ORIGINAL

IN THE SUPREME COURT OF OHIO

Ohio Trucking Ass'n, et al.	:	Case No. 2011-1757
Plaintiffs-Appellees,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
v.	:	
Thomas P. Charles, Director, Ohio Department of Public Safety, et al.	:	Court of Appeals Case No. 10APE-673
Defendants-Appellants.	:	

MERIT BRIEF OF PLAINTIFFS-APPELLEES OHIO TRUCKING ASSOCIATION, PROFESSIONAL INSURANCE AGENTS ASSOCIATION OF OHIO, INC., AND OHIO INSURANCE INSTITUTE

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INTRODUCTION

The Ohio General Assembly exceeded the limits of its power when it amended R.C. 4509.05 in complete disregard of Article XII, Section 5a of the Ohio Constitution. This Court should affirm the two courts below, and determine that Amended R.C. 4509.05 is facially unconstitutional.

Article XII, Section 5a provides that:

> 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.

(Emphasis added).

In April 2009, in an attempt to respond to the budget crisis facing the State of Ohio, the General Assembly, unwilling to raise taxes, attempted to raise general operating revenue through significant fee increases, including the fee charged by the Bureau of Motor Vehicles ("BMV") for a certified driving record abstract pursuant to R.C. 4509.05. House Bill 2, which became effective on July 1, 2009, more than doubled the cost of a certified driving abstract when the fee charged by the BMV was raised from $2.00 to $5.00 per abstract, with the additional $3.00 being sent to funds, that, as even Appellants acknowledge, are beyond the scope of Article XII, Section 5a. This was the first time that the Ohio General Assembly engrafted a distribution provision onto Ohio's certified abstract statute. Before, the certified abstract statute collected $2.00 and, via a default statute, the BMV retained that amount. Now, in contrast, Amended R.C. 4509.05 explicitly distributes the majority of the fee proceeds outside the BMV.

This fee increase, one of hundreds of fee increases which became effective in Ohio on that date, was aimed not at covering any increased costs related to providing a certified driving abstract, or for any Article XII, Section 5a purpose at all, but rather at raising general revenue for the State of Ohio. Thus, the amendment to R.C. 4509.05 violates the Ohio Constitution.

The legislature had no authority to solve Ohio's 2009 budget crisis at the expense of the Ohio Constitution. This will not be the only time that the State of Ohio weathers an economic crisis, and the Ohio General Assembly cannot simply ignore Ohio's constitutional provisions every time that the State needs funds. It is up to this Court to ensure that legislation enacted by the Ohio General Assembly passes constitutional muster. Otherwise, the Ohio Constitution is meaningless.

Appellants, in attempting to defend the legislature's action, make three meritless arguments. Appellants first argue that Appellees, who pay the increased fee, lack standing. Because the long-standing law in Ohio is that fee payers have standing (and because Appellees are injured by paying into this fund), Appellants err. Appellants then argue that "relating to," as found in Article XII, Section 5a of Ohio's Constitution, means "necessary for" or "directly for" or "condition of." Because the plain meaning of "relating to" cannot ever mean "necessary for," "directly for," or "condition of," Appellants err. Appellants' final argument is that, if Amended R.C. 4509.05 is unconstitutional, they can still collect the entire $5.00 fee and keep it for the BMV. Because this outcome does not follow the clear legislative intent in amending R.C. 4509.05, and would result in a legislatively unforeseen windfall to the BMV, Appellants err.

This Court should affirm the decision of the lower courts, strike down the amended statute, and reinstate the predecessor statute.

STATEMENT OF THE FACTS

On April 1, 2009, Ohio enacted House Bill 2, amending R.C. 4509.05 ("the Amended Statute"). The Amended Statute became effective on July 1, 2009. R.C. 4509.05, entitled "Information Furnished by Registrar – Fee," provides the statutory framework under which the Registrar and Deputy Registrars provide certified abstracts of driving records for a fee. Appellees' members regularly purchase these abstracts from the BMV via internet accounts. Supp. at S-10, S-12, Joint Stipulation of Facts at ¶ 2, 5, and 6.

Under the Amended Statute (as well as it prior version) where appropriate,[1] the Registrar furnishes driver record abstracts upon request. The Amended Statute increases the amount of a certified abstract from $2.00 to $5.00 (the "certified abstract fee").

The Amended Statute states:

> (A) Upon request, the registrar of motor vehicles shall search and furnish a certified abstract of the following information with respect to any person:
> (1) An enumeration of the motor vehicle accidents in which such person has been involved except accidents certified as described in division (D) of section 3937.41 of the Revised Code;
> (2) Such person's record of convictions for violation of the motor vehicle laws.
> (B) The registrar shall collect for each abstract a fee of ***five*** dollars.
> (C) The registrar may permit deputy registrars to perform a search and furnish a certified abstract under this section. A deputy registrar performing this function shall comply with section 4501.27 of the Revised Code concerning the disclosure of personal information, shall collect and transmit to the registrar the ***five-dollar*** fee established under division (B) of this section, and may collect and retain a service fee of three dollars and fifty cents.
>
> ***Of each five-dollar fee the registrar collects under this division, the registrar shall pay two dollars into the state treasury to the credit of the state bureau of motor vehicles fund established in section 4501.25 of the Revised Code, sixty cents into the state treasury to the credit of the trauma and emergency medical services fund established in section 4513.263 of the Revised Code, sixty cents into the state treasury to the credit of the homeland security fund***

[1]The type of information, and the persons to whom that information can be provided, is limited under both the federal and state Driver's Privacy Protection Act, 18 U.S.C. 2721, *et seq.* and R.C. 4501.27. *See also* Supp. at S-10, S-12, Joint Stipulation of Facts at ¶¶ 2, 5, 6.

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

R.C. 4509.05 (emphasis added to indicate the changes from the prior version of R.C. 4509.05).[2]

Thus, in addition to increasing the certified abstract fee, the Amended Statute specifically allocates three dollars of the increased fee to be deposited in various state funds other than the state bureau of motor vehicles fund. *See* Supp. at S-1, S-4, Second Amended Complaint at ¶ 7; Answer to Amended Complaint at ¶ 5; Supp. at S-10, S-13, Joint Stipulation of Facts at ¶ 12. Appellants concede that except for the two dollars allocated to the bureau of motor vehicles fund, the monies collected by the Amended Statute are not expended for any of the constitutionally enumerated purposes. *See id.*

On July 20, 2009, just 19 days following its effective date, Appellees filed this action challenging the constitutionality of the Amended Statute under Article XII, Section 5a. After full briefing and a bench trial on the merits, Judge Frye of the Franklin County Common Pleas Court issued a decision on June 8, 2010, finding that Amended R.C. 4509.05 is unconstitutional. *See*

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[2] The prior version of R.C. 4509.05(A) states:

(A) Upon request, the registrar of motor vehicles shall search and furnish a certified abstract of the following information with respect to any person:
  (1) An enumeration of the motor vehicle accidents in which such person has been involved except accidents certified as described in division (D) of section 3937.41 of the Revised Code;
  (2) Such person's record of convictions for violation of the motor vehicle laws.

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

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

Appellants' Br. at Ex. E, Opinion (Jun. 8, 2010). The Tenth District Court of Appeals affirmed this decision on August 30, 2011. *See* Appellants' Br. at Ex. C, Decision (Aug. 30, 2011).

ARGUMENT

Appellants' Proposition of Law No. 1:

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

Appellees' Response to Proposition of Law No. 1:

> Appellees, purchasers of driving record abstracts under R.C. 4509.05, have standing to challenge the Amended Statute's fee increase, which the General Assembly specifically earmarked for unconstitutional distribution and expenditure.

In Ohio, in order to have standing to assert a constitutional challenge to a legislative enactment, a private litigant must show that: (1) "he or she has suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general," (2) the legislation in question has caused the injury, and (3) the requested declaratory relief will redress the injury. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469-470, 715 N.E.2d 1062 (1999). Appellants concede that Appellees, trade associations representing their members, have associational standing to challenge Appellants' conduct so long as their members suffer injury. *See, e.g., Ohio Contrs. Ass'n v. Bicking*, 71 Ohio St.3d 318, 320, 643 N.E.2d 1088 (1994).

Appellants cite this test, and then twist logic and law to conclude that Appellees lack standing because their claim "cannot satisfy the threshold requirements of causation and redressability" because the "claimed injury – payment of a fee – is totally disconnected from the

alleged constitutional violation – violation of a spending restraint." Appellants' Br. at 7. Appellants' conclusion is simply wrong.

Appellees meet *Sheward's* standing test.

A. Appellees Have Suffered a Direct and Concrete Injury Different from that Suffered by the General Public.

First, Appellees have suffered a direct and concrete injury different from that suffered by the public in general.

This is not a general taxpayer standing case. Appellants confuse the law on general taxpayer standing with the law granting standing to those paying a specific fee. Indeed, every case cited by Appellants is inapposite here since each stands for the proposition that a taxpayer paying general taxes lacks standing to contest discretionary spending. Appellees' purchase of driving record abstracts under R.C. 4509.05 differentiates this case, and their standing, from a general taxpayer lawsuit in which a taxpayer, in his or her position as such, generally lacks standing to challenge general revenue expenditures. *Compare State ex rel. Dann v. Taft*, 110 Ohio St.3d 252, 254, 2006-Ohio-3677, 853 N.E.2d 263, ¶ 10[3] ("long-standing Ohio law does recognize that a taxpayer with a 'special interest' in particular public funds has standing to seek equitable relief in a court of equity to remedy a wrong committed by public officers in the management of those funds") *with Brinkman v. Miami Univ.*, 139 Ohio Misc.2d 114, 2005-Ohio-7161, 861 N.E.2d 925, ¶ 20 (C.P.) ("a taxpayer can not [sic] bring an action to prevent the carrying out of a public contract or the expenditure of public funds unless he has some special interest therein by reason of which his own property rights are put into jeopardy"). As

[3] In *State ex rel. Dann*, this Court, for purposes of standing, compared former Attorney General Dann's "special interest" in the State's Worker's Compensation Fund because he had paid into that fund as an employer, *Dann v. Taft II*, 110 Ohio St.3d 1, 2006-Ohio-2947, 850 N.E.2d 27, ¶ 16, with his lack of standing to initiate a general taxpayer action based on his speculation of misconduct on the part of various departments and agencies other than the BWC. *State ex. rel Dann*, 110 Ohio St.3d at 254.

purchasers of abstracts, Appellees *are* differently situated than the public-at-large – persons who *do not* purchase abstracts – because it is their money – as opposed to the general public's – that the State is using in ways that violate Article XII, Section 5a. In sharp contrast, the general non-abstract buying public only suffers remote injury by the State's refusal to honor its constitutional obligations.

The Tenth District Court of Appeals properly concluded below that Appellees have standing:

> Here, the Truckers [Appellees] are not simply taxpayers who are unhappy with a legislative enactment regarding the expenditure of their tax dollars. . . .They are trade associations whose members collectively purchase millions of certified abstracts each year.
>
> * * *
>
> Assuming, for purposes of determining standing, that the fee increase is unconstitutional, the Truckers stand to lose millions of dollars if they must continue to pay the challenged fee. As contributors to the BMV fund created by R.C. 4501.25 and as entities that rely heavily on the BMV, the Truckers have a direct interest in determining the constitutionality of the amended statute. The allegedly unconstitutional fee jeopardizes their own property rights. As monetary contributors to the special funds, they have standing to challenge the fees because they have suffered monetary damages. The Truckers suffer the most if the legislature has piggybacked an unconstitutional fee increase on top of a lawful fee.

Appellants' Br. at Ex. C, Decision at 6-7.

Thus, short of being a taxpayer standing case, both lower courts properly determined that this is a *fee* payer standing case, under which Ohio law grants Appellees standing. Longstanding Ohio law provides that a taxpayer with a "special interest" in particular public funds has standing to seek equitable relief to remedy a wrong committed by public officers in the management of those funds. *State ex rel. Dann* at ¶ 11 (citing *Racing Guild of Ohio v. Ohio State Racing*

Comm'n, 28 Ohio St.3d 317, 503 N.E.2d 1025 (1986)). Here, Appellees are not simply taxpayers who are unhappy with a legislative enactment regarding the expenditure of their tax dollars. Instead, Appellees are trade associations whose members[4] contribute to the special funds identified in the Amended Statute by purchasing millions of driver record abstracts from the Bureau of Motor Vehicles.

Contrary to Appellants' contention that Appellees' payments are not directed to a special fund, *see* Appellants' Br. at 11, it is clear from a plain reading of the statute that Appellees' payments go into six special funds. These funds include the (1) State Bureau of Motor Vehicles Fund established in R.C. 4501.25, (2) Trauma and Emergency Medical Services Fund established in R.C. 4513.263, (3) Homeland Security Fund established in R.C. 5502.03, (4) Investigations Fund established in R.C. 5502.131, (5) Emergency Management Agency Service and Reimbursement Fund established in R.C. 5502.39, and (6) Justice Program Services Fund established in R.C. 5502.67. Indeed, Appellants are foreclosed from making this argument because they previously *stipulated* that each fund "receiv[es] a portion of the proceeds from the five-dollar fee." Supp. at S-13, Joint Stipulation of Facts at ¶ 12.

Thus, Appellees have standing to challenge the unconstitutional fee set forth in the Amended Statute as monetary contributors to these special funds. In other words, Appellees have standing to assert the claims at issue in this case because their members have suffered individual damages as a result of paying an unconstitutional fee.

Finally, the contention that Appellees do not meet the special fund standing requirement because they seek an improper remedy is flawed. Appellants claim that "special fund standing can only satisfy the requirements of causation and redressability if a plaintiff seeks a particular kind of relief: A plaintiff with "a 'special interest' in particular public funds" has standing *only*

[4] Additionally, as found at trial, Appellant Ohio Trucking Association purchases abstracts on its own accord.

to seek "equitable relief . . . to remedy a wrong . . . in the management of those funds." Appellants' Br. at 12 (citations omitted)(emphasis in original). Appellants fail to recognize that equitable relief is precisely how Appellees seek to remedy the wrong imposed by the amendment to R.C. 4509.05. Indeed, Appellees seek (1) a declaration Court that Amended R.C. 4509.05 is unconstitutional under Article XII, Section 5a, and (2) disgorgement by the BMV of all unconstitutional funds collected under the amendment. In Ohio, a court's determination regarding the constitutionality of a statute and the return of funds wrongfully collected under an unconstitutional statute are equitable remedies, which, in this case, will remedy the wrong imposed by the legislature. *See Santos v. Ohio Bur. of Workers' Comp.*, 101 Ohio St.3d 74, 2004-Ohio-28, 801 N.E.2d 441, ¶ 17 ("A suit that seeks the return of specific funds wrongfully collected or held by the state is brought in equity.").

Thus, because Appellees are contributors to a special fund, they have suffered a direct and concrete injury different from that incurred by the general public, and therefore have standing to challenge the constitutionality of Amended R.C. 4509.05.

B. <u>Amended R.C. 4509.05 Caused Appellees' Injury.</u>

Second, the constitutional violation causes Appellees' injury.

Appellants incorrectly argue that the threshold causation requirement of standing is not met because Appellees' "claimed injury – payment of a fee – is totally disconnected from the alleged constitutional violation – violation of a spending restraint." Appellants Br. at 7. While the General Assembly's power to raise revenue and spend revenue may be distinct, *see* Ohio Constitution, Article II, Sections 1 and 22, Appellants themselves concede that if the fee increase and distribution provisions are so connected, they both fall together if the distribution provision is deemed unconstitutional. Appellants' Br. at 9.

Here, a plain reading of R.C. 4509.05 shows that its collection and distribution provisions are inextricably intertwined. The amendment to R.C. 4509.05 not only increases the fee the BMV collects for certified abstract fees from $2.00 per abstract to $5.00 per abstract, but also directs the moneys collected to funds which Appellants admit do not spend that money in accord with the constitutional restriction contained in Article XII, Section 5a. Supp. at S-10, S-12, Joint Stipulation of Facts at ¶ 12 ("The monies in each of those funds... *are not expended*" in accord with the Constitution.) (emphasis added).

Thus, R.C. 4509.05's fee collection is directly intertwined with where that fee must go and, under the Amended Statute, that fee is expended unconstitutionally. In other words, the collection of the fee is part-and-parcel of how it is spent – three dollars of the fee cannot be collected in the first instance because the *only* way it can be spent under the plain language of R.C. 4509.05 violates the Ohio Constitution.

Thus, Appellees have standing to challenge the collection of that fee because that money *cannot* be legally spent under the provisions of the Amended Statute.

C. Appellees' Injury Can Be Redressed By The Relief Sought.

Third, Appellees' injury can be redressed by the declaratory relief requested.

Appellants also incorrectly argue that Appellees cannot meet the redressability requirement for standing because the fee collection and distribution provisions in R.C. 4509.05 are "distinct and severable." Appellants Br. at 7-8. A plain reading of the Amended Statute clearly shows that the collection and distribution provisions contained in the amendment are inextricably linked in such a way that they cannot be severed under Ohio law.

Thus, Appellants' suggestion that "the appropriate remedy for violating a spending restraint is to enjoin the unlawful expenditure" simply does not work here. As is explained in

Appellees' response to Proposition of Law No. 3, severing the unconstitutional portion of the Amended Statute would provide no fix because it would strand the $3.00 fee increase. Moreover, any attempt to redirect the stranded $3.00 to the BMV fund (as suggested by Appellants) also would be improper because such a result would make the Amended Statute internally inconsistent and would violate the clear legislative intent to distribute that $3.00 to funds other than the BMV.

Therefore, the declaratory relief will redress Appellees' injury: the unconstitutional Amended Statute will be stricken and replaced with its predecessor, and the driving record abstract fee will be reduced from five dollars to two dollars. Indeed, this is precisely the remedy fashioned by both lower courts.

Appellant Proposition of Law No. 2:

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

Appellees' Response to Proposition of Law No. 2:

> Fees charged for certified driving record abstracts "relate to" the operation or use of a vehicle on public highways.

A. The Two Courts Below Properly Found That a Certified Abstract "Relates To" the Operation or Use of Vehicles on Public Highways.

> "*If we abandon the words of the Constitution as adopted by the citizens of Ohio..., we invade ... the will of the people.*"
>
> *State ex rel. Maurer v. Sheward*, 71 Ohio St.3d 513, 528, 644 N.E.2d 369 (1994) (Moyer, C.J., concurring).

> "*No legislative Act, therefore, contrary to the Constitution, can be valid.*" Constitutional limitations "*can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.*"
>
> The Federalist No. 78 (Alexander Hamilton) (concerning the judiciary department).

> "[*T*]*he principle, supposed to be essential to all written constitutions, [is] that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.*"
>
> *Marbury v. Madison*, 5 U.S. 137, 179, 1 Cranch 137 (1803) (Marshall, C.J.).

A certified drivers abstract – containing a driver's complete driving history – is a record of that person's "operation, or use of vehicles on public highways." Thus, regardless of whether "relating to" is read narrowly or broadly, a certified abstract *relates to* the "operation, or use of vehicles on public highways." Appellants argue that this Court should interpret broad constitutional language narrowly solely to save an unambiguous statute. They ask this Court to interpret the phrase "relating to" to mean something different than what that phrase means. Appellants argue that "relating to" must mean "necessary for" or "directly for" or "condition of" – phrases that decidedly do not mean "relating to." In making this argument, Appellants ignore several centuries of knowledge of what "relating to" means, including how the Founding Fathers (both of the United States and Ohio) and Ohioans at the time of Article XII, Section 5a's adoption would have understood that phrase, as well as decades-long judicial interpretations. Appellants' proffered reading of Article XII, Section 5a is, simply, implausible.

Appellants make this argument because they admit that three dollars of the five-dollar certified abstract fee set forth in Amended R.C. 4509.05 "are not expended" in accord with Article XII, Section 5a. Supp. at S-10, S-13, Joint Stipulation of Facts at ¶ 12. This acknowledgment puts that distribution at odds with the "relating to" limitation contained in Article XII, Section 5a.

This Court is charged with "evaluating the constitutionality of [the General Assembly's] choices." *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, ¶ 61 (quotation omitted). It does so by looking to the plain meaning of the constitutional provision. *Id.* at ¶ 62. *See also Reutener v. Cleveland*, 107 Ohio St. 117, 139, 141

N.E. 27 (1923) (this Court's duty is to "carry out the plain meaning of the constitutional provision"). Indeed, significance and effect must be given to every word in the Constitution. *See, e.g.*, *Coulson v. Coulson*, 5 Ohio St.3d 12, 19, 448 N.E.2d 809 (1983) ("[i]t is a basic tenet of interpretation that this court will give full force and effect to every word contained in an enactment") (Brown, J. concurring). As Appellants acknowledge, the words of the amendment should be given "such meaning as [the people] usually give to [them] in political discussions and arguments." Appellants' Br. at 16 (quotation omitted). If "a provision is clear on its face," this Court's inquiry ends. *State ex rel. Maurer*, 71 Ohio St.3d at 520, 644 N.E.2d 369. It is important that the words of the Constitution are not "analyze[d] away [in order] to corroborat[e] one's own belief" as to the proper policy. *Id.* at 528 (Moyer, C.J., concurring).

This Court should follow these long-standing principles, apply the plain meaning of "relating to," and find that, because a certified drivers abstract contains information relating to a person's operation or use of a motor vehicle, a certified drivers abstract "relates to" the "operation or use of vehicles on public highways." Amended R.C. 4509.05 is facially unconstitutional on that basis.

1. <u>The Constitutional Language of Article XII, Section 5a.</u>

Article XII, Section 5a requires that "[n]o moneys derived from fees, excises, or license taxes *relating to* registration, operation, or use of vehicles on public highways ... shall be expended" except as enumerated in this section. (Emphasis added). The amendment *does not* state "[n]o moneys derived from fees, excises, or license taxes *directly for* registration, operation, or use of vehicles...." That is a distinction with a difference. Appellants ask the Court to rewrite the Constitution and substitute something much more narrow for the will of the people in adopting the "relating to" language. The Court should resist that invitation. *See, e.g.*, *Wampler v. Higgins*, 93 Ohio St.3d 111, 121, 752 N.E.2d 962 (2001) ("the plain language of the

constitutional provision 'every citizen' cannot reasonably be construed as applying only to members of the media. . . . This court must give effect to the words used in the Ohio Constitution, and the term 'every citizen,' should mean just that") (quotation omitted).

A certified abstract issued pursuant to R.C. 4509.05 embodies an individual's driving record. *See* Supp. at S-10, S-13, Joint Stipulation of Facts at ¶ 13, Ex. 1. A certified abstract contains a driver's name, date of birth, social security number, driver license number, date of issuance, date of expiration, last known address, sex, height, weight, hair color, eye color, license class, license status, endorsements, restrictions, moving violations, and accidents. *Id.* A certified abstract also contains a certification: "The following is a true and accurate enumeration of motor vehicle accidents and records of convictions for violations of the motor vehicle law pursuant to Section 4509.05 of the Ohio Revised Code. REGISTRAR, OHIO BUREAU OF MOTOR VEHICLES." *Id.*

A certified abstract thus relates to the "registration, operation, or use of vehicles on public highways." The "moneys derived from" the certified abstract fee accordingly cannot be used for purposes not specifically delineated by Article XII, Section 5a. Yet, the State of Ohio acknowledges that three dollars of the certified abstract fee is applied in ways violating Article XII, Section 5a.

As discussed below, "relating to" is a broad term with comprehensive scope. The relationship between a certified abstract and a driver's license falls under this term. A driver's license is a prerequisite to the operation or use a motor vehicle. *See* R.C. 4507.02. And a certified abstract contains a person's complete driving history under that license. Applying these facts to the definitions of "relating to" discussed below demonstrates that a certified abstract meets that standard. The State of Ohio surely would not contest that the fee charged for a

driver's license must only be applied in accord with Article XII, Section 5a. Likewise, because the certified abstract contains the history of that license, fees charged for it are subject to the Constitution's limitations.

Further analysis of the language of Article XII, Section 5a leads to the same conclusion. First, Section 5a states: "No moneys derived from fees." The certified abstract fee plainly fits this phrase.

Second, Section 5a casts its net widely, "relating to registration, operation, or use of vehicles on public highways." This is a broad phrase. When Ohio enacted Section 5a in 1947, it could have narrowed the amendment's reach. For example, the amendment could have stated that "no moneys derived from registration fees, operation fees, or use fees on public highways shall be expended...." Or, equally as narrow, the amendment could have stated that "no moneys derived from fees for the registration, operation, or use of vehicles on public highways shall be expended..." or "no moneys derived from fees used in the registration, operation, or use of vehicles on public highways shall be expended..." But the amendment is broad. *See, e.g.*, *Knudsen v. IRS*, 581 F.3d 696, 712 (8th Cir. 2009) ("the phrase 'related to' appears to have a *broader* meaning than the phrase 'used in'; as a result," language using the term "used in" is more restrictive than that using "related to"). A narrow construction of the language in the amendment would read "relating to" out of the Ohio Constitution.

Appellants argue without merit that the "or" between "registration, operation, or use of vehicles on public highways" and "to fuels used for propelling such vehicles," requires a reading that "relating to" means "directly for." Appellants' Br. at 17-18. They argue that, because "or" splits the two clauses, fuels are not included in the first clause (e.g., it would be unnecessary to provide specifically for split fuels if "relating to" is interpreted broadly), and thus "relating to"

must be read narrowly to exclude drivers abstracts. And Appellants are wrong because Article XII, Section 5a logically splits "registration, operation, or use" from "fuels" as the former are privileges and the latter is a tangible commodity.

Appellants take this argument to the extreme, arguing that "the adopters must have intended the phrase 'relating to registration, operation or use of vehicles' to require a closer connection between a fee or tax and the use of a motor vehicle, rather than to include every tax or fee that is in some way *related to* the use of a motor vehicle." *Id.* at 18 (emphasis added). Put another way, Appellants specifically argue that "relating to" does not mean "relating to," but rather "necessary for." *Id.* (arguing that "Ohio drivers do not need to buy a certified abstract in order to operate or use a motor vehicle").[5]

The proceeds of a certified abstract fee plainly are moneys derived from fees ... relating to ... operation or use of vehicles on public highways." Any other reading would render "relating to" a nullity.

Because a certified abstract is a driver's record compiled from a driver's complete driving history (information comprised solely from a driver's operation or use of a vehicle), a certified abstract is "relating to" the "operation, or use of vehicles." The certified abstract fee must therefore be apportioned in compliance with the Ohio Constitution. As three dollars of the certified abstract fee is not so apportioned, R.C. 4509.05 is facially unconstitutional.

2. <u>The Long-Understood Dictionary and Legal Definitions of "Relating To."</u>

The plain meaning of "relating to" has not wavered. Not from the early 1700s. And not through modern-day judicial interpretations. Indeed, neither dictionaries nor courts have *ever*

[5] But as a practical matter, a driving record abstract is needed to obtain insurance (to comply with Ohio's financial responsibility requirement) and to obtain and/or maintain a commercial driver's license.

defined "relating to" as narrowly as Appellants advocate. "Relating to" has never meant "necessary for" or "directly for" or "condition of," and it should not mean so now.

a. **The Plain Dictionary Meaning of "Relating To" Does Not Support Appellants' Argument.**

The plain meaning definition of "relating to" has withstood the test of time.[6] When an object (such as a driving abstract) is in "[r]elation" to something else (such as the operation or use of vehicles), it means that the object stands in "Respect, Regard." Kersey, *Dictionarium Anglo-Britannicum: Or, A General English Dictionary* [no page numbers] (1708).[*] The definition of "relating to" has not wavered from dictionaries predating the Revolution, to dictionaries existent at the time of the 1851 Ohio Constitution, to dictionaries printed the year of the adoption of Article XII, Section 5a (1947), to present day dictionaries. It has never meant "necessary for" or "directly for" or "condition of." *Compare* 2 Johnson, *A General Dictionary of the English Language* [no page numbers] (2d Ed. 1760)[*] (defining "To Relate" to mean "To have reference, to have respect"; and defining "Relation" to mean "Respect; reference; regard... Connexion between one thing and another") *with* 2 Richardson, *A New Dictionary of the English Language* 1596-1597 (1847)[**] (defining "Relate" to mean "to have or bear respect or regard to, to respect, to regard. To ... be in a state of comparison, connexion, or conjunction") *with Webster's Collegiate Dictionary* 839 (5th Ed. 1947)[***] (defining "Relate" as meaning "To stand

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[6] This Court, when determining "the simple language of the plain people" in interpreting the Ohio Constitution looks to dictionary sources to determine a word's plain meaning. *See Grabler Mfg. Co. v. Kosydar*, 35 Ohio St.2d 23, 33, 298 N.E.2d 590 (1973).

[*] These dictionaries are located in the Library of Congress' collection, Washington, D.C.

[**] These dictionaries are located in the Ohio Historical Society's collection, Columbus, Ohio.

[***] These dictionaries are located in Vorys, Sater, Seymour and Pease's collection, Columbus, Ohio.

in some relation; to pertain") *with New Oxford American Dictionary* 1473 (3d Ed. 2010) (defining "Relate" as meaning "(relate to) have reference to; concern).[****]

Support for the breadth of the term used in the Ohio Constitution is legion:

Dictionary	**Definition of "Relating To"**
Cocker's English Dictionary, [no page numbers] (1715)[*]	defining "Relative" to mean "pertaining or belonging to any Person or Thing"
Bailey, *An Universal Etymological English Dictionary,* [no page numbers] (1740)[**]	defining "To Relate" to mean "to belong to"
Complete and Universal English Dictionary on a New Plan, [no page numbers] (1782)[*]	defining "To Relate" to mean "to have relation or respect" and "Relation" to mean "Respect; reference; regard. Connection of one thing to another" and "Relative" to mean "having relation, connection, or regard"
2 *A Dictionary of the English Language,* [no page numbers] (6th Ed. 1785)[*]	defining "To Relate" to mean "To have reference; to have respect" and "Relation" to mean "Respect; reference; regard … *Relation* consists in the consideration and comparing one idea with another … Connexion between one thing and another"
Johnson, *A Dictionary of the English Language*, [no page numbers] (1805)[**]	defining "To Relate" to mean "To have reference; to have respect"
Webster, *A Compendious Dictionary of the English Language*[7], 252 (1806)[*, *****]	defining "Relate" to mean "To … refer, belong"
Walker, *A Critical Pronouncing Dictionary and Expositor of the English Language,* 444 (1825)[**]	defining "To Relate" to mean "To have reference, to have respect to"
Worcester, *A Comprehensive Pronouncing and Explanatory Dictionary of the English Language,* 259 (1834)[**]	defining "Relate" to mean "To have reference or relation"
Johnson's English Dictionary as Improved by Todd and Abridged by Chalmers, 768 (1838)[**]	defining "To Relate" to mean "To have reference; to have respect; to have relation"
Webster, *An American Dictionary of the English Language*, 686 (1845)[**]	defining "Relate" to mean "To have reference or respect; to regard"

[****] These dictionaries are located in the Columbus Metropolitan Public Library's Main Branch's collection, Columbus, Ohio.

[*****] These dictionaries are located in the Supreme Court of Ohio Law Library collection.

[7] In addition to being held in the collections of both the Library of Congress and this Court, this is the dictionary owned by Thomas Jefferson and donated by him to the Library of Congress.

[*****] These dictionaries are located in the Supreme Court of Ohio Law Library collection.

Dictionary	**Definition of "Relating To"**
Webster, *An American Dictionary of the English Language*, 931 (1853)**	defining "Relate" to mean "To have reference or respect; to refer; followed by *to*"
2 Webster, *An American Dictionary of the English Language*, 1111 (1881)**	defining "Relate" to mean "To stand in some relation; to have bearing or concern; to pertain; to refer – followed by *to*" and "Related" to mean "Standing in relation or connection"
3 *The Encyclopædic Dictionary*, 3942 (1894)**	defining "Relate" to mean "To have reference or regard; to refer; to have relation; to have a certain meaning or force when considered in connection with something else" and Related" to mean "Standing in a certain relation or connection; connected"
3 *Universal Dictionary of the English Language*, 3942 (1898)**	defining "Relate" to mean "To have reference or regard; to refer; to have relation"
Webster's New Int'l Dictionary of the English Language, 1800 (1923)**	defining "Relate" to mean "To stand in some relation; to have bearing or concern; to pertain; refer; – with *to*") and "Related" to mean "Standing in relation or connection"
8 *The Oxford English Dictionary*, 397 (1933)*****	defining "Relate" to mean "To have reference to … To be related, have relation, stand in some relation, to another thing"
Funk & Wagnalls College Standard Dictionary of the English Language, 959 (1943)***	defining "Relate" to mean "To be in connection or association; have reference or regard; refer"
2 *The New Century Dictionary of the English Language*, 1512 (1948)*****	defining "Relate" to mean "to bring into or link in association, connection, or relation (with *to*) … to be related, or have some relation (*to*)"
Webster's New International Dictionary Unabridged, 2102 (2d Ed. 1960)***	defining "Relate" to mean "To stand in some relation; to have relationship, to pertain; -- with *to*"
Webster's Third New Int'l Dictionary of the English Language Unabridged, 1916 (1971)*****	defining "Relate" to mean "To show or establish a logical or causal connection between … To be in relationship; have reference"
The American Heritage Dictionary of the English Language, 1097 (1979)***	defining "Relate" to mean "To have connection, relation, or reference. Used with *to*"
The Random House Dictionary of the English Language Unabridged, 1626 (2d Ed. 1987)*****	defining "Relate" to mean ""To bring into or establish association, connection, or relation … To have reference (often followed by *to*) … To have some relation (often followed by *to*)" and defining "Related" to mean "Associated; connected"
13 *The Oxford English Dictionary*, 549 (2d Ed. 1989)*****	defining "Relate" to mean "To have reference to … To be related, have relation, stand in some relation, to another thing"

Dictionary	**Definition of "Relating To"**
The Oxford Encyclopedic English Dictionary, 1219 (1991)*****	defining "Relate … (foll[owed] by *to*)" to mean "have reference to; concern"
Webster's Ninth New Collegiate Dictionary, 994 (1991)***	defining "Relate" to mean "To have relationship or connection"
The American Heritage Dictionary of the English Language, 1523 (3d Ed. 1992)*****	defining "Relate" to mean "To bring into or link in logical or natural association … To establish or demonstrate a connection between … To have connection, relation, or reference" and "Related" to mean "Being connected; associated"
The American Heritage College Dictionary, 1152 (3d Ed. 1997)***	defining "Relate" to mean "To bring into or link in logical or natural association … To establish or demonstrate a connection between … To have connection, relation, or reference"
2 *Shorter Oxford English Dictionary*, 2520 (5th Ed. 2002)****	defining "Relate" to mean "Have reference to, concern … Have some Connection with, be connected to" and "Related" to mean "having relation; having mutual relation; connected (foll[owed] by *to, with*)"
The Chambers Dictionary, 1278 (9th Ed. 2003)****	defining "Relate" to mean "To have reference or relation"
Merriam-Webster's Collegiate Dictionary, 1050 (11th Ed. 2003)*****	defining "Relate" to mean "To have relationship or connection … To have or establish a relationship" and "Related" to mean "Connected by reason of an established or discoverable relation"
Webster's American English Dictionary, 292 (2011)****	defining "Relate" to mean "Have a relationship"
Concise English Dictionary, 1214 (12th Ed. 2011)****	defining "Relate" to mean "(relate to) concern"

None of these definitions from 38 dictionaries spanning three centuries of English usage come close to supporting Appellants' argument. This Court's duty to look at the plain meaning of the constitutional provision can end here. Because a driver's abstract "relat[es] to [the] …operation, or use of vehicles on public highways" under any of these definitions, and because R.C. 4509.05 directs monies collected for drivers abstracts to be spent in ways that Appellants admit are beyond the scope of Article XII, Section 5a, R.C. 4509.05 is facially unconstitutional.[8]

[8] If the General Assembly does not like the result than that is what the recently appointed Constitutional Review Committee can explore.

b. <u>Ohio Courts Consistently Define the Term "Relating To" Broadly.</u>

Ohio courts respect this long historical understanding in defining the term "relating to." Citing to United States Supreme Court precedent, this state's courts consistently define "relating to" as "'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.'" *Hocking Valley Community Hosp. v. Community Health Plan of Ohio*, 4th Dist. No. 02CA28, 2003-Ohio-4243, ¶ 22 (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992) (citing *Black's Law Dictionary* 1158 (5th Ed. 1979))); *Kagy v. Toledo-Lucas County Port Auth.*, 126 Ohio App.3d 675, 680-681, 711 N.E.2d 256 (6th. Dist. 1998) (same) (quoting *Morales*, 504 U.S. at 383). *See also Schumacher v. Amalgamated Leasing, Inc.*, 156 Ohio App.3d 393, 2004-Ohio-1203, 806 N.E.2d 189, ¶ 17 (3d. Dist.) (defining "related to" as "having a connection with or reference to" (quoting *Morales*, 504 U.S. at 383)). And this state's courts recognize that "relating to" is a broad phrase that does not mean "directly for." *See Restivo v. Cont'l Airlines, Inc.*, 192 Ohio App.3d 64, 2011-Ohio-219, 947 N.E.2d 1287, ¶ 9 (8th Dist.) (discussing *Morales* and finding that "relating to" is a broad term that allows, in the context of the Airline Deregulation Act, for preemption "even if a state law's effect on rates, routes, or services *is only indirect*") (emphasis added) (quotation omitted).

The United States Supreme Court likewise has been consistent in observing this broad definition, even under differing statutory regimes. *Compare Morales*, 504 U.S. at 383 ("the ordinary meaning of ['relating to'] is a broad one") *with Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97-98, 103 S. Ct. 2890, 77 L. Ed.2d 490 (1983) ("a law 'relates to' … in the normal sense of the phrase, if it has a connection with or reference to" (citing Black's Law Dictionary 1158 (5th Ed. 1979)).

It is thus unsurprising that other courts, in defining "relating to," look to the United States Supreme Court and apply the *Morales* (and *Shaw*) definition in various contexts. *See, e.g.*, *Cerdant, Inc. v. DHL Express (USA), Inc.*, S.D.Ohio No. 2:08-cv-186, 2009 U.S. Dist. LEXIS 26058, *10 (Mar. 16, 2009) (Federal Aviation Administration Authorization Act – "[t]he ordinary meaning of 'relating to' is broad: to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with") (quotations omitted); *Knudsen v. IRS*, 581 F.3d 696, 712 (8th Cir. 2009) (Bankruptcy Act – same); *United States v. Gallenardo*, 579 F.3d 1076, 1084 (9th Cir. 2009) (criminal sentencing – observing that "'relating to' has broad implications" and following *Morales*'s definition) (citations omitted); *United States v. Morehouse*, 318 Fed.Appx. 87, 89 (3d Cir. 2009) (criminal sentencing – "[t]his Court has also given a broad interpretation to the term 'relating to'" and following *Morales*'s definition); *United States v. Dullea*, 296 Fed.Appx. 733, 735 (11th Cir. 2008) (criminal sentencing – "relating to" "cast[s] a wide net" and following *Morales*'s definition); *Mizrahi v. Gonzales*, 492 F.3d 156, 159 (2d Cir. 2007) (immigration – "relating to" is used to signal "expansive intent," following *Morales*'s definition, and collecting cases) (citations omitted); *United States v. Hubbard*, 480 F.3d 341, 347 (5th Cir. 2007) (criminal sentencing – the words "relating to" are chosen for a purpose and with the knowledge that "[t]he ordinary meaning of these words is a broad one" and following *Morales*'s definition); *N.H. Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 78-79 (1st Cir. 2006) (Federal Aviation Administration Authorization Act – "[t]he phrase 'related to' has a broad meaning in ordinary usage" and following *Morale*'s definition) (quotations omitted). *See also, e.g.*, *Brennan v. Brennan Assocs.*, 977 A.2d 107, 119 (Conn. 2009) (state law – "the term 'relating to' uniformly has been given a broad meaning"); *W. Va. Consol. Pub. Ret. Bd. v. Weaver*, 671 S.E.2d 673, 675 (W.Va. 2008) ("the common, ordinary, and accepted meaning of

the term 'related to' is connected to or associated with") (citations omitted); *Doe v. Iowa Bd. of Med. Exam'rs*, 733 N.W.2d 705, 710 (Iowa 2007) ("the legislature's use of the broad phrase 'relates to'" requires the conclusion that legislature intended broad scope of statute's reach).

Moreover, "relating to" has a long-standing, pre-*Morales*, tradition of being interpreted broadly. *See, e.g.*, *Siano v. Helvering*, 13 F.Supp. 776, 780 (D.N.J. 1936) ("[t]he word 'relate' ... means to bring into association or connection with and is synonymous with the more extensively used 'refer,' [and means has] a 'connection' or 'association' [to]. Furthermore, to give the word 'relate' another meaning renders it without meaning") (quotations omitted); *City of Mitchell v. W. Pub. Serv. Co.*, 246 N.W. 484, 486 (Neb. 1933) ("the intransitive verb 'relate' is defined as [t]o stand in some relation; to have bearing or concern; to pertain; refer; with to") (quotation omitted).

While citing to few cases, Appellants seek to distinguish *Morales* by arguing that the *Morales* definition is "unhelpful." Appellants' Br. at 20. In making that argument, Appellants cite to *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655, 115 S.Ct. 1671, 131 L. Ed.2d 695 (1995), for the proposition that the *Morales* definition is overly broad. What Appellants ignore is that the *Travelers* Court did not reject *Morales*, but rather clarified that the *Shaw* construction (discussed above) was proper – that "relates to" means "has a connection with or reference to." *Id.* at 656 (quoting *Shaw*, 463 U.S. at 96-97). Indeed, the *Travelers* Court refused to preempt "only direct regulation of ERISA plans." *Id.* at 668.

In fact, when using the term "relating to" for his own purposes, the Ohio Attorney General recognizes that it is a broad term. In discovery requests, the Attorney General defines "relating to" and "related to" as "in whole or in part constituting, containing, concerning, discussing, commenting upon, describing, analyzing, identifying, stating, pertaining to, referring

to, or forming the basis of." First Request for Production of Documents, Definition # 8, propounded by the Ohio Attorney General, relevant extracts of which are attached to R. 83, as Exhibit C. This Attorney General's own definition of "relating to" is not inconsistent with – and seems even broader than – the *Morales* definition.

Faced with this mountain of authority, Appellants attempt to distinguish *Morales*, and argue that its broad definition of "related to" actually requires a direct connection. *See, e.g.*, Appellants' Br. at 18 (arguing that "Ohio drivers do not need to buy a certified abstract in order to operate or use a motor vehicle"). But as discussed above, "related to" has never been defined or understood to mean the far more restrictive "direct."

Morales defines "relating to" as "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." *Morales*, 504 U.S. at 383. Appellants claim that *Morales* implied that its proffered definition of "relating to" is not to be broadly applied, but rather limited to "direct" connections.[9] Appellants err.

In *Morales*, the Court determined that state consumer protection and false advertising laws could not be used to regulate airlines' airfare advertisements. *Id.* at 387-388. The Court held that these general statutes were "relating to" airfares, and thus barred by federal statute under the federal preemption doctrine. *Id.* The states argued that the statute in question only prohibited the states from actual regulation of airfares, rather than regulating the advertising of airfares via a general statute. *Id.* at 385. The Court ruled that such a reading would read the words "relating to" out of the statute: "[h]ad the statute been designed to pre-empt state law in

[9] Indeed, the *Morales* Court, in a review of ERISA cases applying the "sweep of the 'relating to' language," expressly states the opposite: "[A] state law may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only *indirect*." *Morales*, 504 U.S. at 386 (emphasis added) (citation omitted). Thus, *Morales* expressly recognized that an *indirect* connection is sufficient under the sweeping definition of "relating to."

such a limited fashion, it would have forbidden the States to *regulate* rates." *Id.* (emphasis sic) (quotation omitted).

Here, Article XII, Section 5a *was not* drafted in a way requiring that the fee be necessary for the operation or use of motor vehicles. A certified abstract contains the complete history of a person's operation or use of a vehicle on the public highways. Applying these facts to any of the definitions of "relating to" demonstrates that a certified abstract not only meets this definition but also has a "direct connection" to a driver's operation or use of a vehicle.

Given this flood of authority, the Court must "give meaning and effect to the plain meaning" of the phrase "relating to." *In re C.T.*, 119 Ohio St.3d 494, 2008-Ohio-4570, 895 N.E.2d 527, ¶ 12 (citations omitted). *See also Estate of Stevic v. Bio-Med. Application of Ohio, Inc.*, 121 Ohio St.3d 488, 2009-Ohio-1525, 905 N.E.2d 635, ¶ 16 (when language is "plain and unambiguous," a court's "analysis is limited to applying [the language] and giving it effect according to its plain meaning" (citation omitted)); *State ex rel. Maurer*, 71 Ohio St.3d at 522, 644 N.E.2d 369 (when the language of a constitutional provision is clear, a court must use its plain meaning, rather than look to the history of the provision's enactment or to any public policy concerns). Because a certified abstract – and accordingly the fee charged to obtain one – is an item "relating to" the operation or use of vehicles, the Amended Statute is facially unconstitutional.

c. **History Supports Affirmance.**

Appellants rely on rote hearsay[10] and ignore two key historical facts in arguing that "Ohioans intended Section 5a as a narrow restraint on the General Assembly's spending power."

[10] On page 24 of their Brief, Appellants cite to a few newspaper articles about what voters understood the "relating to" language in Article XII, Section 5a meant. Those articles, being offered for the truth of the matter asserted, are inadmissible (and impermissible) rote hearsay. Ohio Evid. R. 801 & 802. The motives of those articles' authors is unknown, and Appellees have no way of testing the truthfulness or accuracy of those statements. Moreover,

Appellants' Br. at 25. First, the language used by other states in adopting similar amendments. And second, the language in amendments on the same topics previously rejected by Ohio voters.

Around the same time as Ohioans chose to include Article XII, Section 5a in the Ohio Constitution, many other states had adopted similar amendments. The text of those provisions is instructive and further refutes Appellants' argument that "related to" should be defined to mean "directly for."

Prior to 1947, many states had passed constitutional amendments similar to Ohio's Section 5a, but far more restrictive in scope.

- For instance, Idaho's constitutional amendment, ratified in 1940, uses the narrow word "for" rather than the broad phrase "related to"; it states: "the proceeds from the imposition of any tax on gasoline and like motor vehicle fuels sold or used to propel motor vehicles upon the highways of this state and from any tax or fee *for* the registration of motor vehicles..." Idaho Constitution, Article VII, Section 17 (emphasis added).

- Likewise, Iowa's constitutional amendment, passed in 1942, does not use the "related to" language; it states: "*All* motor vehicle *registration fees* and all *licenses* and excise taxes *on* motor vehicle fuels..." Iowa Constitution, Article VII, Section 8 (emphasis added).

- Nor does New Hampshire's (1938): "All revenue ... *from* registration fees, operators' licenses, gasoline road tolls or any other special charges or taxes with respect to the operation of motor vehicles..." New Hampshire Constitution, Pt. Second, Article 6-a (emphasis added).

- Or North Dakota's (1940): "Revenue *from* gasoline and other motor fuel excise and license taxation, motor vehicle registration and license taxes..." North Dakota Constitution, Article X, Section 11 (emphasis added).

- Or Texas's (1946): "collection *derived from* motor vehicle registration fees..." Texas Constitution, Article VIII, Section 7-a (emphasis added).

- Or Washington's (1943): "All fees collected ... *as license fees for* motor vehicles..." Washington Constitution, Article II, Section 40 (emphasis added).

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insofar as this argument is an evidentiary argument, Appellants did not make it at trial and have thus waived the right to raise it on appeal. *See Hack v. Gillespie*, 74 Ohio St.3d 362, 367, 658 N.E.2d 1046 (1996) fn. 5 (holding that "these issues were not raised in the trial court and, accordingly, have been waived"). Appellees have never been given the opportunity to bring in testimony or other admissible evidence to refute this argument.

- And another group of states chose to limit their amendments to fuel only. *See, e.g.*, Michigan (Michigan Constitution, Article IX, Section 9).

But the drafters of Article XII, Section 5a, in conjunction with Ohio voters, chose to use "relating to," a much broader term in the context of other states' use of limiting language in their constitutional restrictions. Logic suggests that Ohio voters wanted the restriction to be broader than just "taxes levied upon automobile owners" and, aware of what its sister states had passed, purposefully chose broader language.

Indeed, Ohio voters previously had *rejected* narrow language. *See* Supp. at S-75 (text of constitutional amendment language in 1934 that *failed*). That failed language stated: "Motor vehicles registered by the owner thereof, *upon the use of which* on the public highways a license tax *is imposed* and paid, ..." *Id.* (emphasis added). Thirteen years later, after rejecting this narrow language and after observing other states' amendments, Ohio voters purposely chose the broader "relating to" language. Appellants essentially ask this Court to adopt the restrictive language rejected by Ohioans rather than the language actually enacted in order to save R.C. 4509.05.[11]

Appellants base much of their argument on the proposition that certified abstract fees were not mentioned at the time of Section 5a's adoption. Even though the BMV charged a fee for abstracts dating to 1935, *see* Appellants' Br. at 25, it bears noting that Appellants' argument that the certified abstract fee was not mentioned in the discussions predating Section 5a's adoption is based on a small sample of hearsay articles Moreover, throughout the history of the issuances of certified abstracts (until the passage of Amended R.C. 4509.05), there is not one iota

[11] Appellants cite to an inapposite opinion of the Maine Supreme Judicial Court in support of their argument. Appellants' Br. at 19 (citation omitted). In that case the Maine Court simply found that the Coastal Conveyance Act simply "imposes a license fee upon those engaged in over-water transfers of petroleum products" and that, looking to the history of gasoline taxation in Maine, the license fee did not need to be used in accord with Maine's analogous amendment.

of evidence that any monies collected by Appellants for those documents went anywhere but other than into the BMV fund. If, as Appellees understand, all certified abstract fees collected by the Registrar were retained by the Registrar, there would be no need for any discussion of this fee prior to adoption of Section 5a. Moreover, the 1935 drivers abstract statute gives further support to the fact that a driver's abstract "relates to" the operation or use of vehicles – that statute is found in an act entitled: "AN ACT To promote safe driving and to remove the irresponsible driver from the highways." Supp. at S-59. And the entirety of that Act discusses the operation or use of vehicles on the highways. Appellants then argue that the failure of the Commission for Constitutional Revision to mention certified abstracts when discussing Section 5a in its minutes stands for the proposition that certified abstracts do not "relate to" the operation or use of vehicles.[12] *See* Appellants Br. at 25 (citing Supp. at S-79, S-82, & S-88). A quick review of those citations dispels Appellants' argument.

Quotation on S-79 – "Ohio's Article XII, Section 5a ... demand[s] that all of the revenues derived from the registration of motor vehicles and from the taxes imposed on the purchase of fuels for motor vehicles be expended on the requirements of the state's highway system. The quoted language does not mention operation or use – a fact that if Appellants' argument were taken to its logical conclusion, would mean that Section 5a *only* applies to registration and not to "operation and use". That is plainly not so.

Citation to S-82 – Appellants cite to a discussion on S-82 for the proposition that, because the Commission only mentioned the gasoline tax, the motor vehicle license tax, or the registration tax, the failure to mention the certified abstract fee is telling. While *some* taxes are mentioned, there is no indication from the minutes (which are not verbatim testimony) that the

[12] As with the immediately preceding argument, Appellants did not make this argument at trial, and have thus deprived Appellees of the ability to take discovery as to the intent of the drafters of this document.

identified list was exhaustive rather than illustrative. Moreover, looking at the context of the language cited, the discussion surrounded possibilities about expanding highway funding – it did not involve nor did it conclude anything about certified abstracts.

Quotation on S-88 – "Section 5a ... restricts the expenditure of highway 'user' taxes to highway purposes." That statement says nothing about whether the Commission (or the drafters of Section 5a) considered certified abstracts to be related to the operation or use of vehicles. Indeed, facially all it says is that a tax paid to use the roads falls under Section 5a. It does not exclude other taxes or fees relating to registration, operation, or fuel from the constitutional earmark.

Simply, despite the fact that Article XII, Section 5a can be interpreted according to its plain meaning, the history behind Article XII, Section 5a does not lend credence to Appellants' argument that "relating to" must be read to mean "necessary for." Indeed, the history suggests that Ohioans preferred broad rather than limiting language. Ohio's choice to adopt "relating to" should not be read out of the Constitution.

3. <u>This Court Should Not Narrowly Construe the Constitution to Save A Statute.</u>

Appellants turn a jurisprudential canon on its head by arguing that the Court should construe the *Constitution* narrowly in order to save a *statute.*

The cases Appellants cite on pages 14-15 of their Brief talk about how to interpret an ambiguous statute. Those cases state that if such statutes can be given a plausible reading that is constitutional, then those statutes should be given that plausible (and constitutional) reading.[13]

[13] Appellants' citation on pages 14-15 of their Brief to *Ohio Grocers Assn. v. Levin*, 123 Ohio St.3d 303, 2009-Ohio 4872, 916 N.E.2d 446, is misplaced. That case dealt with constitutional language that specifically barred direct sales tax exemptions on food purchases. This Court held that the Commercial Activity Tax taxed the privilege of doing business and was thus not a direct tax on food sales. It did not deal with "relating to" language nor did it narrowly construe the Constitution to save a statute. This Court simply did what Supreme Courts do, and first interpreted the Constitution before determining if the statute was in violation thereof. *Ohio Grocers* at ¶¶ 26-32.

For example, Appellants argue that *Pioneer Linen Supply Co. v. Evatt*, 146 Ohio St. 248, 251, 65 N.E.2d 711 (1946), stands for the proposition that "constitutional grants of power [should be read] broadly." Appellants' Br. at 14. *Pioneer Linen does not* stand for that proposition. In *Pioneer Linen Supply*, this Court was dealing with the legality of the collection of certain taxes pursuant to statute. Indeed, no form of the word "constitution" is found anywhere in the *Pioneer Linen Supply* decision. As another example, Appellants' citation to *Martin v. City of Columbus*, 101 Ohio St. 1, 7, 127 N.E. 411 (1920), on page 14 of their Brief is likewise misleading. *Martin* simply stands for the proposition that the *State's* feet should be held to the fire when the state is exercising the *State's* constitutional right to take an individual's property. *Martin* at 8 ("Those who seek to dispossess others of their constitutional right of private property, under the provisions of the extraordinary power of eminent domain, should have cast upon them the burden of proving to the satisfaction of the court and jury that they have performed, or are willing to perform, their full constitutional and statutory duty in the premises touching such full or just compensation. Such provision is special and in derogation not only of the common law but also of the general provision of the constitution, and therefore should be strictly construed."). *Martin* does not stand for the proposition that Article XII, Section 5a's "relating to" language should be construed so narrowly as to read the plain language out of the amendment.

These cases do not apply. Here, in sharp contrast, everyone agrees that R.C. 4509.05 is not ambiguous – the parties agree on what R.C. 4509.05 says and means.

Despite Appellants' argument that this Court must narrowly construe the Constitution in order to save an unambiguous statute, no Ohio court has ever held that courts must narrowly construe a constitutional provision to save a statute. To the contrary, statutes are subservient to

the Constitution, and Ohio courts, including the trial court here,[14] have repeatedly held that, in order to promote the purpose of the Ohio Constitution, it should be given a liberal construction, *not* a narrow construction. *See, e.g.*, *Cass v. Dillon*, 2 Ohio St. 607 (1853), syllabus ("While we should be careful not to extend the powers of government, by far fetched implication, we should be equally careful not to defeat the purpose of the constitution, by a narrow and unreasonable construction."); *Weiss v. Kearns*, 117 Ohio App. 393, 404, 191 N.E.2d 552 (8th Dist. 1963) ("The fundamental law of the state is to be construed in no narrow and illiberal spirit. . . . Since a constitution deals in general terms, it should receive a broader and more liberal construction than statutes in order that its purposes may be achieved") (quotation omitted); *State ex rel. Rose v. Ryan*, 118 Ohio App. 161, 163, 193 N.E.2d 540 (10th Dist. 1963) ("The purpose of the Constitution must not be defeated by a narrow and unreasonable construction. Unreasonable or absurd consequences should, if possible, be avoided.") (quotation omitted); *Kraus v. Cleveland*, 58 Ohio Law Abs. 353, 94 N.E.2d 814, 818 (C.P. 1950) ("The fundamental law of the State is to be construed in no narrow and illiberal spirit. It is to be construed according to its intention, where that is clear; and that which clearly falls within the reason of a constitutional prohibition may be regarded as embodied within it.") (citation omitted).

4. <u>Appellants' Slippery Slope Argument Is Meritless.</u>

Appellants argue that if this Court finds that a drivers abstract relates to the operation or use of motor vehicles, then *every* fee that somehow touches on driving will be implicated. *See* Appellants' Br. at 26-28 (arguing that public records fees and court fees would be implicated).

Appellants' arguments that public records fees and court fees would be covered by Section 5a if Appellees prevail are erroneous. Simply, Appellants seek to distract this Court

[14] In his Opinion, Judge Frye recognized the "generally accepted premise that courts must interpret the Constitution broadly in order to accomplish the manifest purpose of an amendment. [citation omitted]. *State ex rel. Swetland v. Kinney* (1982), 69 Ohio St.2d 567, 570, 433 N.E.2d 217, 219." Appellants' Br. at Ex. E, Opinion at 14.

from the narrow question in front of it: Does a certified abstract relate to the operation or use of vehicles on the public highways? The answer, correctly found by both courts below, is "yes." This case is not the vehicle by which this Court needs to establish the outer bounds of what "relating to" means.[15]

Finally, if this Court narrowly interprets "relating to," the implications of that interpretation reach farther than if it holds that a drivers abstract relates to the operation or use of vehicles. Indeed, the term "relating to" appears 1,399 times in the Revised Code. *See* LAWriter Ohio Laws and Rules, *Ohio Revised Code,* http://codes.ohio.gov/orc/search/%22relating+to%22 (accessed May 17, 2012). And it appears in eight other sections of the Ohio Constitution.

Appellants' Proposition of Law No. 3:

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

Appellees' Response to Proposition of Law No. 3:

> The unconstitutional provision contained in amended R.C. 4509.05 cannot be severed, and amended R.C. 4509.05 should be stricken and replaced with its predecessor.

Appellants, after unsuccessfully relying below upon the balancing test in *Geiger v. Geiger,* 117 Ohio St. 451, 160 N.E. 28 (1927), now erroneously argue that legislative choices regarding revenue collection and allocation are "conclusively presumed" to be severable, and thus, amended R.C. 4509.05 – without the unconstitutional distributions – can stand. Amended R.C. 4509.05 is not severable, and therefore, it should be stricken and replaced with its

[15] Even so, if this Court interpreted "relating to" such that Appellants' slippery slope argument comes to be, that is an issue for the legislature to remedy – it should be of no consequence to this Court what the result of a correct ruling is. *See, e.g., State ex rel. Maurer,* 71 Ohio St.3d at 528, 644 N.E.2d 369 (Moyer, C.J., concurring). Nonetheless, there are reasonable arguments as to why a drivers abstract – containing a driver's complete driving history – relates to the operation or use of vehicles but public records and court fees do not. As with the Commercial Activity Tax discussed in the *Grocers* case, *see Ohio Grocers,* 123 Ohio St.3d 303, 2009-Ohio-4872, 916 N.E. 2d 446, those are fees for the service of making copies and use of the courts.

predecessor statute. Indeed, even the legal authority cited by Appellants contradicts their legal conclusion. In their Brief, Appellants cite *Maurer* for the proposition that "in Ohio, 'statutory provisions are presumptively severable.'" Appellants' Br. at 33 (citing *Maurer* at 523). However, in *Maurer,* a case in which this Court considered whether it could sever unconstitutional references to commutations and reprieves from the otherwise constitutional portions of R.C. 2967.07, this Court stated that while R.C. 1.50 provides that statutory provisions are presumptively severable, "[i]n order to sever a portion of a statute, we must first find that such a severance will not fundamentally disrupt the statutory scheme of which the unconstitutional provision is part." *Maurer* at 523. In *Maurer,* this Court then referred to the *Geiger* test for the determination of severability in Ohio: "we set forth the test for determining whether an unconstitutional provision may in fact be severed in *Geiger v. Geiger* (1927), 117 Ohio St. 451, 466, 160 N.E. 28, 33." *Id.*

A. <u>There Is No Conclusive Presumption of Severability in Ohio.</u>

R.C. 1.50 and *Geiger* set forth the standards applicable to severability in Ohio. R.C. 1.50 provides:

> If any provisions of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, *the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application,* and to this end the provisions are severable.

(Emphasis added). Ohio courts hold that, in applying R.C. 1.50 to determine severability, the court must first apply the *Geiger* test to determine that severance will not fundamentally disrupt the statutory scheme of which the unconstitutional provision is part. *See State ex rel. Maurer*, 71 Ohio St.3d at 523, 644 N.E.2d 369. Under the *Geiger* test, this Court must determine:

> (1) Are the constitutional and unconstitutional parts capable of separation so that each may be read and may stand by itself? (2) Is the unconstitutional part so

> connected with the general scope of the whole as to make it impossible to give effect to the apparent intent of the Legislature if the clause or part is stricken out? (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?

Geiger at 466 (quotation omitted). Thus, there is no conclusive presumption of severability in Ohio under R.C. 1.50. Severability must be determined under the *Geiger* balancing test.

Nevertheless, Appellants ignore *Geiger* and erroneously rely upon *State ex rel. Donahey v. Edmondson*, 89 Ohio St.3d 93, 105 N.E. 269 (1913), to assert that severability is in order here because revenue collection and allocation are distinct and inherently severable. In *Edmondson*, this Court noted that a statute containing a constitutional levy of taxes could stand even if "*other laws* in relation to the disbursement of the fund so raised . . . are unconstitutional." *Id.* at 114 (emphasis added). In other words, in *Edmondson,* the collection statute and the allocation statute were two distinct and separate parts of the legislation. In contrast, in this case, collection and disbursement are both intimately intertwined in R.C. 4509.05, and, as written, the collection provision and the disbursement provision cannot stand without the other.[16] Thus, this Court, like the lower courts before it, must apply the *Geiger* balancing test to determine that amended R.C. 4509.05 is not severable.

B. Appellants Misstate the Judicial Role in Remedying This Unconstitutional Enactment.

Relying upon *Friedlander v. Gorman*, 126 Ohio St. 163, 184 N.E. 530 (1933), Appellants argue that even, if this Court concludes that the Amended Statute distributes revenue in an unconstitutional manner, it has no basis to invalidate the fee increase but instead must defer to

[16] Appellants, relying upon *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, also mischaracterize the impact of R.C. 4509.05's simultaneous collection and disbursement provisions on this Court's severability analysis. Appellants' argument that the simultaneity of the enactment is not fatal to severability is simply misplaced. *See* Appellants' Br. at 35. Indeed, it is not the fact that the General Assembly simultaneously enacted the fee increase and distribution provision which makes it not severable. Instead, it is the fact that in drafting the amendment, the Ohio General Assembly inextricably intertwined the collection and disbursement provisions in a way that makes severability impossible without fundamentally disrupting the statutory scheme.

the General Assembly regarding its re-distribution. Appellants' Br. at 35. Indeed, Appellants even go so far as to suggest that the General Assembly has already established an alternative distribution scheme under R.C. 4501.25 (which directs any funds collected by the BMV that are not otherwise allocated to the BMV fund).

Friedlander does not stand for the proposition that an unconstitutional collection must continue and only the General Assembly can later remedy the violation. Instead, the *Friedlander* Court enjoined a county from sending money to the state pursuant to a new state program, and did not reach the issue of whether the state fund was constitutional or not (or what should have happened to the money in the fund). 126 Ohio St. at 168-170. Separation of powers in government requires that the judicial branch not abandon its role by deferring to unconstitutional legislative enactments. *See Sheward*, 86 Ohio St.3d at 462, 715 N.E.2d 1062 ("The power and duty of the judiciary to determine the constitutionality and, therefore, the validity of the acts of the other branches of government have been firmly established as an essential feature of the Ohio system of separation of powers.").

Moreover, Appellants' argument strains credibility since (1) it is clear that the General Assembly did not intend for the BMV to receive any of the $3.00 increase, (2) in a budget crisis, it is difficult to imagine any scenario in which the General Assembly would overfund the BMV when so many other programs and agency budgets are extraordinarily underfunded, including roads and bridges, and (3) as a matter of statutory construction, Appellants' construction would render severed R.C. 4509.05 internally inconsistent. *See infra* at 38-41. As a result, severing the latter portion of Amended R.C. 4509.05, as Appellants suggest, leaves an untenable result – the BMV receives a three-dollar per abstract windfall that the legislature never intended.

Thus, contrary to Appellants' suggestion, the only way to effectuate the legislature's intent and remedy the unconstitutional wrong is to strike Amended R.C. 4509.05, and replace it with its prior version.

C. The Lower Courts Properly Applied *Geiger.*

Appellants incorrectly conclude that *Geiger* balancing leaves the BMV with the ability to charge the full five-dollar fee, ignoring that such a result pays no attention to legislative intent. First, Appellants incorrectly assume that the unconstitutional portion of the statute can be separated; on the contrary viewing the Amended Statute through the lens of its predecessor demonstrates the unconstitutionality of the whole of the Amended Statute. Second, Appellants incorrectly assume that the intention of the Amended Statute is merely to "impose a fee," Appellants' Br. at 39, rather than acknowledge that the Legislature's intent was to raise specific revenue for specific funds. Finally, Appellants incorrectly assume that no additional words or phrases are necessary to give the statute effect if the Amended Statute is severed, rather than acknowledge that severability will leave three dollars of the fee unaccounted for.

1. The Legislature's Intent Was to Raise Money for Certain Funds; It Did Not Intend a Windfall for the BMV or to Simply Impose a Higher Fee.

The legislature always intended the BMV to receive *only* two dollars of the fee – both in the old statute and the new. There simply is no evidence that the legislature, if faced with a vote to appropriate three dollars to the programs listed in the Amended Statute or the BMV, would choose to overfund the BMV. The Tenth District Court of Appeals, affirming the trial court observed:

> Under the second part of the test, the rest of the paragraph is so tied to the general scope of the amended statute that it is not possible to give effect to the apparent intention of the legislature. If the unconstitutional portion is severed, the $5 fee will still be collected but $3 of that fee will not be allocated or disbursed. *This*

> *was not the apparent intent of the General Assembly when it passed the amended statute.*

Appellants' Br. at Ex. C, Decision at 18 (emphasis added).

The lower courts were correct: the legislature obviously intended the fee increase to only benefit funds other than the BMV fund and the only way to give that effect is to strike the statute. "[I]n determining the intention of the legislature, [courts] may consider among other matters ... former statutory provisions." R.C. 1.49(D). Comparing the prior version of R.C. 4509.05 to the amended one demonstrates that the intent of the legislature was not a blanket raising of revenue, but rather to raise money for specific funds. Under the prior version of R.C. 4509.05, certified abstracts cost two dollars. *See* Supp. at S-3, Second Amended Complaint at 3, n. 1. And the entirety of that two dollars went to the BMV. *See* R.C. 4501.25. Likewise, under the Amended Statute, the legislature raised the fee to five dollars, and *specifically designated* where the entirety of that five-dollar fee went all the while leaving *only two dollars designated to go to the BMV*. *See* R.C. 4509.05.

Therefore, fatal to Appellants' argument is the fact that the amount of the certified abstract fee going to the Bureau of Motor Vehicles *remained unchanged* from the prior version of R.C. 4509.05 to the Amended Statute. Under both versions, the Bureau of Motor Vehicles received two dollars. The intent of the legislature in amending R.C. 4509.05 was not to generally "raise revenue," or increase the certified abstract fee, but specifically to raise three additional dollars and apportion that money to funds that are not the Bureau of Motor Vehicles fund.

In other words, the legislature always intended that the bureau of motor vehicles *only receive* two dollars from the certified abstract fee. This salient fact is clearly demonstrated by the legislature's refusal to increase the Bureau of Motor Vehicle's funding even when increasing

the certified abstract fee by 150%. The legislature did not want the Bureau of Motor Vehicles to receive more than two dollars, under either the previous version of R.C. 4509.05 or the Amended Statute.

Because the legislature only increased the certified abstract fee to finance other state funds and not to increase the Bureau's revenue, the unconstitutional part of the Amended Statute – the distribution of fees to funds prohibited by Article XII, Section 5a – is so connected with the general scope of the whole that it is impossible to give effect to the apparent intent of the Legislature if that clause or part is simply stricken out. As the lower courts correctly held, under the second prong of the *Geiger* test, severability is improper.

2. <u>Severing Amended R.C. 4509.05 Requires a Redraft of the Statute.</u>

Appellants assume in error that no additional words or phrases would be necessary if this Court elects to sever, without performing any substantive analysis. Appellants' Br. at 41. But as the Tenth District Court correctly concluded below, "additional words or terms are necessary to provide meaning and context to the statute if the offending language is removed." Appellants' Br. at Ex. C, Decision at 18. Indeed, the Tenth District observed:

> If the court were to strike just the unconstitutional language from the statute, new language would be needed to explain where the additional $3 of the fee would be allocated. It is not clear whether the legislature would seek to raise the allocation to the BMV fund to $5, or if the legislature would select a different amount. This is a task for the legislature and not for the judiciary.

Id.

Indeed, if the unconstitutional provision is severed, the statute as a whole becomes internally inconsistent without modification. Nevertheless, Appellants essentially argue that, in applying this prong of *Geiger*'s balancing test, this Court should *ignore* legislative intent. Thus,

Appellants seek the anomalous result of having this Court bless the severability of legislation by ignoring what the legislature intended with that legislation.

Relevant to this discussion, the Amended Statute states (with the portion Appellants believes severable indicated):

> (B) The registrar shall collect for each abstract a fee of five dollars.
> (C) ***
> Of each five-dollar fee the registrar collects under this division, the registrar shall pay two dollars into the state treasury to the credit of the state bureau of motor vehicles fund established in section 4501.25 of the Revised Code~~, sixty cents into the state treasury to the credit of the trauma and emergency medical services fund established in section 4513.263 of the Revised Code, sixty cents into the state treasury to the credit of the homeland security fund established in section 5502.03 of the Revised Code, thirty cents into the state treasury to the credit of the investigations fund established in section 5502.131 of the Revised Code, one dollar and twenty-five cents into the state treasury to the credit of the emergency management agency service and reimbursement fund established in section 5502.39 of the Revised Code, and twenty-five cents into the state treasury to the credit of the justice program services fund established in section 5502.67 of the Revised Code~~.

Thus, the Amended Statute requires the registrar to collect a five-dollar fee, but only directs the distribution of two dollars of that fee. There is no dispute that the Bureau of Motor Vehicles fund is a proper destination for two dollars of the certified abstract fee under Article XII, Section 5a. Appellants conclude that, because R.C. 4501.25 requires distribution of moneys collected under Chapter 4509 to the Bureau of Motor Vehicles fund "unless otherwise designated by law," there are no inconsistencies with the Amended Statute. But statutes must be internally consistent, and Appellants' analysis leaves three dollars without any statutorily-designated home.

As this Court has "consistently held, the canon *expressio unius est exclusio alterius*[17] tells us that the express inclusion of one thing implies the exclusion of the other." *State ex rel.*

[17]"*Expressio unius est exclusio alterius* is an interpretative maxim meaning that if certain things are specified in a law, contract, or will, other things are impliedly excluded." *Laikos v. Marquis Mgmt. Group,* LLC, 5th Dist. No. 2008CA00166, 2009-Ohio-3574, ¶ 26 (citing *Harris v. Atlas Single Ply Sys., Inc.*, 64 Ohio St.3d 171, 173, 593 N.E.2d 1376 (1992); *Vincent v. Zanesville Civ. Serv. Comm.*, 54 Ohio St.3d 30, 33, 560 N.E.2d 226 (1990)).

LetOhioVote.org v. Brunner, 123 Ohio St.3d 322, 2009-Ohio-4900, 916 N.E.2d 462, ¶ 39 (quotations and citations omitted). Thus, the statutory distribution of two dollars of the certified abstract fee to the Bureau requires that the other three dollars collected *not* be likewise distributed. It makes no sense either in law or logic for both the catch-all statute and the specific distribution of two dollars to both apply. A court would therefore have to modify the Amended Statute to effect severance.

For example, section (C) could be changed from: "Of each five-dollar fee the registrar collects under this division, the registrar shall pay two dollars into the state treasury to the credit of the state bureau of motor vehicles fund established in section 4501.25 of the Revised Code;" to "Of each five-dollar fee the registrar collects under this division, the registrar shall pay *five* dollars into the state treasury to the credit of the state bureau of motor vehicles fund established in section 4501.25 of the Revised Code." (Change indicated in emphasis). Or the following phrase could be inserted after section (C): "Of the remaining three dollars, that money too shall be paid into the state treasury to the credit of the state bureau of motor vehicles fund."

Or that phrase could be stricken altogether – a phrase no one believes is unconstitutional – and thus this Court could strike a constitutional phrase in the interest of maintaining the constitutionality of the statute (an absurd result). Indeed, this is the result Appellants insist on. On pages 37-38 of their Brief, Appellants argue that *all* of the distribution language – the constitutional *and* unconstitutional parts – should be severed in order to save the fee increase. By explicitly arguing that this Court should strike constitutional language along with unconstitutional language as the way of saving the rest of the statute, Appellants tacitly concede that severability fails under *Geiger*'s second prong.

Thus, because judicial modification of the Amended Statute is necessary, under the *Geiger* balancing third prong, severability is improper.

3. The Constitutional Portion of the Amended Statute Does Not Stand By Itself.

Turning back to the first prong of the *Geiger* balancing test – "[a]re the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself" – Appellants err in their suggestion that the Amended Statute is severable. Analyzing the first prong in view of the other prongs shows the fallacy of Appellants' position.

The Amended Statute was not legislatively crafted from new cloth. It expressly added and changed some of the terms of the prior version of R.C. 4509.05. And the purpose of adding and changing those terms was solely to raise money for state funds which are not the bureau of motor vehicles fund. Because that distribution, which is inextricably tied to the fee increase, is improper under Article XII, Section 5a of the Ohio Constitution, the proper course is a return to the status quo – *i.e.*, striking the Amended Statute in favor of its prior version. *See State v. Sullivan*, 90 Ohio St.3d 502, 2001-Ohio-6, 739 N.E.2d 788, paragraph two of the syllabus ("When a court strikes down a statute as unconstitutional, and the offending statute replaced an existing law that had been repealed in the same bill that enacted the offending statute, the repeal is also invalid unless it clearly appears that the General Assembly meant the repeal to have effect even if the offending statute had never been passed."). If the legislature so chooses it is free to recast R.C. 4509.05 in constitutional terms.

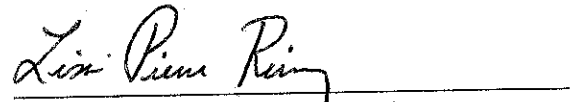
Severability is improper, and the entirety of the Amended Statute should be struck.

CONCLUSION

For all the foregoing reasons, this Court should strike Amended R.C. 4509.05 because it violates Article XII, Section 5a of the Ohio Constitution, and replace it with its predecessor – the statute in place prior to the July 1, 2009 amendment. Further, this Court should remand this case

the Franklin County Court of Common Pleas to address the return of funds which the BMV has improperly collected pursuant to this Amended Statute since July 1, 2009.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief of Plaintiffs-Appellees Ohio Trucking Association, Professional Insurance Agents of Ohio, Inc., and Ohio Trucking Association was served by U.S. mail, postage prepaid, this 21st day of May, 2012, on the following:

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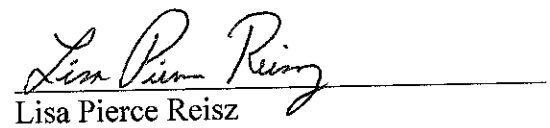

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