

ORIGINAL

IN THE SUPREME COURT OF OHIO

OHIO TRUCKING	:	
ASSOCIATION, <i>et al.</i>	:	
	:	
Plaintiffs-Appellees,	:	Case No. 11-2013 11-1757
	:	
v.	:	
	:	
THOMAS P. CHARLES, Director, Ohio	:	On Appeal from the Franklin County
Department of Public Safety, <i>et al.</i>	:	Court of Appeals, Tenth Appellate
	:	
Defendants-Appellants.	:	District (C.A. No. 10APE-673)

**MERIT BRIEF OF AMICI CURIAE OHIO CHAMBER OF COMMERCE,
OHIO FARM BUREAU FEDERATION, AND NATIONAL FEDERATION OF
INDEPENDENT BUSINESS/OHIO IN SUPPORT OF APPELLEES**

Chad A. Endsley (0080648)
 Leah F. Curtis (0086257)
 OHIO FARM BUREAU FEDERATION
 PO Box 182383
 280 North High Street, 6th Floor
 Columbus, Ohio 43218-2383
 Tel: (614) 246-8258
 Fax: (614) 246-8658
cendsley@ofbf.org

*Counsel for Amicus Curiae Ohio Farm
 Bureau Federation*

Lisa P. Reisz (0059290)
 Kenneth J. Rubin (0077819)
 Thomas E. Szykowny (0014603)
 VORYS, SATER, SEYMOUR AND
 PEASE LLP
 52 E. Gay Street, PO Box 1008
 Columbus, Ohio 43216-1008
 Tel: (614) 464-6400
 Fax: (614) 719-4932
lpreisz@vorys.com

*Counsel for Plaintiffs-Appellees Ohio
 Trucking Ass'n., et al.*

Michael DeWine (0009181)
 OHIO ATTORNEY GENERAL
 Elisabeth A. Long (0084128)
 Counsel of Record
 Stephen P. Carney (0063460)
 Matthew P. Hampton (PHV 1893-2012)
 Deputy Solicitors
 Hilary R. Damaser (0059190)
 Assistant Attorney General
 30 E. Broad Street, 17th Floor
 Columbus, Ohio 43215
 Tel: (614) 466-8980
 Fax: (614) 466-5087
elisabeth.long@ohioattorneygeneral.gov

*Counsel for Defendants-Appellants Director
 Thomas P. Charles [Thomas Stickrath], Director,
 Ohio Department of Public Safety, et al.*

Linda Woggon (0059082)
 OHIO CHAMBER OF COMMERCE
 220 East Town Street
 Columbus, Ohio 43215
 Tel: (614) 228-4201
 Fax: (614) 228-6403
lwoggon@ohiochamber.com

*Counsel for Amicus Curiae Ohio Chamber of
 Commerce*

FILED
 MAY 21 2012
 CLERK OF COURT
 SUPREME COURT OF OHIO

Greg Saul (0084827)
NFIB/OHIO
10 West Borad Street, Suite 2450
Columbus, OH 43215
Tel: (614) 221-4107
Fax: (614) 221-8677
greg.saul@NFIB.org

*Counsel for Amicus Curiae National Federation of
Independent Business/Ohio*

TABLE OF CONTENTS

TABLE OF AUTHORITIES v

STATEMENT OF INTEREST 1

STATEMENT OF CASE AND FACTS 4

ARGUMENT 5

Appellant’s Proposition of Law No. 1:

A party seeking to challenge a fee or tax has no standing to do so if its objection is based solely upon allegedly improper spending, as the alleged injury of paying fees is not caused by the alleged spending violation, and would not be redressed by restraining the challenged spending. Further, “special fund” standing does not exist for those who purchase certified abstracts..... 5

Response of Amici Curiae:

Ohio organizations that, unlike members of the general public, must pay millions of dollars annually in statutory fee increases under R.C. 4509.05 for specifically designated state funds, have legal standing to challenge the constitutionality of that statute..... 5

Appellant’s Proposition of Law No. 2:

Fees charged for obtaining drivers’ abstracts are not “related to” operating a vehicle, and thus do not trigger Section 5a’s spending restraint, because they are not fees generally charged to the motoring public as a condition on using public roads..... 8

Response of Amici Curiae

The types of fees that are “related to” the registration, operation, or use of a motor vehicle for purposes of Article XII, Section 5a, of the Ohio Constitution have been understood and accepted for over 60 years, and budgetary exigencies do not change the language, the intent, or the meaning of constitutional guarantees. 8

Appellant’s Proposition of Law No. 3:

Absent an express statement by the General Assembly, the collection and expenditure of revenue are conclusively presumed to be severable, so the proper remedy for a Section 5a violation is to restrict spending, not collection..... 12

Response of Amici Curiae:

The provisions of R.C. 4905.05 cannot be severed into constitutional and unconstitutional parts; each part is so connected to the other that it is impossible to give effect to the intent of the General Assembly if one part is stricken, unless additional words are added by the Court to the statutory language..... 12

CONCLUSION..... 15

CERTIFICATE OF SERVICE 16

TABLE OF AUTHORITIES

Cases

<i>Bowles v. State</i> , 37 Ohio St. 35 (1881)	14
<i>Duncan v. Kahanamoku</i> , 327 U.S. 304 (1946) (Stone, C.H., concurring)	4
<i>Geiger v. Geiger</i> , 117 Ohio St. 451 (1927).....	12
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137, 176-77 (1803)	10
<i>McCulloch v. Maryland</i> , 17 U.S. (4 Wheat.) 316 (1819)	10
<i>Ohio Contractors Ass'n v. Bicking</i> , 71 Ohio St.3d 318 1994-Ohio-183, 643 N.E.2d 1088, 1090 (1994).....	6
<i>Pioneer Linen Supply Co. v. Evatt</i> , 146 Ohio St. 251 (1946).....	9
<i>Racing Guild of Ohio, Local 304 v. Ohio State Racing Commission</i> , 28 Ohio St.3d 317 (1986)..	7
<i>State ex rel. Donahey v. Edmundson</i> , 89 Ohio St. 93 (1913)	13
<i>State ex rel. Maurer v. Sheward</i> , 71 Ohio St.3d 513, 521, 1994-Ohio-496, 644 N.E.2d 369 (1994) (per curiam)	9
<i>State ex rel. Ohio Academy of Trial Lawyers v. Sheward</i> , 86 Ohio St.3d 451 1999-Ohio-123, 715 N.E.2d 1062, 1081 (1999)	6
<i>State ex rel. Taft v. Franklin County Court of Common Pleas</i> , 81 Ohio St.3d 480, 1998-Ohio-333	10
<i>State ex rel. v. Forney</i> , 108 Ohio St. 463 141 N.E. 16, 17 (1923).....	10
<i>State v. Foster</i> , 109 Ohio St.3d 1, 2006-Ohio-856	13

Statutes

R.C. 4509.05	passim
--------------------	--------

STATEMENT OF INTEREST

Amici curiae Ohio Chamber of Commerce, Ohio Farm Bureau Federation, and National Federation of Independent Business/Ohio are extremely interested in the three issues presented by this appeal: (1) whether Ohio organizations that pay millions of dollars annually into specifically designated state funds through statutory fee increases have legal standing to challenge the constitutionality of the statute that increased the fees; (2) whether the common and ordinary meaning of the language of Article XII, Section 5a, of the Ohio Constitution, as it has been understood and applied for 65 years, can be interpreted differently when the State faces budgetary challenges; and (3) whether a statute that unconstitutionally increases fees for specific state funds can be severed into two independent parts, such that the fee increase, standing alone, would effectuate the intention of the legislature without the addition of any other words by the Court.

Amicus curiae Ohio Chamber of Commerce is a non-profit trade association that has served as the voice of business in the State of Ohio for over a century. Founded in 1893, it is Ohio's oldest and most diverse business association, representing over 6,000 Ohio companies that range from family-owned stores to multinational corporations. Among other things, the Ohio Chamber of Commerce fights for fair business regulations and legislation that improve Ohio's job climate and opposes disguised tax increases that target Ohio businesses, while it aggressively champions free enterprise, economic competitiveness, and economic growth. All three issues presented by this appeal are very important to the Ohio Chamber of Commerce, although it is particularly concerned about appellant's contention that the Court should strip Ohio organizations and businesses of standing to challenge unconstitutional fees and fee increases that cost them millions of dollars annually but cost the general public nothing.

Amicus curiae Ohio Farm Bureau Federation is Ohio's largest general farm organization, with over 200,000 members who share its vision of a partnership between farmers and consumers to ensure agricultural prosperity and abundance in the global marketplace. It was originally founded in 1919 to address emerging issues affecting farmers and farms, but it presently develops and conducts educational campaigns and programs that address a wide variety of issues affecting both rural and urban citizens of Ohio, including taxes and fees, the environment, trade regulation, land use and property rights, and health and safety. The Ohio Farm Bureau Federation relies on public policy generated by political activism, from the county level to the national level, to create a stronger economy and a better future for farmers and consumers alike. In this case, appellant's attempts to side-step the language and purpose of Article XII, Section 5a of the Ohio Constitution undermine formal policies of the Bureau that emphasize the need for an adequate and safe road system throughout the State, and that oppose governmental reliance on special fees and licenses to raise revenue for unrelated expenses.

Amici curiae Ohio Chapter of the National Federation of Independent Business ("NIFB/Ohio") has more than 24,000 members and is the State's largest association dedicated exclusively to the interests of business owners. NIFB/Ohio aggressively promotes and protects the rights of its members to create, operate, and grow their own businesses. A major tenet of its public policy agenda is to ensure that Ohio's tax system treats individuals, businesses, corporations, and other entities fairly. NIFB/Ohio supports rules and regulations that will provide an economic climate that attracts new businesses to Ohio and support their growth and development.

All three amici curiae believe that businesses and individuals benefit from a stable legal environment that protects long-settled legal expectations and prevents governmental intrusions

through unwarranted and unconstitutional regulations and fees. In the present case, the citizens of Ohio adopted Article XII, Section 5a, of the Ohio Constitution in 1947 by initiative, the most democratic of our law-making traditions, after more than a decade of public debate. They decided that the General Assembly must spend all fees collected by the State “relating to registration, operation, or use of vehicles on public highways” for specifically designated highway purposes. (*Id.*) The Ohio General Assembly obeyed that mandate for 65 years, until budgetary exigencies prompted it to amend R.C. 4509.05, increasing the Board of Motor Vehicles fee for certified abstracts for purposes that are not included in Article XII, Section 5a.

As a result, appellees’ members must shoulder millions of dollars in fee increases, which members of the general public do not pay, for the unconstitutional purposes listed in R.C. 4509.05. As discussed below in response to appellant’s Proposition of Law No. 1, settled precedent and simple fairness support the Court of Appeals’ ruling that appellees have legal standing to challenge the constitutionality of the amendment to R.C. 4509.05. If that ruling were reversed, the General Assembly could also impose unconstitutional fees that target amici curiae, their members, or other Ohio organizations or businesses in order to fill holes in the budget that have nothing to do with them, and they would have no standing to challenge them in court.

Amici curiae and their members are also keenly interested in the issue raised by appellant’s second Proposition of Law. Appellees’ members were selectively burdened by what the trial court called “a disguised tax-increase” (Court of Common Pleas Opinion, at ¶32) in this instance, but the broader interests at stake here are important to all Ohioans: the language of the Ohio Constitution cannot be ignored by the General Assembly to appease public sentiment, to advance political interests, or to shore up shaky budgets. Principles are enshrined in constitutions to protect them from temporary political and economic perturbations. “The

Constitution was built for rough as well as smooth roads.” *Duncan v. Kahanamoku*, 327 U.S. 304, 342 (1946) (Stone, C.H., concurring). Truckers, farmers, business owners, and all other Ohio citizens expect, need, and deserve that constitutional guarantees are stable and enduring.

The third issue raised by appellant is equally important, for similar reasons. Settled principles of Ohio law prohibit courts from severing R.C. 4509.05 to salvage what appellant calls its “constitutional portion,” *i.e.*, the fee increase. But this is not an independent, stand-alone provision, and it would not effectuate the original intent of the General Assembly unless new language was added to the statute judicially. If it were endorsed by this Court, appellant’s third Proposition of Law would require Ohio citizens and businesses to comply with fragments left over from unconstitutional statutes that do not preserve the legislature’s original intention.

Amici curiae are deeply concerned about the General Assembly’s willingness to ignore long-standing constitutional limits in response to budgetary exigencies, and about appellant’s present attempt to eliminate their members’ standing to challenge the resulting unconstitutional statute. They now ask this Court to enforce the words of the Ohio Constitution and reaffirm that its guarantees do not depend upon political or economic expediency.

STATEMENT OF CASE AND FACTS

Amici curiae adopt and incorporate the Statement of the Case and Facts set forth in appellees’ Merit Brief. The parties previously stipulated to the only facts that are relevant to appellant’s propositions of law: (1) the appellees are trade associations whose members collectively purchase more than five million Ohio certified abstracts from the Registrar of the Bureau of Motor Vehicles each year; (2) R.C. 4509.05(B), as amended in 2009, increased the fee for each certified abstract from two dollars to five dollars and directed the Registrar to pay the three dollar increase into six specified state funds; and (3) the six state funds specified by R.C.

4509.05(B) are not used for any of the purposes described in Article XII, Section 5a, of the Ohio Constitution. Jt. Stip. ¶¶ 2-6, 12 (Supp. At S-10 to S-13).

In the proceedings below, both the trial court (Opinion, June 8, 2010) and the Court of Appeals (Decision, August 30, 2011) held (1) that appellees have standing to challenge the constitutionality of R.C. 4509.05; (2) that the fee imposed by the statute for abstracts is related to the registration, operation, or use of a motor vehicle and thus violates Article XII, Section 5a; and (3) that there is no independent, constitutional portion of R.C. 4509.05 that can be severed and preserved to effectuate the intent of the General Assembly in amending the statute. Amici curiae support appellees in asking the Court to reject appellants' propositions of law and affirm the ruling below.

ARGUMENT

Appellant's Proposition of Law No. 1:

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

Response of Amici Curiae:

Ohio organizations that, unlike members of the general public, must pay millions of dollars annually in statutory fee increases under R.C. 4509.05 for specifically designated state funds, have legal standing to challenge the constitutionality of that statute.

In its first Proposition of Law, appellant argues that appellees lack standing to challenge the constitutionality of R.C. 4509.05 because their members, who must pay the increased abstract fees, would purportedly lack standing to bring suit on their own behalf. Merit Brief of Defendants-Appellants, at 7. *See, e.g., Ohio Contractors Ass'n v. Bicking*, 71 Ohio St.3d 318,

320, 1994-Ohio-183, 643 N.E.2d 1088, 1090 (1994) (holding that an organization may have standing to sue on behalf of members who would have standing to sue on their own behalf). In this case, members of appellees have sustained legal injuries that are radically and materially different in degree from any sustained by members of the general public. Only one such member is necessary to establish standing to request the declaratory relief appellees seek in this case.

All parties agree that the applicable legal standard for determining legal standing is set forth in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469-470, 1999-Ohio-123, 715 N.E.2d 1062, 1081 (1999): a private litigant has standing to contest the constitutionality of a legislative enactment when: (1) it “has suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general;” (2) the challenged statute “cause[d] the injury;” and (3) the relief requested “will redress the injury.”

First, appellant argues perfunctorily that the legal injuries to appellees in this case are the sole result of the language in amended R.C. 4909.05 that increased the fees for abstracts, and that no injuries were “caused” by the language of the statute that earmarks the fee increase for purposes that are not included in Article XII, Section 5a. (*Id.*, at 8-9.) It then argues, for the same reason, that the scope of the declaratory relief sought by appellees – a declaration that the 2009 statutory amendment as a whole is unconstitutional – is not necessary to “redress” their injuries. (*Id.*, at 8-9.) According to appellant, the two portions of R.C. 4509.05 are not “so connected that they rise or fall together,” and it contends that appellees lack standing to challenge the increase in fees. (*Id.*, at 9.)

Appellant’s “severability” analysis is relevant to its third Proposition of Law, regarding the proper scope of declaratory relief, but it is improper with respect to the standing issue raised

by their first Proposition of Law. The injury to appellees for standing purposes is not just the way the fee increase is distributed; that distribution scheme would not exist without the increase in fees, and it was created at the same time and in the same legislative amendment. Appellees' injury is the direct result of increasing the fee for the sole benefit of specific state funds that are not constitutionally allowed to receive those fees. Regardless of this Court's conclusion as to the alleged severability of the statute in connection with Proposition of Law No. 3, it is indisputable that R.C. 4905.05, as amended, "caused" the injury to appellees and that a decision by this Court affirming the unconstitutionality of that statute would "redress" the injury.

Second, appellant also argues that appellees lack standing under the final element of the three-part test described in *Sheward, supra*, because they purportedly have not suffered injury "in a manner or degree different from that suffered by the public in general." See Merit Brief of Defendants-Appellants, at 10, quoting *Sheward, supra*, 86 Ohio St.3d at 469-470, 715 N.E.2d at 1081. This argument was properly rejected by the Court of Appeals, and its ruling should be affirmed.

"The requirement of standing is not designed to shield agencies and officials from accountability to taxpayers; instead, it denies the use of the courts to those who, while not sustaining a legal injury, nevertheless seek to air their grievances concerning the conduct of government." *Racing Guild of Ohio, Local 304 v. Ohio State Racing Commission*, 28 Ohio St.3d 317, 321, 503 N.E.2d 1025, 1029 (1986). In this case, appellees are not merely disgruntled taxpayers airing grievances about government actions that affect all taxpayers. Unlike members of the general public, they must pay millions of dollars of increased fees annually into six specified funds in violation of the Ohio Constitution. Appellant cannot plausibly maintain that appellees' injuries are no different in manner or degree from those of the public in general, when

appellees purchase more than 5,000,000 abstracts a year – and must therefore pay an additional \$15 million in unconstitutional fees each year – while members of the public pay nothing. It. Stip., *supra*, ¶¶ 2-6. (Supp. S-10 to S-12.)

The Court of Appeals properly found that appellees’ members “are not simply taxpayers who are unhappy with a legislative enactment regarding the expenditure of their tax dollars.... They stand to lose millions of dollars if they must continue to pay the challenged fee.” Decision, at ¶¶ 15-16 (emphasis added). This Court should reject appellant’s attempt to deprive appellees of standing to challenge the constitutionality of R.C. 4509.05.

Appellant’s Proposition of Law No. 2:

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

Response of Amici Curiae:

The types of the “fees” that are “related to” the registration, operation, or use of a motor vehicle for purposes of Article XII, Section 5a, of the Ohio Constitution have been settled for over 60 years, and budgetary exigencies do not change the language, the intent, or the meaning of this provision.

In its second Proposition of Law, appellant BMV argues that the fees charged by the Registrar for abstracts, pursuant to R.C. 4509.05, are not “related to operating a vehicle,” and therefore are not restricted by Article XII, Section 5a, of the Ohio Constitution, because they are not “a condition on using public roads.” (Merit Brief of Defendants-Appellants, at 13.) There are many things wrong with that proposition, as described below, and it should not be endorsed by the Court. The language of Article XII, Section 5a is not limited to fees that are a “condition” of “operating a vehicle.” The broad language of this constitutional mandate cannot be narrowed whenever it is expedient to do so.

First, appellant misleadingly paraphrases the language of Section 5a, which does not mention any “condition[s] on using public roads.” Instead, it provides that “fees... relating to registration, operation, or use of vehicles on public highways” must be expended only for certain specified purposes. (*Id.*) As these words are commonly understood, fees may be “related to” the registration, operation, or use of a motor vehicle, even if they are not a necessary “condition” for engaging in those activities. In the present case, the fees paid to the Registrar under R.C. 4509.05 for abstracts include drivers’ records which are provided so that those drivers can insure (and thus operate) motor vehicles or obtain commercial licenses, and thus are within the scope of Section 5a. The Court of Appeals recognized that some of appellees’ members employ commercial truck drivers who “need” certified abstracts to operate their vehicles. *See* Decision, at ¶¶ 38-39. But these fees are related to the registration, operation, and use of motor vehicles even if they are not a condition for engaging in those activities.

Appellant concedes that this Court should read constitutional provisions “broadly” and that “anything ‘not clearly excluded from [their] operation... is clearly included therein.’” Merit Brief of Defendants-Appellants, at 14, *quoting Pioneer Linen Supply Co. v. Evatt*, 146 Ohio St. 248, 251 (1946). In this instance, Article XII, Section 5a, of the Constitution does not clearly exclude driver abstract fees from the fees it broadly restricts to highway purposes, *i.e.*, “fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways,” and they are therefore properly included within that restriction.

“The first step in determining the meaning of a constitutional provision is to look at the language of the provision itself.” *State ex rel. Maurer v. Sheward*, 71 Ohio St.3d 513, 521, 1994-Ohio-496, 644 N.E.2d 369, 375 (1994) (*per curiam*). Words that are not specifically defined in the Constitution must be read consistent with “their usual, normal, or customary

meaning.” *State ex rel. Taft v. Franklin County Court of Common Pleas*, 81 Ohio St.3d 480, 481, 1998-Ohio-333, 692 N.E.2d 560, 562 (1998). Appellant acknowledges that these principles apply in this case, and it also concedes that courts must take “special care to read words in voter initiatives as ‘the simple language of the plain people,’ assigning them ‘such meaning as [the people] usually give to [them].’” Merit Brief of Defendants-Appellants, at 16, *quoting State ex rel. v. Forney*, 108 Ohio St. 463, 466 141 N.E. 16, 17 (1923).

However, appellant claims that “the meaning [of Section 5a] is unclear” and that this Court must therefore “look to other evidence of [legislative] intent, including the circumstances of [its] adoption, its history, and the consequences of alternative constructions.” (*Id.*, at 16.) Appellant then argues that the “history and circumstances” of Section 5a “confirm” that it was “never intended” to include fees from abstracts. (*Id.*) But the common and ordinary meaning of Section 5a is not unclear, and the “history and circumstances” of that provision do not confirm appellant’s narrow reading of its language. On the contrary, during the 65 years since the voters of Ohio adopted this constitutional provision, the abstract fees have been paid only into state funds that are permitted by Section 5a.

This provision of the Ohio Constitution contains the same language that it had 65 years ago, and those words mean the same thing now that they meant then. “[W]e must never forget that it is a constitution we are expounding.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819). The limits that the Ohio Constitution places on the General Assembly are not mere recommendations, and they cannot be nullified in the name of political or financial expedience. John Marshall emphasized this point in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803), more than 200 years ago:

The powers of the legislature are defined, and limited; and that these limits may not be mistaken, or forgotten, the constitution is

written. To what purpose are powers limited, and to what purpose is that limitation reduced in writing, if these limits may, at any time, be passed by those intended to be restrained?

Appellant nevertheless contends that Article XII, Section 5a, uses “general language,” which purportedly authorizes this Court to uphold the General Assembly’s eleventh-hour attempt to “fix” the State budget by making appellees’ members pay increased fees for abstracts to cover the cost of budget items that have no connection with motor vehicles or highways. But the language used in constitutions is necessarily general in nature, in order to accommodate the many permutations of conduct that they encompass. With respect to Article XII, Section 5a, the use of broad language hedges against attempts to find loopholes and ensures that it will be applied broadly in cases like this. The voters did not limit its scope to fees that are a “condition of,” or “necessary to,” the registration, use, or operation of a motor vehicle. They used the broad language “related to” in order to avoid the kind of linguistic gymnastics that appellant’s arguments rely upon in this case.

Current events confirm the wisdom of Ohio voters in enacting Article XII, Section 5a. Ohio highways are underfunded and are falling into a deplorable condition as the State constricts spending. Fees related to the use of those highways are needed to repair and maintain them. The General Assembly decided to use those fees for non-highway purposes instead of obeying the Ohio Constitution. Section 5a was adopted by the voters after more than a decade of spirited public debate, and it cannot be ignored by the legislature when it is convenient to do so.

The Court of Appeals correctly recognized that the ordinary meaning of the words actually used in Article XII, Section 5a, apply to the fees at issue in this case. The fees would not exist if motor vehicles were not registered, owned, or operated by Ohio residents. Budgets do not trump the Ohio Constitution, and the ruling of the Court of Appeals should be affirmed.

Appellant's Proposition of Law No. 3:

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

Response of Amici Curiae:

The provisions of R.C. 4905.05 cannot be severed into constitutional and unconstitutional parts; each part is so connected to the other that it is impossible to give effect to the intent of the General Assembly if one part is stricken, unless additional words are added by the Court to the statutory language.

In its third Proposition of Law, appellant argues that the "collection portion" of R.C. 4509.05 is severable from its "expenditure portion" and therefore should be preserved even if the "expenditure portion" violates Article XII, Section 5a, of the Ohio Constitution. (Merit Brief of Defendants-Appellants, at 32.) Appellant's argument violates the long-settled principle of Ohio law that courts cannot sever a statute unless the language that is preserved, standing alone, expresses the legislature's intention. The Court of Appeals properly held that R.C. 4509.05 cannot be severed, and its ruling should be affirmed by this Court.

Both parties have previously relied upon language in *Geiger v. Geiger*, 117 Ohio St. 451, 160 N.E.28 (1927), as the proper legal standard governing severability. Under that decision, the Court must ask:

(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 to give effect to the former only?

117 Ohio St. at 466, 160 N.E. at 33 (citation omitted). This legal standard has not changed since *Geiger* was decided in 1927. See *State v. Foster*, 109 Ohio St.3d 1, 28-29, 2006-Ohio-856, ¶¶ 93-95, 845 N.E.2d 470, 487 (2006).

The Court of Common Pleas ruled that the provisions of R.C. 4509.05 could not be severed because the fee increase “is so interconnected” with the funds that it must be used for that it is “impossible to give effect to the apparent intention of the legislature if only the offending clause or part is stricken;” instead, “new language about how the \$3 increased fee should be distributed ... would be needed. This court cannot make that expenditure decision for the legislature, but without some replacement language the \$5 fee is nonsensical.” Opinion, at ¶¶ 32-34. The Court of Appeals reached the same conclusion:

[T]he present allocations do not comport with Section 5a of the Ohio Constitution.... 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.

Decision, at ¶¶ 44-45.

Not surprisingly, appellant now argues that the *Geiger* test for determining the propriety of severability should not be used in this case. It asks the Court to follow an earlier ruling, *State ex rel. Donahey v. Edmundson*, 89 Ohio St. 93, 105 N.E. 269 (1913), that appellant deems “more specific.” (Merit Brief of Defendants-Appellants, at 36.) However, the *Edmundson* Court, unlike the *Geiger* Court, did not address the issue presented here: whether some of the language of a statute can be preserved by severing other, unconstitutional language from the same statute. It found that a constitutional statute could stand even if “other laws” connected with it were

unconstitutional. 89 Ohio St. at 114, 105 N.E. at 275. The decision in *Edmundson* is not “more specific” than the ruling in *Geiger* with respect to the issue presented by this appeal.

Here, the General Assembly increased abstract fees to obtain money for specific state funds, in a single statutory amendment, and neither “portion” of the statute makes sense standing alone unless the Court adds new language that the General Assembly never considered or enacted. Otherwise, the fee increases would be left in legal limbo disconnected from those specific funds, which the General Assembly obviously never intended when it amended R.C. 4509.05. The fees were increased to provide revenue for those funds.

Appellant’s attempted reliance on *Bowles v. State*, 37 Ohio St. 35 (1881), is unavailing. (Merit Brief of Defendants-Appellants, at 38-39.) In that decision, the Court anticipated its later ruling in *Geiger, supra*, and held that unconstitutional words in a statute cannot be severed unless the remaining language “is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which is rejected.” 37 Ohio St. at 44 (citation omitted; emphasis added). The General Assembly’s purpose in amending R.C. 4509.05 was indisputably to generate additional revenue for specified state funds. That purpose cannot be achieved if the statute is severed and the fee increase does not go to those funds.

Appellant contends that it would not be necessary to “add any words or terms” to the remaining portion of R.C. 4509.05 if the distribution language were severed (Merit Brief of Defendants-Appellants, at 41) because the additional fees could simply be paid into the BMV fund. But that was obviously not the intent of the General Assembly when it amended the statute. On the contrary, it did just the opposite, specifying that the increased fees would not be paid into the BMV fund and providing it with precisely the same amount for each abstract – two

dollars – that it received before the statute was amended. The Court has no authority to increase that amount.

Accordingly, the Court of Appeals' ruling should be affirmed. The unconstitutionality of R.C. 4509.05 cannot be remedied by ignoring the legislature's intent, severing one portion of the statute, and directing the fee increases to funds chosen by the Court.

CONCLUSION

Amici curiae Ohio Chamber of Commerce, Ohio Farm Bureau Federation, and National Federation of Independent Business/Ohio urge the Court to affirm the decision of the Court of Appeals.

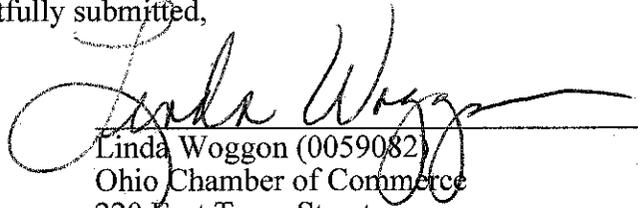
Respectfully submitted,


Chad A. Endsley (0080648)
Leah F. Curtis (0086257)
Ohio Farm Bureau Federation
PO Box 182383
280 North High Street, 6th Floor
Columbus, Ohio 43218-2383
Tel: (614) 246-8258
Fax: (614) 246-8658
cendsley@ofbf.org

*Counsel for Amicus Curiae
Ohio Farm Bureau Federation*


Greg Saul (0084827)
NFIB/OHIO
10 West Broad Street, Suite 2450
Columbus, Ohio 43215
Tel: (614) 221-4107
Fax: (614) 221-8677
greg.saul@NFIB.org

*Counsel for Amicus Curiae
National Federation of Independent
Business/Ohio*


Linda Woggon (0059082)
Ohio Chamber of Commerce
220 East Town Street
Columbus, Ohio 43215
Tel: (614) 228-4201
Fax: (614) 228-6403
lwoggon@ohiochamber.com

*Counsel for Amicus Curiae
Ohio Chamber of Commerce*

CERTIFICATE OF SERVICE

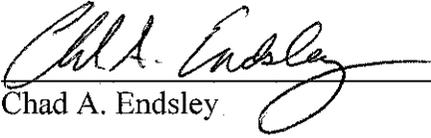
I certify that a copy of the foregoing *Merit Brief of Amici Curiae Ohio Chamber of Commerce, Ohio Farm Bureau Federation, and National Federation of Independent Business in Support of Appellees* was served by U.S. mail this 21st day of May, 2012, on the following:

Michael DeWine (0009181)
OHIO ATTORNEY GENERAL
Elisabeth A. Long (0084128)
Counsel of Record
Stephen P. Carney (0063460)
Matthew P. Hampton (PHV 1893-2012)
Deputy Solicitors
Hilary R. Damaser (0059190)
Assistant Attorney General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
Tel: (614) 466-8980
Fax: (614) 466-5087
elisabeth.long@ohioattorneygeneral.gov

*Counsel for Defendants-Appellants Director
Thomas P. Charles [Thomas Stickrath],
Director, Ohio Department of Public Safety,
et al.*

Lisa P. Reisz (0059290)
Kenneth J. Rubin (0077819)
Thomas E. Szykowny (0014603)
VORYS, SATER, SEYMOUR AND
PEASE LLP
52 E. Gay Street, PO Box 1008
Columbus, Ohio 43216-1008
Tel: (614) 464-6400
Fax: (614) 719-4932
lpreisz@vorys.com

*Counsel for Plaintiffs-Appellees Ohio
Trucking Ass'n., et al.*


Chad A. Endsley