

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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

D E C I S I O N

Rendered on August 30, 2011

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

Michael DeWine, Attorney General, Todd A. Nist, Hilary R. Damaser, and Barton A. Hubbard, for appellants.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

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

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

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

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

Use of Motor Vehicle License and Fuel Taxes Restricted.

§5a No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles, shall be expended for other than costs of administering such laws, statutory refunds and adjustments provided therein, payment of highway obligations, costs for construction, reconstruction, maintenance and repair of public highways and bridges and other statutory highway purposes, expense of state enforcement of traffic laws, and expenditures authorized for hospitalization of indigent persons injured in motor vehicle accidents on the public highways. (1947)

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

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

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

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

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Each "fund" listed in R.C. 4509.05(C)¹ as receiving a portion of the proceeds from the five-dollar fee imposed under the statute is established pursuant to statute. The moneys in each of those funds, other than the state bureau of motor vehicles fund established in R.C. 4501.25, are not expended for the "costs of administering such laws, statutory refunds and adjustments provided therein, payment of highway obligations, costs for construction, reconstruction, maintenance and repair of public highways and bridges and other statutory highway purposes, expense of state enforcement of traffic laws, and expenditures authorized for hospitalization of indigent persons injured in motor vehicle accidents on the public highways. Ohio Constitution, Article XII, §5a.

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

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

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

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

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

No moneys derived from fees * * * relating to registration, operation, or use of vehicles on public highways * * * shall be expended for other than costs of administering such laws, statutory refunds and adjustments provided therein, payment of highway obligations, costs for construction, reconstruction, maintenance and repair of public highways and bridges and other statutory highway purposes * * *.

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

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

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

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

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

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

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

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

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

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

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

Many streets are dangerous traffic bottle-necks.

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

.....

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

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

.....

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

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

{¶32} The opponents argued as follows:

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

.....

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Judgment affirmed.

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

KLATT, J., dissenting.

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

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

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

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

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

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

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

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