the use of the revenue, did not limit taxation as the 1934 proposal would have done.

After Section 5a was enacted, the General Assembly quickly repealed the liquid fuel tax to conform, as revenue from that tax was not limited to highway purposes. The General Assembly also raised the gasoline tax from three cents to four cents per gallon—that is, to the same combined amount that the two taxes had imposed together, and to the same amount that the gasoline tax had been before it was lowered when the liquid fuel tax was enacted. 122 Ohio Laws 807, 809. The Assembly did not need to revise the laws that had directed license-tax revenue to non-highway purposes, as it had already repealed them. *See* 122 Ohio Laws 28, 29.

The CFT, meanwhile, was not amended in any way in response to Section 5a. Further, in 1971, the CFT was amended to require a net income calculation as well as a net worth calculation in determining CFT liability for the privilege of doing business, with businesses required to pay the higher of the two. R.C. 5733.01; R.C. 5733.05; 134 Ohio Laws 1485, 1549-75. Thus, any income generated from motor fuel sales went into the calculation for CFT liability. This lasted from 1971 through the CAT's enactment in 2005, and through the phaseout until 2009. During that time, to the Commissioner's knowledge, no one alleged, in litigation or administrative proceedings, that this system implicated Section 5a.

4. **Ohio replaced its old corporate franchise tax with the CAT, which also taxes the privilege of doing business in Ohio, but uses gross receipts as a measuring stick for assessing the value of the privilege and thus the amount of tax.**

For about a century, Ohio imposed the CFT on most Ohio businesses, "on the privilege of doing business." *See Grocers*, 2009-Ohio-4872, ¶ 37. Whenever the privilege of doing business is taxed, "the privilege must be valued" by some method. *Id.* ¶ 16. For decades, Ohio's valuation method had centered on the value of a company's outstanding stock, and beginning "in 1971, the net-income method for measuring [the privilege] was introduced." *Id.* ¶ 37. The full formula reviewed a company's income and other factors, leading to the amount of tax owed.

As part of a comprehensive tax reform, Ohio replaced the CFT with the CAT. *Id.* ¶ 1. The CAT, like the CFT, is imposed on the privilege of doing business. *Id.* It applies to all business, incorporated or not, and it measures the value of that privilege by a business's "gross receipts," not net income or other factors. *Id.* Further, under a tiered system, no CAT liability is triggered by the first $150,000 in gross receipts, and a flat $150 applies to those with receipts between $150,000 and $1 million. "For gross receipts over $1 million, the tax" is the amount over that line multiplied by the applicable rate, now $.0026 per dollar. *Id.* ¶¶ 7, 52-53.

Revenue generated by the CAT is first deposited in a "commercial activities tax receipts fund," and then is credited to three funds: "the general revenue fund," "the school district tangible property tax replacement fund," and "the local government tangible property tax replacement fund." R.C. 5751.20. In FY 2009, the net collections of the CAT were approximately $1.2 billion. Hall Aff. ¶ 7 (Def. 2d MSJ Ex. 3). Of this amount, approximately $139 million (11.6%) is attributable to gross receipts from motor-fuel sales. *Id.* ¶ 3; Beaver Br. at 1. By comparison, the combined net collections of the special taxes that are statutorily set aside for Section 5a purposes—including the "motor fuel tax" (R.C. Chapter 5735), the "fuel use tax" (R.C. Chapter 5728), vehicle registration fees (R.C. Chapter 4503), operator license fees (R.C. Chapters 4506 and 4507), and titles and liens (R.C. Chapters 4505, 1548 and 4519)—were nearly $2.5 billion. *Id.* ¶ 17; Riggins Aff. ¶¶ 3-5 (Def. 2d MSJ Ex. 45).

B. Beaver sued the Tax Commissioner, claiming that the CAT's imposition violates Section 5a, and both lower courts rejected its claims.

1. Beaver—with other fuel sellers, road-construction contractors and two county engineers—sued, seeking to enjoin collection of the CAT to the extent it is based on gross receipts that allegedly relate to motor fuel sales.

Beaver is one of twelve Plaintiffs here. Ten, including Beaver, are companies that the Complaint identified as the "Motor Fuel Seller Plaintiffs," who "generate gross receipts relating to fuel used to propel vehicles." Complaint at 2-3, ¶ 1. The Tax Commissioner does not dispute that at least some of them sell motor fuel, and presumably pay the CAT. However, most of the "Motor Fuel Seller Plaintiffs," such as Beaver, Kokosing Construction Co., Gerken Paving Co., and others, sell very little fuel, and much of their business is devoted to highway construction. At least one Plaintiff, Lykins Companies, is primarily a fuel-selling company.

The remaining two plaintiffs are the County Engineers of Ashland and Highland Counties. They alleged that their "budgets for county infrastructure projects depend, in part, on proceeds from taxes relating to motor fuel." Complaint at 3, ¶ 2. They alleged that they are being "deprived of certain funds that they would receive" if the disputed CAT revenues were earmarked for highway purposes. *Id.*; *see* Beaver Br. at 13 (claiming they are "aggrieved" by being "deprived of funds" that they would receive if Section 5a were applied to those funds).

The Complaint challenges the application of the CAT to these taxpayers, to the extent their CAT liability is based on gross receipts, including amounts generated by the motor fuel sales. Count I seeks a declaration that the "application of the CAT to motor fuel violates"

Section 5a. *Id.* at 5, ¶ 17. Count II, the "Claim for Injunctive Relief," says the "collection of the CAT relating to motor fuel should be enjoined." *Id.* at 6, ¶ 19. The prayer for relief seeks three declarations, ending in a declaration that the "CAT as it relates to motor fuel is unconstitutional," because the money raised is "not expended" for Section 5a purposes. *Id.* at 6. It seeks one injunctive remedy: "an order enjoining the Defendant . . . from levying, collecting, or enforcing the CAT as it relates to motor fuel." *Id.* It also seeks "such other relief" as "appropriate." *Id.*

The Complaint does not specify any alternative remedy that would restrain allegedly improper spending; it seeks nothing other than invalidation of the tax.

2. Both lower courts rejected Beaver's claim that the CAT triggered Section 5a, and neither court addressed the proper remedy for a violation.

Both courts below rejected Beaver's claim on the merits. The trial court relied heavily on *Grocers*, focusing on this Court's explanation of the CAT as a tax on the privilege of doing business, measured by gross receipts. Com. Pl. Op. at 2, 4-6, 7. Noting this Court's reasoning that the CAT is not imposed on any particular item or transaction that helped generate the taxpayer's gross receipts, the trial court concluded that the CAT did not trigger Section 5a here.

The appeals court likewise concluded that the CAT, and its measurement of gross receipts including those derived from motor fuel sales, did not trigger Section 5a. App. Op. ¶ 34. The appeals court also relied on *Grocers*, and it reviewed Section 5a's text and the history surrounding its adoption. The court explained that the "related to" language had to be read in light of Section 5a's purpose, because without a limiting principle, "[t]aken to the broadest possible extent, everything is related in some way to everything else." *Id.* ¶ 26. A concurring opinion added that Section 5a applied only "to restrict the use of revenues from taxes and fees targeted at users of the public roads." *Id.* ¶ 38 (Dorrian, J., concurring). The CAT, as a broad tax, is not "targeted at users of the public roads." *Id.*

Because the appeals court concluded that Section 5a was not implicated here, it did not reach the issue of what remedy would apply if Section 5a were violated.

Beaver appealed to this Court, which granted review.

ARGUMENT

Beaver's attempt to lower its taxes, based on Section 5a's spending restraint, fails at every stage of the analysis, and it fails each stage for multiple reasons. First, Beaver has no taxpayer standing to raise its tax-based objection, and it has not pursued a true spending-based claim. Second, Beaver's claim fails on the merits, because Section 5a is not violated when CAT liability is calculated by including, in measuring gross receipts, any receipts generated by motor-fuel sales. Finally, even if Beaver could show a violation here, the sole available remedy is enforcement of Section 5a's spending restraint, not cancellation of the tax.

Appellee Tax Commissioner's Proposition of Law No. 1:

> *Taxpayers have no standing to enforce Section 5a, because Section 5a provides no basis for a tax-cancellation remedy, and standing does not exist when a plaintiff has no redress available for his alleged harm.*

The Court should not reach the merits of Beaver's claim, because Beaver fails to establish standing. Well-settled rules of standing, recently re-affirmed and applied by this Court, require that a plaintiff not only show a concrete injury, but also that the injury must be *redressable* by the Court, and the relief sought must be available against the defendant. *Clifton*, 2012-Ohio-780, ¶¶ 20-23. The Taxpayer Plaintiffs have no standing because no tax-cancellation remedy is available, and because the alleged misspending is disconnected from their duty to pay the tax. Separately, although the County Engineer Plaintiffs, or anyone with a cognizable interest in protecting highway funding, might have standing in a case brought properly, they have no standing here because they have not requested any spending-based relief.

A. Settled standing principles require Beaver to show that it has suffered an injury that is caused by the Tax Commissioner and may be redressed in the case.

"Before an Ohio court can consider the merits of a legal claim, the person or entity seeking relief must establish standing to sue." *Ohio Pyro, Inc. v. Ohio Dep't of Commerce,* 115 Ohio St. 3d 375, 2007-Ohio-5024, ¶ 27. "[S]tanding to attack the constitutionality of a legislative enactment exists only where a litigant" (1) "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) "that the law in question has caused the injury," and (3) "that the relief requested will redress the injury." *Cuyahoga Cty. Bd. of Comm'rs v. State*, 112 Ohio St. 3d 59, 2006-Ohio-6499, ¶ 22. Further, the redressability prong requires that the type of relief sought must actually be available as a matter of law. *Clifton*, 2012-Ohio-780, ¶ 25. If a plaintiff seeks relief that a court cannot impose, the injury is not truly redressable, and no standing exists. *Id.*

Because standing is jurisdictional, the issue is non-waivable, and the Court must satisfy itself that standing exists. The Tax Commissioner acknowledges that he did not oppose standing below, but he is duty-bound to raise it now. Moreover, the Commissioner has always argued that no tax-cancellation remedy is available, and it is that lack of an *available* remedy—a point that this Court recently addressed as a standing issue in *Clifton*—that dooms Beaver's standing here.

In applying the standing tests above, the key point is to distinguish between the tax side and the spending side of the case, and to apply the prongs of the standing inquiry consistently to one theory or the other—and each type of Plaintiff must be tested separately. Beaver cannot mix and match, saying, for example, that the injury here is improper spending, but then seek a tax-cancellation remedy. Nor can the Engineers claim to be injured by the tax itself, and so on. As shown below, each combination of possible injury and relief here, for each type of Plaintiff, leaves Beaver without standing.

B. The Taxpayer Plaintiffs have no taxpayer standing here because no tax-cancellation remedy is available, and restraining the spending would not lower their tax bills.

Beaver's claim to standing is tax-based. The "Motor Fuel Seller Plaintiffs," or "Taxpayer Plaintiffs" for short, claim that they have standing as taxpayers. They allege that they pay the CAT and that gas-sale revenue is improperly included in calculating their CAT liability, and they seek to enjoin such taxation. The Taxpayers suffer at least two flaws in showing standing.

First, the disconnect between the Taxpayer Plaintiffs' tax objection and the "misspending" allegation means that they cannot show that "the law in question has caused the injury" at issue. *See Cuyahoga Cty. Bd. of Commr's,* 2006-Ohio-6499, ¶ 22. The injury in question is imposition of the tax; the Taxpayers do not allege that they are injured by the "misspending" itself. However, the "law in question," or the law they *substantively* challenge, is not the tax provision, but the spending/distribution provision. That is, the Taxpayers cannot deny that the tax itself, including the disputed inclusion of fuel-sales revenue in calculating gross receipts, is perfectly valid, and would be constitutional, in their view, if only the funds were set aside for Section 5a purposes. Thus, the statute that supposedly violates Section 5a is the one that *distributes* CAT revenue to the GRF, the local government fund, and the school district fund. *See* R.C. 5751.20. And *that* statute, or "law in question," does not cause them any injury as taxpayers. No amount of rhetorical appeals to saving the roads can change that concrete reality.

Second, and independently fatal to the Taxpayers' standing, is that a tax-cancellation remedy would not be available to them. The third prong of the standing injury requires not only that the requested relief be something that redresses the claimed injury, but it must be *available as a matter of law.* It is not enough for the Taxpayers to achieve internal consistency by saying (1) that their injury is taxation, (2) that it is caused (for argument's sake) by the taxation itself rather than the spending, and (3) that a tax-cancellation remedy would indeed cure their tax-based injury. The Taxpayers must show that the latter remedy is available at law.

The Court recently illustrated that principle—that a plaintiff lacks standing when the remedy it seeks is legally unavailable—in *Clifton v. Village of Blanchester*, 2012-Ohio-780, ¶ 25. In *Clifton,* a plaintiff whose property was outside a Village's borders, but adjacent to Village land, filed a "regulatory taking" claim against the Village, alleging that the Village's zoning changes harmed his adjacent property. *Id.* ¶ 1. The Court explained that the plaintiff's standing, although a threshold issue, depended upon looking ahead to see whether the sought-after remedy would be available if he won on the merits. The Court explained that the recognized "remedy for an alleged regulatory taking is for the property owner to file a complaint seeking a writ of mandamus to compel the regulating government entity to initiate appropriation proceedings against the property allegedly burdened by the regulation." *Id.* ¶ 26. The problem, however, was that under Ohio law, the Village had "no authority to initiate appropriation proceedings" against property "outside the municipality's limits." *Id.* ¶ 29. That meant that the Court could not order the Village to take that step, and that in turn meant that the plaintiff failed the "redressability" prong, and thus had no standing.

Here, as in *Clifton,* it is not enough for the Taxpayers to *state* a request for relief (a tax-cancellation remedy) that *would, if available,* redress its injury. It must show that the law allows for such relief. Thus, the Taxpayers' standing indisputably turns upon the Court's resolution of the "remedy issue" detailed in Proposition of Law No. 3. The Commissioner concedes that *if* the Court determines that a tax-cancellation remedy is available, then the Taxpayers would have standing to seek that relief. But the reverse is also true: *If* the Court determines that no such remedy is available, then that determination would not lead merely to limiting the remedy after any potential merits victory, but it would undercut any taxpayer-based standing in the first place.

C. The County Engineers, or anyone else with a cognizable interest in highway funds, might have standing to enforce Section 5a's spending restraints in a case properly brought to seek such relief, but they do not seek such relief here.

As the Tax Commissioner has repeatedly noted, Beaver's claim involves a complete disconnect between its stated devotion to preserving highway funding and its actual goal of cancelling the disputed taxation, which would not add a cent to any highway budget. While that problem permeates the case, nowhere is it more apparent than in Beaver's intentional avoidance of an alternate spending-restraint remedy, and in the Engineers' very presence in this case as plaintiffs. The Engineers claim to have an interest in protecting highway funds, but they have lent their name to a case that seeks *solely* a tax break for certain taxpayers.

The Complaint's failure to seek relief for the Engineers' distinct "injury" is plain, despite the Beaver coalition's half-invocation of the Engineers' apparent interest in preserving highway spending. On one hand, a backup plea for a spending remedy might seem implicit in the very presence of the County Engineer Plaintiffs, who claim to be "aggrieved" by being "deprived of funds they otherwise would receive if moneys derived from the CAT relating to Motor Vehicle Fuel sales were collected and distributed in the manner mandated by Section 5a." Beaver Br. at 13. And Beaver acknowledges mildly that it "would not be adverse to" a spending-remedy "result." *Id.* at 47. On the other hand, Beaver has not truly left that door open. Beaver insists a spending remedy is *not even available* to this Court. *Id.* at 47-48. More important, the Complaint sought only tax relief.[1] Because Beaver has deliberately avoided a spending remedy,

[1] Because the Complaint sought only tax relief, the Engineers would need to file a new case to seek spending relief. Even if Beaver is now willing to pivot to a spending remedy, it would need to identify the basis for that remedy in the Complaint. It cannot be the general prayer for relief, seeking "[s]uch other relief" as the court "deems appropriate," as courts have routinely rejected

the Engineers' joinder as Plaintiffs is not just legally flawed, but is inexplicable.[2]

However curious this position is, the more important point is the undeniable *legal* result that the County Engineers do not have standing, even though they might in a true spending-restraint case. Other county engineers have, after all, been parties in cases raising spending disputes over funds that are already in Section 5a accounts. *See, e.g., Knox County Bd. of Comm'rs v. Knox County Eng'r,* 109 Ohio St. 3d 353, 2006-Ohio-2576; *Stockberger v. Henry,* pending Sup. Ct. Case No. 11-0859. Such standing might extend to cases addressing whether certain revenues trigger Section 5a to begin with, but the Engineers' failure to seek spending-based relief means that the issue is not raised here.

In addition, Beaver cannot pursue the alternative route of "special fund" standing. The Court has explained that "[c]ontributors to a special fund"—regardless of whether the contributions occur through taxes, fees, or other form of payment—"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). In such cases, a taxpayer or feepayer might be able to pursue a spending-objection case. But again, Beaver does not seek such relief. Also, the doctrine does not apply here on its own terms. The Court has already held that payers into the actual gas-tax fund do not

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belated attempts to cure jurisdictional defects by invoking general prayers. *See, e.g., Thomas R.W. by & through Pamela R. v. Massachusetts Dep't of Educ.*, 130 F.3d 477, 480 (2d Cir. 1997) ("Nor does the general prayer for 'such further relief' . . . preserve a request for damages in order to avoid mootness"), citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 ("A claim for nominal damages, extracted late in the day from [plaintiff's] general prayer for relief and asserted solely to avoid otherwise certain mootness, bears close inspection."). If Beaver identifies a standing theory that is not jurisdictionally barred, the Tax Commissioner is willing to consider waiving non-jurisdictional objections to any such late-arriving theory, as the Commissioner welcomes resolution of this case on the merits if possible.

[2] Similarly, Beaver's amici seem to be universally devoted to preserving highway funding, yet not one addresses Beaver's commitment to a tax remedy. Most amici seem to proceed on the unspoken premise that the case involves a spending restraint, while one amicus—in contrast to Beaver's demand—expressly asks the Court to "restore full funding for highway improvements as mandated by Section 5a." Amicus Br. of Aggregates and Industrial Minerals Ass'n, *et al.* at 3.

have special-fund standing. *State ex rel. Dann v. Taft*, 110 Ohio St. 3d 252, 2006-Ohio-3677, ¶¶ 7, 9. Thus, payers of a merely alleged "gas tax" cannot have such standing.

In sum, none of the Plaintiffs has standing, and that is the end of the matter.

<u>Appellee Tax Commissioner's Proposition of Law No. 2:</u>

> *Section 5a governs taxes and fees that are targeted at motorists, such as gas taxes and driver's license fees. The general commercial activity tax is not "related to" motor fuels, and Section 5a is not triggered when a company's CAT liability is measured by gross receipts including receipts generated by motor fuel sales.*

If the Court reaches the merits of Beaver's claim, it should reject it, for many reasons. The CAT is not an excise tax related to motor fuels, as a matter of text, history, and more.

A. Beaver cannot succeed unless it overcomes the presumptions against its claim.

Beaver faces two heavy presumptions against its claim. First, statutes are entitled to a strong presumption of constitutionality, and Beaver must show that the law is unconstitutional beyond a reasonable doubt. *Grocers*, 2009-Ohio-4872, ¶ 11; *see also State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Educ.*, 111 Ohio St. 3d 568, 2006-Ohio-5512, ¶ 20. Any doubts are resolved in the statute's favor, so even if Beaver offers a "plausible" reading of the law, it loses if another view is also plausible. The challenged law survives "if it may plausibly be interpreted as permissible" under Section 5a. *See Grocers*, 2009-Ohio-4872, ¶11.

Second, exceptions to the general law, whether statutory or constitutional, are not favored and must be strictly construed. *Pioneer Linen Supply Co. v. Evatt*, 146 Ohio St. 248, 250-51 (1946); *State ex rel. Keller v. Forney*, 108 Ohio St. 463 (1923); *Martin v. Columbus*, 101 Ohio St. 1, 7 (1920). Ohio's general law is that "[f]unds raised by the taxation of franchises, rights and privileges may be applied to purposes of general revenue, or any other purpose authorized by statute." *State ex rel. Schwartz v. Ferris*, 53 Ohio St. 314 (1895), syl. ¶ 1. Section 5a's spending restriction is an exception to the general law. Accordingly, the Court must strictly construe Section 5a's restriction and uphold the CAT's distribution provision, R.C. 5751.20, if possible.

These two principles, taken together, require Beaver to meet an especially heavy burden.

B. Section 5a's plain text shows that it does not apply to CAT and does not render the CAT's imposition here invalid.

1. Section 5a's plain terms restrict spending, not taxation itself, so the imposition of the tax itself cannot violate the spending restraint.

Section 5a's plain text shows that it is directed solely at limiting spending of certain revenues *after* the revenues are collected, and it has nothing to say about collecting revenue in the first place. While that point—and Beaver's disconnect on it—also animates the Tax Commissioner's standing and remedy arguments, the point has independent significance as a merits point. No tax law, nor any as-applied incident of taxation, can violate Section 5a.

Section 5a's text on this point is straightforward. The core prohibition is that "No moneys derived from" the listed revenue sources "shall be expended for other than" the listed allowable uses. No matter how much litigants debate the scope of the revenue side—namely, what types of revenues trigger the prohibition—and no matter how much litigants debate the scope of the spending side—namely, what expenses can be paid with funds subject to Section 5a—this text is a straightforward spending restriction. Beyond the core phrase "shall be expended," which aims only at spending, the opening phrase, "[n]o moneys derived from," also shows that the restriction kicks in *after* revenues are collected, and it concerns only how the affected revenues may be spent.

This reading is supported by a common-sense look at the Court's Section 5a cases on the spending side, as well. Those cases have always described Section 5a as a spending restraint, not a tax limitation, calling it "the constitutional restriction on expenditure." *Knox County Bd. of Comm'rs*, 2006-Ohio-2576, ¶ 8; *id.* at ¶ 3 ("the Ohio Constitution restricts the expenditure of moneys derived from" the named sources); *Grandle v. Rhodes,* 169 Ohio St. 77 (1969), syl. ¶ 1 (Section 5a "closely restricts the expenditure of the fees and taxes received in relation to vehicles using the public highways to purposes directly connected with" highway purposes). In short, the Court has never described Section 5a as a tax restraint because it cannot possibly be read as one.

Equally important, the Court's Section 5a spending cases show that the provision has not only been described as a spending restriction, but it also has been treated as one. When the Court has resolved the spending challenges, it has ordered the parties accordingly to spend or not spend funds on the disputed expenses. No one ever suggested, even when the Court found misspending, that the revenue collection was an additional injury.

2. Neither the CAT's provision for unconstitutional tax impositions, R.C. 5751.01(F)(2)(ff), nor Section 5 of Article XII, convert a Section 5a spending objection into a tax objection.

Beaver invokes two provisions, one statutory and one constitutional, as textual aids to convert its spending objection into a tax-objection claim. Neither one works.

First, Beaver invokes R.C. 5751.01(F)(2)(ff) (now renumbered as R.C. 5751.01(F)(2)(gg)), which is an express tax limitation within the CAT scheme, but that effort fails. The provision excludes from gross receipts included in the base for calculating the CAT "[a]ny receipts for which the tax *imposed* by this chapter is prohibited by the Constitution or laws of the United States or the Constitution of Ohio." *Id.* (emphasis added). Although it is a tax limitation, it applies only when the tax's *imposition* violates the Constitution. If the Constitution does not already limit the tax's imposition, the statute does not apply, so the statute cannot convert a constitutional spending restraint into a statutory tax limit. The provision does not say that receipts shall be excluded "if a constitutional provision would limit the spending of revenue derived from such receipts to certain purposes." By contrast to this case, the provision applied squarely in *Grocers,* as the claim there was that the food-sales amendments prohibited the *imposition* of the CAT in a manner that included gross receipts derived from food sales. It does not apply here.

Second, Beaver invokes *Section 5* of Article XII to convert its spending objection into a tax objection, but that attempt fails, too. *See* Beaver Br. at 44. Section 5 provides that "[n]o tax shall be levied, except in pursuance of law; and every law imposing a tax shall state, distinctly, the object of same, to which only, it shall be applied." Beaver says that the alleged Section 5a spending violation means that some CAT revenue is being used for an improper "object," violating Section 5 (and perhaps thus triggering Section 5's tax-specific "[n]o tax shall be levied" language, though Beaver is unclear on that point). In support, Beaver cites cases and Attorney General opinions that, in its view, show that improper spending violates Section 5 as well as Section 5a. Beaver Br. at 46-48.

Beaver's invocation of Section 5 fails for several reasons. First, that provision's *relevant* part is *also* a spending restraint rather than a tax restraint. The opening tax-limiting clause, "[no tax shall be levied," concludes with the words "except in pursuance of law," and that clause is satisfied by the CAT's proper legal enactment. The semicolon and the conjunction "and" confirm that the tax-limiting clause ends there. The next clause requires the law to state the tax's object, and *then* limits spending of the revenue to the stated purpose: "and every law imposing a tax shall state, distinctly, the object of same, to which only, it shall be applied." Thus, once an object is stated, Section 5 forbids spending the revenue on anything other than that stated object—it does not render the initial taxation invalid.

The cases and Attorney General opinions that Beaver cites prove this point, and undercut any attempt to use Section 5 to convert spending objections into tax objections. In every one of those cases and opinions, the court or Attorney General rejected a proposed transfer of funds or spending of funds on an objective different from the stated or allowed one; in *no case* was the taxation itself implicated. *See In re Petition for Transfer of Funds by Perry Twp.*, 52 Ohio App.3d 1, 4-5 (1988); 1982 Ohio Atty. Gen. Ops. No. 82-031, 5; 1975 Ohio Atty. Gen. Ops. No. 75-088; 1976 Ohio Atty.Gen.Ops. No. 76-076; *see also Edmondson,* 89 Ohio St. at 114 (finding Section 5 and prohibiting spending, while specifying that the tax remains valid).

Further, if Section 5 could be used to convert spending violations into tax violations, then every case concerning alleged misspending, not just Section 5a cases, could be converted into tax cases. That would contradict common sense and settled practice. For example, when a challenger asserts that some spending amounts to a subsidy of religion, in violation of constitutional limits, no one says that the predicate taxation is rendered illegal. *See, e.g., Simmons-Harris v. Goff,* 86 Ohio St. 3d 1, 9, 1999-Ohio-77. Notably, Section 5, which was part of the 1851 Constitution, long predated Section 5a and was in place when this Court decided *Edmondson* and explained that spending objections do not implicate taxation. *Edmondson*, 89 Ohio St. at 114. If Section 5 provided otherwise, *Edmondson* should have come out differently. *See also Friedlander,* 126 Ohio St. at 168 (enjoining spending and noting taxation not at issue).[3]

Consequently, the plain text of Section 5a shows that it is solely a spending restraint, and neither R.C. 5751.01(F)(2)(ff) nor Section 5 allows Beaver to raise a tax objection. That alone defeats Beaver's claim of a tax violation.

[3] Although Section 5 does not help Beaver, the Commissioner notes that Beaver never cited Section 5 in its complaint, and has waived its use. Beaver cannot revive it by citing Section 5 as a mere interpretive tool to be used in combination with Section 5a. Under Beaver's construct, Section 5 would be the section violated, because the tax is being allegedly spent on the wrong object, with Section 5a acting as the auxiliary or "helper section" to establish the spending violation that leads to the tax violation. A party may use newly-cited sections as interpretive aids, but cannot cite a wholly new provision as the provision allegedly being violated.

3. The CAT is not within the category of excise taxes covered by Section 5a.

Section 5a's text also shows in another way why it is not triggered by the CAT, apart from the tax/spending disconnect: The CAT is not the type of "excise" reached by Section 5a.

In *Grocers,* the Court explained why the CAT, although technically an "excise" tax in some usages of that term, was not an "excise tax" for purposes of the provision at issue there. That precluded application of the provision, independent of whether the CAT amounted to a tax "upon food." *Grocers*, 2009-Ohio-4872, ¶¶ 26-32. The Court explained that Section 3 authorizes both franchise taxes and excise taxes, and Section 3 then separately limited the reach of excises only, showing that franchise taxes were separate. Further, excises, by definition, are always "upon" some particular item: "An excise tax cannot operate unless made to fall upon a specified subject." *Id.* ¶ 30. Thus, before reaching the "upon food" point, the Court held that the CAT, as a franchise tax upon the privilege of doing business, could not be within the scope of "excise" taxes, since "doing business" was a concept distinct from *any* particular subject of an excise. *Id.* ("But although Sections 3(C) and 13 use the term 'excise,' it does not follow that they are concerned with privilege-of-doing-business taxes.")

Here, too, the CAT is outside the reach of relevant "excises" that are even subject to the connected restraint in this nearby Article XII provision, even though it remains "true that a franchise tax is a kind of excise tax," *id.*, in other usage. First, Section 5a's text shows that "excises" must be a subset smaller than "all taxes," or even "all privilege taxes," because the relevant phrase identifies "fees, excises and license taxes" as the relevant categories. The text would have, said "all fees and taxes" if all taxes were included. Further, a "license tax" is itself a species of privilege tax, since of course a license is a privilege granted. *See* Black's Law Dictionary, 6th Ed., 634-35 (defining "license tax" as a "charge imposed by the government for the granting of a privilege" and "license" as "a personal privilege to do some particular act"). Thus, the term "excises" does not include all taxes, and specifically not all privilege taxes.

Second, the Court's reading of "excise" in *Grocers* should apply to all uses of the term in Article XII, including in 5a, because the Article is a cohesive whole, authorizing excise and franchise taxes and then applying a series of restrictions. As the Court explained, one subpart of Section 3(C) *authorizes* excises and franchises, and another subpart limits excises, showing that "excise" was used in a non-franchise sense. The Court applied this reading across Article XII to reach Section 13, too. Section 5a's use of the term is the *only* other usage of "excise" in all of Article XII, and it makes the most sense to read the definition of excises in the initial authorization to carry through all following usages in Article XII. That is especially so when considering that the authorization clause was once an independent provision in Article XII, and was only later connected to the food provision. *Grocers,* 2009-Ohio-4872, ¶ 31.

Third, as explained more fully in Part C, Section 5a's history shows it was adopted against a backdrop of many specific excise taxes on gasoline and "liquid fuel," and just as that history shows the meaning of "related to," it also shows the understanding of "excise" at issue.

Consequently, the term "excise" in Section 5a does not include the CAT, as a privilege-of-doing-business tax, so the provision's plain text defeats Beaver's claim in that way as well.[4]

4. **The CAT is not a tax "related to" motor fuels, because the restriction textually applies to the tax as written on its face, not to applications of a tax or to "moneys derived from" a tax.**

Other aspects of Section 5a's text also show why, even before considering the history and context of the provision, the CAT cannot be an "excise . . . related to . . . motor fuels."

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4 Beaver is also mistaken in claiming, as an alternative, that the CAT is a "license tax" for Section 5a purposes. Beaver Br. at 14. Beaver says the CAT is a license tax because it applies to the "privilege of doing business," and a license is a privilege. In the Section 5a context, however, the "license" referred to is an *automobile driver's license,* not any other type of license.

First, Section 5a's grammatical structure shows that tax *statutes* related to motor fuels implicate the spending restriction, while individual tax *impositions* do not. The "related to" restriction modifies the nouns specifying three categories of taxes or fees, and that means that the restraint applies only when the relevant tax or fee *as written* relates to driving or to motor fuels. That is, the noun being modified is the "excise" or excise tax, or the "fee," and the definition of an excise or a fee, as a noun, can only mean the law as written. The tax statute, providing for a tax with a certain scope, *is* the tax. The application of the tax to a given taxpayer, or its imposition in a given circumstance, is not the tax itself, as the "related to" clause does not modify any term referring to application. That means that the restriction applies only when an excise tax as written "relates to" motor fuel. If the tax itself does not refer to motor fuel, as the CAT does not here, then the text does not apply. In other words, all challenges under Section 5a must be facial, not "as applied."

That grammatical reading also makes sense, as the General Assembly can implement Section 5a *only if it knows* when it is enacting a law that "relates to" topics that trigger Section 5a. When it passes such a tax, it can and must direct the revenue toward Section 5a funds. But if the General Assembly passes a general tax, it cannot identify every possible *application* of the law that might "relate to" motor fuel, or to "use of vehicles on public highways." Thus it cannot provide for segregation, for Section 5a purposes, of revenues generated by such applications.

Beaver's argument on this score is telling, as it primarily attempts to rewrite the clause to link the "related to" restriction to the "money derived" from a tax, rather than to the actual tax. *See* Beaver Br. at 22. Beaver asserts that "[t]here is no modifying language in Section 5a that limits the type of excises affected." *Id.* But of course, the entire "related to" clause *is* such modifying language; an excise is affected only if the excise relates to specific topics. Beaver then says that "[m]oneys derived from the CAT . . . relate to Motor Vehicle Fuel." *Id.* (Heading B); *see id.* at 27 ("[T]he Court need only determine whether moneys derived from the CAT measured by Motor Vehicle Fuel gross receipts relates to Motor Vehicle Fuel."). But that, of course, misstates the question, for the "related to" clause modifies the term "excise" (or fee or license tax), *not* the "moneys derived from" the tax.

Second, the impossibility of an "as-applied" meaning is confirmed by another textual element: The "related to" clause links to two distinct clauses, one regarding motor fuels and one regarding "operation[] or use of vehicles on public highways." This shows that the relationship must be at the statutory-text level, and not through "application to circumstances," or else the motor-fuel clause would be superfluous. A gasoline tax, as applied to almost all circumstances, would "relate to" use of a vehicle on the highway, and would thus be covered by the "use of a vehicle" prong. So even if the motor-fuel clause did not exist, the other clause would still govern gas taxes, if it were susceptible to "as-applied" readings. Because that cannot be so, the clause refers only to "excises" or "fees" that are "related to" motor fuels or driving at the statutory level.

C. Section 5a's history shows that it applies only to taxes targeted at motorists, not general taxes that happen to intersect with gas or driving as applied to certain facts.

As explained above, the plain text of Section 5a shows that it is not implicated here. If, however, that text needs further review to resolve its meaning, then the history of its adoption and of Ohio taxation shows why the CAT is not an excise "related to" motor fuels. Section 5a was enacted to restrain the use of revenue generated by *special taxes and fees* that applied to motorists, ensuring that money generated from drivers was not diverted to non-highway uses.

1. The term "related to" means that the tax refers expressly to an item to create a relationship, and if that is not the plain meaning, the term is ambiguous.

The starting point for interpreting a constitutional amendment is the voters' intent: The Court ascertains and gives effect to the object of those adopting the amendment. *Castleberry v.*

Evatt, 147 Ohio St. 30, 33 (1946); *Platt v. Craig*, 66 Ohio St. 75, 77 (1902) ("The constitution must be construed in the light of the popular and received signification of its words. Because it emanates from the people it must be construed as the people must have understood it.").

The voters did not define, in Section 5a itself, the term "related to," and that term by itself can have varying meanings in varying contexts, so the Court must look to the context of its usage. As the court below noted, at some point "everything is related to everything else." App. Op. ¶ 26 (quoting *California Div. of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.* (1997), 519 U.S. 316, 335-36 (Scalia, J., concurring)).

Although the term "relate to" is not defined, two synonyms, "refer to," and "in respect to," offer guidance. Dictionaries define "relate" as including "to have connection, relation, or reference," Webster's II New College Dictionary, 1995 ed., or "to have reference," dictionary.reference.com. That supports the view that the challenged law itself must *refer to* motor fuel or the other listed topics. (Beaver tries, as an alternative, to meets that express reference test, but it fails, as shown below at 43). The term "respecting" or "with respect to" is another synonym; dictionaries define "respect" to include "to relate or refer to," Webster's II, or "to relate or have reference to," dictionary.reference.com.

And this Court has defined "respect to," when used in a tax exemption, to mean that the tax statute itself concerns the topic at issue, not merely that tax might be applied to create such a relationship. See *Philips Indus., Inc. v. Limbach*, 37 Ohio St.3d 100, 102-03 (1988) (holding that sales tax was not a tax "with respect to ownership" of aircraft; rejecting claim that purchase of aircraft was related to owning aircraft); *see also Howell Air, Inc. v. Porterfield*, 22 Ohio St.2d 32 (1970). In contrast, the Court has never defined "related to" or any synonymous term in the way Beaver wishes. Although Beaver seeks support in this Court's description of "relating to" as broader than "providing for" in *State ex rel. Keller,* see Beaver Br. at 24-25, that case was not reviewing the term "related," nor did it even say that term was especially broad. The Court was reviewing the term "providing for," and said only that "providing" was relatively narrower and thus not as broad as "related" might be, not that "related" itself was broad. Thus, in the Section 5a context, the term "related to" has its common meaning of *referring to,* that is, that Section 5a applies only to statutes that create a relationship to motor fuel by referring to motor fuel.

Several United States Supreme Court cases illustrate the need to carefully assess the context of "related to," because it can be narrow or broad. Beaver seeks to cherry-pick one broad use of "related to," relying on *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992),, for the proposition that all uses of "related to" must be broadly construed. Although the Supreme Court read "related to" broadly in the ERISA pre-emption context, it explained in other cases that the same term must often be read *narrowly.* In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), the Court held that the phrase "relating to smoking and health" must be "construed narrowly," *id.* at 529, because "there is a presumption against the pre-emption of state police power regulations," *id.* at 518. *Morales* did not involve any such presumption.

The Court later limited its *Morales* holding in another ERISA pre-emption case, explaining that "[i]f 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for 'really, universally, relations stop nowhere." *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins.*, 514 U.S. 645, 655 (1995). The Court explained the need to "go beyond the unhelpful text and the frustrating difficulty of defining" the term "related to," looking "to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.* at 656; *see also Cal. Div. of Labor Standards*, 519 U.S. at 335-36 (Scalia, J., concurring).

And notably, in such cases, the Court was dealing with a relationship between one statute, ERISA, and various state law *statutes,* not with "as-applied" factual scenarios.

In the Commissioner's view, the term "related to" is unambiguous, and does not support Beaver, for the textual reasons above and the contextual reasons below. But because the term, once extended, has no stopping point, then the only alternative is to find it ambiguous, as many courts have. *See MacCharles v. Minn. Dept. of Revenue,* 584 N.W.2d 795, 798 (Minn. Ct. App. 1998) ("In the context of this statute we conclude the term 'relating to' is ambiguous."); *Burks v. Belz-Wilson Props.*, 958 S.W.2d 773, 777 ("We believe that the language 'relating to participation in these events' can be considered ambiguous") (Tenn. Ct. App. 1997). But under no approach can the term be found unambiguous in Beaver's favor, given the lack of a limiting principle in that direction and given the presumptions running against Beaver's claim.

If the term is ambiguous, several principles resolve the ambiguity against Beaver's reading. Relevant factors include the history and circumstances of adoption; the cause, occasion or necessity for the provision; the imperfections to be removed or the mischief sought to be avoided; the remedy intended to be afforded; and the consequences of a particular construction. *See* R.C. 1.49(A), (B), (C) and (E); *Cleveland v. Bd. of Tax Appeals*, 153 Ohio St. 97, 103 (1950). In applying those principles, courts also work to avoid unreasonable, absurd, or ridiculous consequences. *Canton v. Imperial Bowling Lanes*, 16 Ohio St.2d 47, 53 (1968).

2. **The history of Section 5a's enactment, and tax history before and after, shows that it applies to special taxes and fees imposed on highway users, not to franchise taxes like the CFT and CAT or to any general taxes that might indirectly be linked to motor fuels or driving in certain applications.**

Long before Section 5a was enacted, various taxes on highway users, such as license taxes and gasoline taxes, were understood to be "special taxes." That was because they were imposed narrowly on certain products or situations, and the revenue generated was put to a narrow purpose that was connected to those who paid the tax. *See Saviers*, 101 Ohio St. at syl. ¶ 5; *see also Foltz Grocery & Baking v. Brown*, 111 Ohio St. 646, 653 (automobile license tax is a "special privilege tax upon motor vehicles for the use of the roads"). And after Section 5a's enactment, the Court continued to refer to such taxes as "special taxes," explaining the connection between such a tax's narrow source and the narrow purposes to which the revenue was put. *See Geo. F. Alger Co. v. Bowers*, 166 Ohio St. 427, 429 (1957). In *Geo F. Alger*, the Court explained that the "evident purpose of [the annual license] tax" was "to allocate to the commercial users of the state highways their proportionate share of the cost of construction and maintenance of such highways," and it held that it was "certainly a reasonable exercise of the taxing power to impose a *special tax* on the persons causing such increased deterioration." *Id.* (emphasis added); *see also Fisher Bros. Co. v. Brown* 111 Ohio St. 602, 623 (1924) (describing "special fund" that receives automobile license tax revenues for dedicated highway uses).

Further, the Court repeatedly, before Section 5a was adopted, protected special-tax revenues to ensure that the connection between the tax and spending was reasonable. When a statute created such a link, any diversion of money from the intended purpose was unlawful, because "[i]t is agreed that a special privilege tax upon motor vehicles for the use of the roads must bear a reasonable relation to the damage to the roads done by the automobiles." *Foltz Grocery*, 111 Ohio St. at 653.

However, the Court could only protect that relationship when the statutes provided the spending restraint, and could only ask whether a given scheme followed the statutory anti-diversion command. *Calderine v. Freiberg*, 129 Ohio St. 453, 460-462 (1935). When the General Assembly enacted statutes that diverted special-tax funds from their former highway-related purposes, the Court explained that the only remedy was "by recourse to either constitutional or statutory amendment or both." *Id.* at 462-63. That was the background of Section 5a: the need to stop the growing diversions of revenue from particular special taxes.

Evidence surrounding Section 5a's adoption shows both that Ohio's voters were concerned with narrow special taxes—the gasoline tax, liquid fuel tax, license tax, and so on—and not the CFT or other general taxes—and that Ohio's proposal was part of the national anti-diversion effort and was connected to the federal Hayden-Cartwright Act. The 1947 ballot language stating the "Argument in Favor" of Section 5a shows this:

> This Amendment simply says you want your *automobile license and gas tax* money to go for better roads and streets.
>
> ***
>
> 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 constitution.
>
> * * *
>
> 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.

Supp. S-110 (emphases added). Likewise, the "Argument in Opposition," although disputing the need for the amendment, agreed with proponents that its scope concerned specific taxes targeted at motorists. It identified the then-existing taxes that would be subject to 5a's expenditure restriction: "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 being used to pay general governmental obligations." *Id.*

In addition to the official ballot arguments, public debate over the amendment shows a common understanding that the special taxes were at issue; no one ever mentioned the CFT or any other general tax. Indeed, Beaver cites a plethora of newspaper articles, editorials, and other sources to support its claim that voters knew they were passing a "wide-reaching" amendment that would be a "strait jacket" on the General Assembly. Beaver Br. at 34-36. But *every one* of those sources cites the same special taxes over and over, supporting the Commissioner's view, not Beaver's. *See, e.g.*, Coshocton Ohio Tribune, *Pro and Con Arguments On Gas Tax Use Offered*, Oct. 23, 1947, Supp. S-82 ("Former Lt. Gov. John T. Brown, who introduced Ohio's first gasoline tax, said 'it is only fair' that the persons who pay the gasoline tax and auto license fees should expect 'these funds may be used for'" highway purposes.).

Beaver is right to say that the amendment went beyond the specific tax whose revenue was then being diverted, the liquid fuel tax, and included the other special taxes whose revenue was then being devoted to highways, such as the gasoline tax and the license tax. But that does not mean that the amendment covered non-targeted, general taxes that might happen to indirectly intersect with fuel in some cases. Beaver does not identify a single contemporaneous source citing a general tax by name, or even referring conceptually to general taxes whose *imposition in certain cases* might somehow connect indirectly to gasoline or driving.[5]

[5] While Beaver's mistake in this regard is most important regarding the CFT, predecessor to the CAT, its mistake extends to its discussion of the general sales tax. Beaver insists that Section 5a's drafters were concerned about a possible extension of the sales tax to include motor fuel, but Beaver offers no citation for this assertion, and indeed, none of Beaver's cited sources mentions the sales tax. *See* Beaver Br. at 35. The issue is irrelevant here, as the concurring opinion below noted. App. Op. ¶ 47 n.3. Nevertheless, the Commissioner notes that the sales tax, as a general tax not targeted at motorists, *could* extend to motor fuels without triggering Section 5a. In fact, the sales tax does apply to some gasoline purchases, and always has, without meeting a Section 5a objection. For example, Ohio applies the sales tax, while granting a refund from the motor vehicle fuel tax, for gas purchased for use on out-of-state highways. *See* R.C. 5739.02(B)(6) (excluding from sales tax exemption any purchases for which the motor fuel consumer may

Moreover, as the ballot language quoted above shows, Ohio's Section 5a was connected to the broader national anti-diversion movement, as shown by both the federal Hayden-Cartwright Act and by many States' enactment of similar anti-diversion amendments to their State constitutions. 48 Stat. 993, 995 at §12. *See* 1939 Report of the Chief of the Bureau of Public Roads, 8 (Def. 2d MSJ Ex. 66) (noting the diversion of proceeds from "special taxes on motor vehicle owners and operators to purposes other than highways, particularly to relief purposes"). That connection means that the language and applications of those other laws offers useful guidance. Beaver is mistaken in seeking to isolate Ohio's Section 5a from this national trend. To be sure, the text of Ohio's amendment, and not any other State's, governs, but in asking what Ohio's voters had on their minds, it would deny reality to ignore the national trend.

Beaver is also mistaken in claiming that Ohio's rejection of a 1934 anti-diversion amendment shows both that the successful 1947 one must be broader and that the 1947 amendment is disconnected from Hayden-Cartwright and other States' amendments. *See* Beaver Br. at 34, 39. First, the rejection itself does not show that voters rejected that attempt because they thought it was too narrow in scope. They might not yet have been sold on the antidiversion concept, or might have objected to capping the gas tax at 3%, or had some other objections. Indeed, Beaver cites no evidence linking the rejection to anything. Second, the increased "breadth" of the 1947 amendment shows only that the later drafters thought to cover other special taxes that might be a problem; it in no way shows a giant leap toward including business franchise taxes or any other general taxes not targeted at motorists.

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obtain a refund); R.C. 5735.14(A) (providing for refund for any uses other than Ohio highway uses, including non-Ohio highway use). Moreover, although the General Assembly has long followed a tradition and policy of avoiding "double taxation" by crafting exemptions to avoid overlapping taxes, that policy is not constitutionally mandated, so none of Beaver's complaints on that score is meaningful.

The passage of thirteen years between Hayden-Cartwright and Section 5a does not undercut the link between the federal law and Section 5a, as the movement continued over many years. Eight years after Hayden-Cartwright, only fourteen States had enacted such amendments. Yet the Act's restriction "marshaled public opinion for a series of constitutional amendments" that were eventually adopted in 28 States, including Ohio.[6] U.S. Dept. of Transportation, Federal Highway Administration, *America's Highways 1776-1976—A History of the Federal-Aid Program*, 124, 247 (Def. 2d MSJ Ex. 58); Gutfreund, *Twentieth-Century Sprawl*, 32-33 (Def. 2d MSJ Ex. 13). As detailed below (at 39-40), none of those States have adopted Beaver's view and applied their amendments to business franchise taxes, and several have rejected attempts to broaden their amendments' scopes, including States with language like Ohio's. And in any case, even if Section 5a were not connected to Hayden-Cartwright, such disconnection would not help Beaver's case, and Section 5a remains linked to the other States' anti-diversion amendments.

Moreover, after Section 5a's enactment, no one even suggested that the CAT's predecessor, the CFT, needed to be revised to conform to the new restraint. To be sure, the CFT formula at that time did not include the net income formula, so the connection might not have been as obvious for some taxpayers. But for companies whose sole business centered on petroleum, such as Standard Oil of Ohio and Marathon, it could easily be said that their net

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[6] The States' amendments are all available as Def. 2d MSJ Exs. 54-57, and include Ala. Const. art. IV, §111.06 (amendment 93); Ariz. Const. art. IX, §14; Calif. Const. art. XIX, §1, replacing art. XXVI; Colo. Const. art. X, §18; Fla. Const. art. XII, §9(c), replacing art. IX, §16 of the Constitution of 1885; Ga. Const. art. III, §IX, ¶VI(b); Idaho Const. art. VII, §17; Iowa Const. art. VII, §8; Kansas Const. art. 11, §10; Ky. Const. §230; La. Const. art. VI, §23; Me. Const. art. IX, §19; Mass. Const. art. 78; Mich. Const. art. IX, §9, replacing §22; Minn. Const. art. XIV, §§5, 9 & 10; Mo. Const. art. IV, §30(a) & (b); Mont. Const. art. VIII, §6; Nev. Const. art. 9, §5; N.H. Const. Pt. Second, Art. 6-a; N.D. Const. art. X, §11; N.J. Const. art. VIII, §II, ¶4; Ore. Const. art. IX, §3a, replacing art. IX, §3; Pa. Const. art. 8, §11(a); S.D. Const. art. XI, §8; Tex. Const. art. VIII, §7-a; Utah Const. art. XIII, §13; Wash. Const. art. II, §40; W. Va. Const. art. XI, §52; Wyo. Const. art. 15, §16).

worth or stock value was "related to" motor fuel. Further, a broad reading of "related to" would apply equally to the "operation" or "use" of a vehicle prong, not just to the "motor fuel" prong, and that would have implicated the CFT's application to businesses that sell cars and related products, for, after all, one must buy a car before driving it. From FY 2004 through FY 2008, the CFT raised $47.5 million from motor vehicle dealers; auto parts, accessories, and tire stores; automotive equipment rental and leasing; and automotive repair and maintenance services paid CFT. *See* Hall Aff. Ex. B (Def. 2d MSJ Ex. 3). No one ever objected. That "dog that didn't bark" stayed silent for the next 60 years, and that silence is relevant.

Beaver is equally mistaken in its attempt to describe the liquid fuel tax, which was eliminated after Section 5a's enactment, and the existing motor fuel tax, as "privilege-of-doing-business, measuring-stick taxes," with the attendant implication that Section 5a must therefore reach the CAT or any other such "privilege" tax. *See* Beaver Br. at 36; *id.* at 20, 32, citing *Hickock Oil v. Evatt*, 141 Ohio. St. 644, 652-53 (1943). First, the argument is irrelevant, as Section 5a's application turns on whether the tax at issue is *targeted* at gasoline, as both the liquid fuel and motor fuel taxes were and are, not on whether the tax is categorically a "privilege" tax or a transactional excise tax. Second, Beaver's description is wrong, as both forms of gas tax were, and the motor fuel tax still is, a garden-variety transactional tax. See App. Op. ¶¶ 41-47 (Dorrian, J., concurring). That is not changed by the fact that is has been described as a "privilege" tax, *id.*, as other undoubtedly transactional taxes, such as the sales and use taxes, have also been described as applying to the "privilege" of conducting a covered transaction. *See Celina Mut. Ins. Co. v. Bowers*, 5 Ohio St. 2d 12, 16 (1965) ("In reality, the Ohio sales and use taxes are on transactions—the exercise of a privilege, viz., the right to acquire and use tangible personal property, and they apply only to the transactions by which that privilege is exercised.").

Nor does it matter that the motor fuel tax is charged to the seller rather than the buyer, as that is an administrative formality. The tax's effect on buyers is plain, and it is confirmed by the provisions allowing the *buyer* to apply for a refund of motor fuel tax. *See* App. Op. ¶ 47; R.C. 5739.02(B)(06).

Third, in claiming that the two gas taxes are "privilege" taxes, and then comparing them to the CAT, Beaver fails to note the CFT's existence, let alone its implication. Beaver says "In 1947, there were two privilege-of-doing-business, measuring-stick taxes applied to motor fuel sellers," naming the two gas taxes. Beaver Br. at 36. But of course, fuel sellers were subject to the CFT as a privilege-of-doing-business tax. While Beaver elsewhere attacks the validity of comparing the CFT to the CAT (and is wrong, see below at 38), it is a further stretch to say that the CAT is directly comparable to the motor fuel tax, but not at all comparable to the CFT.

3. The history after Section 5a's enactment confirms that it was never thought to reach business franchise taxes such as the CFT and the CAT, and other States' application of their amendments further supports the Tax Commissioner.

Just as Section 5a was understood to cover special taxes, not business franchise taxes, in 1947, that understanding remained unshaken for decades in Ohio and around the country.

For example, the 1972 Ohio Constitutional Revision Commission expressly recognized the Hayden-Cartwright Act's role in Section 5a's adoption, thus showing that Section 5a's meaning is informed by the federal definition of affected special taxes:

> [I]n 1934 Congress passed the Hayden-Cartwright Act, 23 U.S.C. 126. The new federal legislation required that for a state to receive federal funds for highway programs after June, 1935, the state would have to apply the revenue it gained from highway-related taxes to highway-related purposes. *The influence on the states of the requirements for federal aid to highway programs ignited efforts of the highway interest groups, which eventually led to the adoption of constitutional amendments similar to Article XII, Section 5a of the Ohio Constitution in more than half of the states.*

Oh. Const. Rev. Commn. 1970-1977, Proceedings Research ("PR"), vol. 4, 1755 (Def. 2d MSJ Ex. 36). This merely confirms what the ballot language already tells us about Section 5a's link to the national movement. In contrast, Beaver cites no source isolating Ohio's amendment as uniquely broader than other States'.

History also shows that no one ever suggested applying Section 5a to the CAT's predecessor, the CFT, and Beaver's attempts to downplay the CFT's importance were all squarely rejected in *Ohio Grocers*. Under the CFT, businesses were taxed for the privilege of doing business, even if their business included, or was almost completely comprised of, selling motor fuel. And after the 1971 CFT amendments added the "net income" formula, a business's CFT liability would increase as its income from gasoline sales increased.

Beaver insists that the CFT comparison is inapt for several reasons, but those precise reasons were raised and rejected in *Grocers*. It is one thing for Beaver to attempt to distinguish *Grocers* because different provisions are at issue, but Beaver surprisingly ignores *Grocers*'s teachings on broad principles about the usefulness of comparing the CFT and CAT. Beaver says "the mere fact that the [CFT] has not been challenged means only that it has not been challenged," and that fact "does not serve as any authority that Section 5a would not apply to the corporate franchise tax." Beaver Br. at 40. But this Court said "The history and application of [CFT] provisions confirm our interpretation. Without challenge, food sellers have been subject to a tax (the corporate franchise tax) upon the privilege of doing business that included proceeds from the sale of food in its measure for almost 40 years." *Grocers* at ¶ 36. Beaver also says that the CFT was different "because the CFT applied only to doing business in the corporate form," unlike the CAT. Beaver Br. at 40-41. The *Grocers* plaintiffs tried that, too, and this Court still cited the CFT as an apt comparison. Beaver also says that the CFT did not raise the same concerns as the CAT now does because the CAT leads to alleged double taxation for an unincorporated sole proprietor, whereas the CFT would not. Beaver Br. at 41. But for sole proprietors with receipts under $1 million, CAT liability is a flat $150, so the "relationship" to fluctuating gasoline sales is nonexistent. Compare *Grocers* ¶¶ 52-56. And for those with greater receipts, the legal and factual distinctions between the gas tax and the CAT still stand. *See id.*

Consequently, the CFT/CAT comparison is valid, as it was in *Grocers*, and it shows a continued understanding that Section 5a does not implicate franchise taxes on the privilege of doing business. In addition to the CFT comparison, the *Grocers* discussion of the CAT itself applies. The Court in *Grocers* explained that the CAT truly acts as a privilege-of-doing-business tax, and it noted that any such tax must be valued and measured in some way, so treating such measurement as if it amounted to a tax on a tax-exempt item is untenable. *Id.* ¶¶ 16-20. That is equally true here, and the difference between the "upon" issue in *Grocers* and the "related to" issue here is not a valid distinction. To the contrary, the *Grocers* concern carries even more force here. If Beaver is right that the "related to" standard is so much broader than "upon," then a franchise tax, which again *must be measured somehow,* would, under Beaver's view, bump into all manner of problems, not just motor fuel. *See* below at 41-43 (noting absurd results).

Just as Ohio's history shows that Section 5a does not reach the CAT, so, too, does the experience in other States confirm that antidiversion amendments concern taxes targeted at highway users. For example, Maine's relevant language is *identical* to Ohio's, and the Maine Supreme Court has read it to apply to specific taxes targeted at highway users, such as "the 'gasoline tax,' a tax imposed on highway users." *Portland Pipe Line Corp. v. Envtl. Improvement Comm'n* 307 A.2d 1, 16 (Me. 1973). The Maine court rejected the extension of the provision to a fee imposed on barrels of petroleum products transferred over water, because that fee was not targeted at highway users, despite the fact that it was "related to" fuel under a reading such as Beaver's. Likewise, Kentucky's amendment is nearly identical to Section 5a; it says "No money derived from excise or license taxation relating to gasoline and other motor fuel" shall be spent for disallowed purposes. Ky. Const. §230. A Kentucky appeals court described that text as reaching "excise taxes on gasoline and license taxes on motor vehicles" and "special taxes levied against" "motor vehicle interests." *Keck v. Manning* 231 S.W.2d 604, 606 (Ky. Ct. App. 1950).

Other States similarly describe their amendments as covering taxes targeted at motorists, with some listing Hayden-Cartwright's scope as instructive, too. *See State ex rel. Syvertson v. Jones* 23 N.W.2d 465, 487-88, 493-94 (N.D. 1946), (concurring opinion) (explaining the Hayden-Cartwright roots of North Dakota's amendment); *In re Opinion of the Supreme Court Relative to the Constitutionality of Chapter 239, Session Laws of 1977*, 257 N.W.2d 442, 444 (S.D. 1977) (same as to South Dakota, noting that "[a]ll of these" States' "provisions arose as a result of . . . the Hayden-Cartwright Act" and that they applied to "motor vehicle registration fees, licenses, gasoline taxes, and other special taxes"); *see also* U.S. Dept. of Transportation, *America's Highways*, 124, 247 (describing Hayden-Cartwright as "the genesis of many State so-called 'antidiversion" amendments"); Gutfreund, *Twentieth-Century Sprawl*, 32-33.

While these States' understanding of their identical, near-identical, or similar provisions support the Commissioner here, Beaver cannot cite a single State that has adopted a view similar to what it advances here. This Court should not depart from Ohio's 65-year-old understanding or break with a national consensus to adopt Beaver's novel theory. And in any event, even if Beaver were successful in persuading the Court to ignore Ohio's CFT history *and* Hayden-Cartwright *and* other States' views, that success would at most counter the strong support those considerations give to the Commissioner's view. It would not advance Beaver's view. That leaves Beaver, at best, with one of two "plausible" views, and that is not enough.

D. Beaver's view creates an unworkable standard that makes both tax legislation and tax administration impossible.

Beaver's view is also unworkable. The two key, unworkable aspects of Beaver's view are (1) it reads "related to" overbroadly to include indirect connections, and (2) it looks to the factual application of a tax's imposition, as opposed to looking to the law's actual textual scope. Those principles easily lead—not by a slippery slope, but by straightforward application of Beaver's principles—to a host of absurd results, and leave the General Assembly, the Tax Commissioner, and the courts unable to legislate and administer the laws sensibly.

For example, the sales tax applies to sales of cars, car parts, and more, and the imposition of the general sales tax to a car is, by a broad reading, "related to" "operation[] or use of vehicles on public highways." After all, one cannot drive a car on the highway without first buying a car, so the purchase (and resulting tax) are just as "related" to highway use as the CAT is to motor fuel. Beaver cannot avoid this result merely by stressing that the "motor fuel" prong names a specific product, while the "use of vehicles" prong does not. Both prongs use the *same* "related to" phrase, so it cannot be read broadly for one prong and not the other. Beaver's view would implicate the CAT's application to all manner of car-related businesses on a forward-looking basis, and it also raises the historical question of why the sales tax, as well as the CFT, was never challenged in its application to the many driving- and highway-related businesses in Ohio.

Similarly, for more than 75 years, Ohio has imposed an annual franchise tax on domestic insurance companies, measured by, among other things, the gross amount of premiums that a company received from policies covering risks within Ohio during the preceding calendar year. *See* 115 Ohio Laws 548, 576-577; R.C. 5725.18. Since 1939, revenues generated by Ohio's franchise tax on domestic insurance companies have been credited to the GRF. 118 Ohio Laws 48, 49; R.C. 5725.24(B). Under Beaver's view, Section 5a would have applied to revenues connected to insurance policies that involve cars or drivers, as those would, "as applied," "relate to" the operation or use of motor vehicles.

Again, Beaver cannot avoid that result of their view by divorcing the "operation" or "use" prong from the motor fuel prong. Indeed, it is telling that in a separate Section 5a case before the Court, the plaintiffs use an even *more* attenuated link than the insurance premiums example. In *Ohio Truckers*, No. 11-1757, plaintiffs claim that Section 5a applies to fees paid to buy drivers' license abstracts from the Bureau of Motor Vehicles. The Ohio Insurance Association is a plaintiff there, and one theory of the "relationship" is that insurers buy the abstracts to assess drivers' risk and set premiums. If *that* link is "related," so that buying records *in order to offer insurance* qualifies, then surely the revenue from actual insurance premiums is a closer link.

Not only does Beaver's view implicate these many scenarios, but more important, it sets a standard that is unworkable for tax legislation and administration. As noted in Part A-3, the General Assembly can only implement Section 5a predictably if the restraint applies only when the *statute* refers to motor fuel, driving, and the like. Under that approach, the Assembly can provide for the placement of *all* revenue raised by such a tax or fee in a Section 5a fund. But under Beaver's view, whenever the General Assembly enacts a general tax, it must account for every possible factual application that might create a "relationship" with gas or driving. The problem here is not that the General Assembly could not exclude motor fuel receipts from gross receipts under the CAT; the problem is that it cannot anticipate every as-applied relationship.

Nor could it apply a Section 5a earmark prophylactically to all taxes that might trigger such a relationship, or virtually all Ohio taxes would be so earmarked.

Because the General Assembly cannot predict and itemize every such as-applied relationship, perhaps the only thing it could do, under Beaver's view, would be to add a catchall provision to the CAT, sales tax, and every general tax, directing that "all revenues raised by this tax that are related to motor fuel or operation or use of a vehicle shall be credited to" Section 5a funds. But that catchall approach would merely shift the problem from the General Assembly to the Tax Commissioner and this Court, because every taxpayer with a potential "relationship" issue could press it in his assessment, and every such "as-applied challenge" would be need to be resolved administratively and in litigation. Moreover, if violations lead to *tax relief*, and not just to enforcement of the spending restraint, such challenges would of course be common.

Beaver cannot offer any plausible retort to this problem. As long as the test turns on factual applications, and not on reading the tax or fee provision on its face, the problem occurs. That cannot be what Section 5a compels.

E. None of Beaver's other claims has merit.

None of Beaver's other arguments helps its cause. For example, Beaver claims that the General Assembly conceded Beaver's point by enacting, when first establishing the CAT, a two-year grace period in which receipts derived from motor-fuel sales were excluded from gross receipts in calculating CAT liability. Beaver Br. at 29-30. Beaver says the temporary exclusion shows that the Assembly knew that the inclusion of such receipts would violate Section 5a.

Beaver's reliance on the temporary window is wrong. First, the window means only that the General Assembly gave the issue more time for study; Beaver cannot point to any "admission." Second, the Assembly also let the window close, and Beaver offers no sound reason to defer to the first decision but not the second. If the Court should "defer" to the

Assembly's ostensible admission, it should equally defer to the Assembly's decision to allow the window to close, showing that it concluded that including the disputed receipts was legal. Third, attributing significance to such temporary arrangements, by treating them as admissions of invalidity, would jeopardize all sorts of laws, as phase-ins are common. The Assembly would hesitate to use such mechanisms for fear of the implications.

Beaver is also mistaken in relying upon a statutory provision that exempts from gross receipts any amounts paid for the motor fuel tax, claiming that effort against double taxation shows an admitted overlap between the actual motor fuel tax, which is subject to Section 5a, and the CAT. *See* Beaver Br. at 30-31, citing R.C. 5701.01(F)(2)(r). Beaver fails to note that this CAT exclusion is not unique to motor fuel, and thus says nothing about fuel in particular. Other provisions exclude all sales and use tax collected by a vendor, R.C. 5751.01(F)(2)(p), and exclude state and federal excise taxes paid on or for cigarettes, other tobacco products, beer, and intoxicating liquor, R.C. 5751.01(F)(2)(q), (r) & (s). Even the provision Beaver cites excludes *federal* as well as state gasoline taxes. Together, these provisions reflect a decision to exclude *any* receipts that represent amounts paid as other taxes, so that the CAT taxpayer is not paying tax upon tax. In other words, when a retailer receives from customers amounts for sales taxes, liquor taxes, and the like, on top of the pretax prices of items sold, the retailer excludes the tax amounts from gross receipts for CAT calculation. That broad principle happens to include motor fuel taxes, but that inclusion does mean something unique about motor fuel taxes and Section 5a.

Beaver also claims that these two provisions are direct "references" in the CAT statutes to motor fuel, thus satisfying, it says, the Commissioner's view that the "related to" test requires an actual legislative reference to motor fuel. That is wrong. First, the temporary provision expired, so its former existence cannot provide permanent relatedness. Second, both provisions' references are exclusionary, not inclusionary, and it makes no sense for the express exclusion of an item to count as a creating a relationship between a tax and an item. Otherwise, whenever the General Assembly might exclude motor fuels, to avoid a potential or actual Section 5a trigger, it would always end up providing the trigger by naming the exclusion. That defies logic.

F. Beaver's appeal to the cause of saving highways is both irrelevant and wrong.

Much of Beaver's brief is devoted to its passionate pleas for saving the highways from decay. Its opening line cites shortages in highway funding, and its brief repeats the theme of "saving highway dollars" throughout. All of that means nothing, for Beaver does not seek to protect *a single penny* for road repair. It seeks instead to have its taxes lowered.

Not only does Beaver's tax-relief claim fail to help the highway budget, but it actually *hurts* that cause. After all, while Section 5a funds *must* be used for highways purposes, both state and local governments can and do use general revenue funds for highway uses, beyond what the Section 5a funds provide. Likewise, local governments use their funds, including those received from the State through the local government fund, for highway purposes. Thus, if Beaver loses, its CAT payments *might* still go to highway uses, or, at least, would go to other public purposes. But if Beaver wins, the funds will not be available for highway use or any purpose. It is hard to see how that result saves the roads or helps Ohio drivers.

Moreover, it is all irrelevant to the actual legal question. Either Beaver is right, or not. If it is wrong—and it is—the Court should not read the provisions differently merely because more highway funding is needed. And Beaver's rhetoric even implicitly overstates the extent to which the disputed funds would enhance highway funding. Beaver agrees with the Commissioner that the amount of CAT revenue that it considers related to motor fuel, and thus the impact of the case, is about $139 million. But Ohio's highway funding from all sources is about $2.5 billion, so adding the disputed $139 million would amount to a 5.6% increase—not negligible, but not enough to dramatically change the outlook. And again, that is *only if the remedy were spending restraint* as opposed to tax relief. A tax relief remedy would, again, get the highway budgets—including those of the County Engineer Plaintiffs—nothing.

Beaver has never explained, nor could it, how a victory in securing tax relief would help to fix the highways. Perhaps the only route to that outcome would be for the General Assembly to re-impose the CAT's inclusion of gross receipt derived from motor-fuel sales, but with a Section 5a earmark. But that speculative result, relying on another branch of government's response, is too speculative and attenuated to consider this tax-relief case as serving the cause of highway funding. *See Cuyahoga Cty. Bd. of Commr's,* 2006-Ohio-6499, ¶¶ 27-28.

In sum, the "save the highways" theme here is misleading and irrelevant.

<u>Appellee Tax Commissioner's Proposition of Law No. 3:</u>

> *Section 5a, on its own terms, restricts only improper spending of the relevant revenues. Therefore, the proper remedy for a Section 5a violation is enforcement of the spending restraint, not an injunction against collecting the tax or fee. (State ex rel. Donahey v. Edmondson, 89 Ohio St. 93 (1913), and Friedlander v. Gorman, 126 Ohio St. 163 (1933), followed and applied.)*

Because Beaver fails to show a violation of Section 5a on the merits, the Court need not reach the remedy issue. Nevertheless, the Commissioner notes that Beaver cannot achieve the relief it seeks merely by showing a violation; it would need to show why it deserves invalidation of the tax's *collection* as a remedy. It cannot do so, as that remedy runs against well-settled law, as well as Section 5a's text, and Beaver offers no reason, let alone a sound one, for departing from that precedent and from common sense.

As noted above, this Court addressed this issue in *Edmondson*, and it held that an *expenditure* violation, under an earmarking provision, does not implicate the validity of a tax's collection. *Edmondson,* 89 Ohio St. at 114. In *Edmondson,* the Court explained that "[i]f perchance other laws in relation to the disbursement of the fund so raised, for the purpose for which it was levied, are unconstitutional, nevertheless the levy must stand, leaving it to the legislature to provide constitutional ways and means by which the fund may be applied to the object named in the statutes." *Id.*; *see also Friedlander*, 126 Ohio St. at 168 (citing *Edmondson*'s distinction); *State ex rel. Lampson v. Cook*, 44 Ohio App. 501, 512 (1932) ("[C]onstitutional provisions relating to assessment and collection of taxes have no application to distribution of the proceeds of the tax.").

Notably, Beaver does not even cite, let alone distinguish, *Edmondson* or the other cases that limit the remedy to a spending restraint. That avoidance is telling, as the Commissioner has cited the same few cases at every stage of the litigation, beginning in the trial court. Indeed, in his Opposition to Jurisdiction in this Court, the Commissioner cited *Edmondson* in his Proposition of Law, which was the same then as it is above. *See* Mem. Opp. Jur. at 14. Presumably, Beaver will finally offer some explanation in its Reply, but whatever it is, its avoidance of these cases in its opening brief is telling.

What Beaver does say about the remedy is wrong, in several respects, including that Beaver misstates the Tax Commissioner's position. Beaver says the Commissioner is concerned about refunding taxes already collected, and Beaver says that the "Commissioner has suggested at various times in the litigation that, if the CAT is subject to Section 5a, the Court could avoid the refund problem by judicially enacting the necessary appropriation." Beaver Br. at 47. In response to the alleged "refund" concern and alleged "appropriation" remedy, Beaver insists that a spending remedy is outside the Court's power, because ordering appropriations would violate the separation of powers. Beaver Br. at 47-48. Beaver then says that the Commissioner's "refund concern" could be met if the Court adopts Beaver's more "elegant and practical solution" of applying any remedy prospectively only under the *Sunburst* doctrine.

First, Beaver misstates both the Commissioner's position on remedy and his "concern." The Commissioner does not advocate an affirmative "judicial appropriation" that would award the disputed funds to one of the eligible highway funds. By contrast, the Commissioner believes that the spending *restraint* could be enforced by a *negative* injunction prohibiting spending for any other purpose.[7] This affirmative/negative distinction is critical, and is long recognized in Section 5a law, other earmark law, and in injunctive law generally. Surely it is within the Court's power to enjoin improper spending. Indeed, that is what the Court has ordered before. *see Friedlander*, 126 Ohio St. at 165, 170 (affirming order that "permanently enjoined and restrained" county auditor and treasurer "from honoring any warrant drawn upon them by the auditor of state" under a state law that the Court found to violate a spending restraint). Such a negative injunction would leave the General Assembly free to appropriate the funds, and although it might seem that the Court's negative injunction against all other uses forces its hand, the formality of leaving the actual appropriation to the legislative branch makes all the difference. Consequently, Beaver's complaints about judicial appropriations are irrelevant, and notably, Beaver does not address the possibility of a negative injunction against "misspending."

Equally important, Beaver misstates not only the Commissioner's position regarding the possible remedy, but it also misstates the Commissioner's underlying "concern" when it claims the Commissioner is concerned only about refunds for past collections. He is not merely concerned about refunds (although that is a separate, valid concern). The Commissioner's larger point—stated plainly before—is that *any* tax remedy, even if prospective only, violates

[7] The Commissioner does not believe that he has ever said judicial appropriation is available. To the extent the Commissioner may have spoken in shorthand about a "spending remedy" or about the Plaintiffs' interest in "reallocation," he did not intend a judicial appropriation. He meant "spending remedy" in the restraint-on-spending sense, and "reallocation" only in the sense that the Plaintiffs presumably would like to see the General Assembly respond to a negative injunction against "non-highway spending" spending by *legislatively* reallocating such funds.

Edmondson and does nothing to help fund highways, and even a prospective tax-cancellation remedy means that the future funds *will not be there, not for highways or for any other public purpose.* Mem. Opp. Jur. at 1, 9-10. And as to that true concern, regarding *future lost revenue*, Beaver's "elegant and practical solution" of prospective-only tax relief does literally *nothing.*

Further, Beaver's invocation of the *Sunburst* doctrine is wrong on its own terms. The *Sunburst* doctrine is specifically aimed at honoring citizens' reliance upon a *prior decision* when a new decision reverses course. *See DiCenzo v. A Best Prods. Co.*, 120 Ohio St. 3d 149, 2008-Ohio-5327, ¶ 28. Even then, exceptional circumstances must exist, but *DiCenzo* says plainly that a prior decision is a predicate, and the court asks if "a party has contract rights or vested rights under the prior decision." *Id.* ¶ 25 (citing *Peerless Elec. Co. v. Bowers*, 164 Ohio St. 209 (1955), syllabus). Beaver fails to identify the "prior decision" that warrants a reliance interest and thus justifies *Sunburst.* No previous case law addresses the scope of Section 5a's coverage on the tax/fee side; although other cases point in the Commissioner's direction, no one case substantively counts as a prior decision that would be overruled by a decision in Beaver's favor. Ironically, the closest candidate for an overruled "prior decision" would be *Edmondson* and progeny on the remedy point, but Beaver does not even acknowledge that precedent, let alone explain why it should be overruled at all, let alone prospectively-only.

Moreover, even if Beaver could overcome the case law regarding the proper remedy, it could not overcome the fact that Section 5a's text speaks only in terms of spending restraint, not tax limitation. So even if the Court were writing on a blank slate, it would still be faced with a substantive provision that does not limit taxes, so it has no warrant to create a tax remedy.

In the end, *Sunburst* is a diversion, as Beaver shows no good reason to overrule *Edmondson,* and no good reason to enforce a spending restraint with a tax-relief remedy. Thus, even if Beaver could succeed on the merits, it cannot achieve the relief it seeks. And, as the Commissioner showed in Proposition 1, that failure to show an available remedy circles back to the redressability prong of standing, meaning that Beaver cannot even bring this claim.

Beaver is wrong on standing, wrong on the merits, wrong on the remedy, and wrong to hide its case behind this masquerade. The Court should tell them no on all counts.

CONCLUSION

For the above reasons, the Tax Commissioner urges the Court to hold that Beaver has no standing. If the Court reaches the merits, it should hold that Section 5a spending restraint is not violated by the CAT, even if the measurement of gross receipts for CAT purposes includes receipts derived from motor fuel sales. In the alternative, if the Court finds that Section 5a is implicated, it should hold that the imposition of the tax is not invalid, and it should limit any potential remedy to enforcing the spending restraint.

Respectfully submitted,

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