ORIGINAL

IN THE SUPREME COURT OF OHIO

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

MEMORANDUM IN OPPOSITION TO JURISDICTION OF PLAINTIFF-APPELLEES OHIO TRUCKING ASSOCIATION, PROFESSIONAL INSURANCE AGENTS ASSOCIATION OF OHIO, INC., AND OHIO INSURANCE INSTITUTE

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INTRODUCTION

This case does not involve a question of public or great general interest. Simply because Appellants disagree with the well-reasoned decisions of both the Franklin County Court of Common Pleas and the Tenth District Court of Appeals, does not make it a matter of public or great general interest.[1] Nothing about the two lower courts' decisions rewrites – radically or otherwise – the meaning of Article XII, Section 5a of the Ohio Constitution. Instead, the lower courts both reasonably determined that fees collected by the BMV for the purchase of a certified driving record abstract under R.C. § 4509.05 – a record which only exists because of an Ohio driver's operation or use of a motor vehicle and upon which both trucking companies and insurance companies rely to license or insure drivers to operate and use vehicles in Ohio – relate to the registration, operation or use of a motor vehicle, and therefore, the use of such funds is restricted to highway purposes by Article XII, Section 5a.

This Court should not now bail out the legislature for its attempt to solve Ohio's 2009 budget crisis at the expense of the Ohio Constitution. In 2009, Ohio's General Assembly, unwilling to raise taxes, attempted to raise general operating revenue through significant fee increases, including the fee charged by the BMV for a driving record abstract. H.B. 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. However, this fee increase, one of hundreds of fee increases which became effective in Ohio on that date, was aimed at raising general revenue for the State of Ohio, not to cover any increased costs related to a certified driving abstract or for any BMV purpose at all. Thus, the legislature simply ignored

[1] Indeed, just over one month ago, the State of Ohio, in *Beaver Excavating Company v. Joseph W. Testa*, No. 2011-1536 – another Article XII, Section 5a case pending before this Court in which the State prevailed below – argued against this Court accepting jurisdiction stating that that case "did not warrant the Court's review, and it does not implicate the broad interests that Plaintiffs-Appellants allege." *See* Memorandum Opposing Jurisdiction of Appellee Joseph W. Testa [Richard A. Levin], Tax Commissioner of Ohio, at 1 (Oct. 11, 2011).

Article XII, Section 5a's limitation in enacting this statute, and now is relying upon this Court to fix a problem which it has taken no action to avert. Indeed, for the entire pendency of this case, the legislature has not taken the simple step of amending R.C. § 4509.05 to distribute the entire $5.00 certified abstract fee to the BMV as Appellants suggest should happen here or otherwise in accord with Section 5a. Given the amount at issue, tens of millions of dollars per year of revenue, it simply makes no sense for the legislature to gamble with a judicial outcome rather than simply fix the problem. This Court, therefore, should respect the legislative determination of the General Assembly, respect the constitutional separation of powers (and not insert itself into a legislative dispute), and not accept jurisdiction of this matter.

Appellants attempt to make this case more than it is by confusing and conflating Article XII, Section 5a's spending restriction. While Appellants argue that the lower courts' decision transformed Article XII, Section 5a's spending restriction into a collection restriction, their conclusion is flawed. R.C. 4509.05 is unconstitutional under Article XII, Section 5a because it both collects and spends funds in a way that cannot be severed. The lower court decisions do not broaden Article XII, Section 5a in any way.

Appellants also try to paint a slippery slope of endless applications which just do not exist here:

- Appellants attempt to confuse public records requests (where a requestor identity is not required) with requests for driving record abstracts under R.C. 4509.05. Requests for public records to the BMV (like any other public agency) are governed by, not R.C. 4509.05. The BMV's public records policy is not at issue here.[2] A review of BMV Form 1173 – the form the BMV uses to process R.C. 4509.05 requests – shows that the BMV already has in its possession the identity of requestors seeking driving record abstracts and the purpose for which they are sought when a request for an abstract is filled under R.C. 4509.05. Thus,

[2]Even if the BMV's public records' policy was at issue, it is the BMV's policy to provide the first 40 pages of a requested public record at no charge. Driving record abstracts are typically 2 pages. Thus, no fees would be at issue if Appellees' requested these records pursuant to an R.C. 149.43 *See* R.55, Jt. Stip., at ¶16.

Appellees' objection that requestor identity is a challenge – and a violation of Ohio's public records laws – is simply not accurate.

- Appellants' example of the trucking company or pizza delivery service seeking criminal background checks is misplaced. Fees paid for criminal background checks for employee drivers do not relate to the employee's operation or use of a vehicle, but instead go to a company's ability to make appropriate hiring decisions (though a request by such a company for a driving record to assess the employee's ability to operate and use a vehicle is).

- Appellants' third example regarding the distribution of BMV license-reinstatement fees under R.C. 4511.191(F)(2) seemingly illustrates other legislation where the General Assembly also ignored Article XII, Section 5a. Even appellants cannot argue that license fees do not go to the operation or use of a motor vehicle. Thus, reinstatement fees certainly fall within the Section 5a restriction. And, simply because such fees have not yet been challenged, does not make them constitutional.

- A criminal fine, to the contrary, is a penalty which should not be confused with taxes or fees related to the operation or use of a vehicle, even if the payment of such is a prerequisite for the privilege of obtaining a driver's license.

Finally, this Court should not be swayed by Appellants' predictions of impending financial disaster. This Court cannot ignore the unconstitutionality of a statute simply because the remedy could cause the state, which enacted the unconstitutional provision, financial hardship. Indeed, Appellants have been on notice of Appellees' challenge to the July 1, 2009 amendment to R.C. § 4509.05 since July 20, 2009 – just 19 days following its enactment. In the days that followed, the legislature could have amended the statute or could have begun to re-budget for the potential loss of revenue to the non-5a funds, but the legislature did not act at all. Instead, Appellants have simply continued to collect $5.00 per abstract for almost two and a half years, and, twice moved for a stay to continue to collect such funds notwithstanding two opinions determining that such fees violate Ohio's constitution. A determination of constitutionality should not be influenced by tough economic times and poor planning.

For the reasons set forth below, the Court should decline jurisdiction.

STATEMENT OF THE CASE AND 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. R.55, Jt. Stip., at ¶ 2, 5, and 6.

Under the Amended Statute (as well as it prior version) where appropriate,[3] 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 established in section 5502.03 of the Revised Code, thirty cents into the state treasury to the credit of the***

[3]The type of information, and to whom that information can be provided, is limited under both the federal and state Driver's Privacy Protection Act (collectively "DPPA"), 18 U.S.C. § 2721 *et seq.* and R.C. 4501.27. See also R.55, Jt. Stip. At ¶¶ 2, 5, 6.

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).[4]

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 R.45, Amended Complaint at ¶ 7; R.46, Answer to Amended Complaint at ¶ 5; R.55, Jt. Stip. at ¶ 12. In other words, 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 in accordance with the Ohio Constitution. See R.55, Jt. Stip. at ¶ 12.

On July 20, 2009, just 19 days following its enactment, Appellees filed this action challenging the constitutionality of the Amended Statute under Article XII, Section 5a of the Ohio Constitution. After the parties had an opportunity to fully brief this case and a bench trial on the merits was held on March 19, 2010, Judge Frye issued a decision on June 8, 2010, finding that amended R.C. 4509.05 is unconstitutional. The Tenth District Court of Appeals affirmed

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[4] 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.

this decision on August 31, 2011.

ARGUMENT

Appellant BMV's Proposition of Law No. 1:

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

In Ohio, in order to have standing to assert a constitutional challenge to a legislative enactment, a private litigant[5] must show: (1) "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," (2) that the legislation in question has caused the injury, and (3) that the declaratory relief sought will redress the injury. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451.

Appellants cite to this test, and then twist logic and law to conclude that Appellees lack standing because, as they posit, Appellees are no different than anyone who has purchased an abstract. However, Appellees have standing because they purchase abstracts, and thus, Appellees are not the general public, but are voluntary fee payors for a specific service. As purchasers of these abstracts, they directly pay the BMV, which then distributes those moneys in ways it acknowledges violate Article XII, Section 5a of the Ohio Constitution. Like anyone who purchased an abstract, Appellees have standing to challenge this unconstitutional monetary

[5]Appellants do not dispute 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* (1994), 71 Ohio St.3d 318, 320.

distribution and subsequent unconstitutional expenditure.

Here, Appellees meet the standing test set forth in *Sheward.*

First, Appellees have suffered a direct and concrete injury different from that suffered by the public in general. Indeed, as 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 is directly being used by the State in ways that violate Article XII, Section 5a of the Ohio Constitution. In sharp contrast, the general non-abstract buying public, only suffers remote injury by the State's refusal to honor its Constitutional obligations. Indeed, 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 v. Taft* (2006), 110 Ohio St.3d 252, 254 (citing *Racing Guild of Ohio v. Ohio State Racing Comm'n* (1986), 28 Ohio St.3d 317. This is a ***fee*** payer standing case, under which the law grants Appellees standing. Appellees are not simply taxpayers who are unhappy with a legislative enactment regarding the expenditure of their tax dollars.

Second, the constitutional violation causes Appellees' injury. Appellees' injury is absolutely traceable to the challenged action. See *Brown v. Columbus City Schs. Bd. of Educ.* (10th Dist. 2009), 2009-Ohio-3230, at ¶ 6. Article XII, Section 5a specifically prohibits the use of certain moneys in certain ways. The Amended Statute not only collects certified abstract fees but it also directs the moneys collected to funds which Appellants admit do not spend that money in accord with the constitutional restriction. R.55, ¶ 12 ("The monies in each of those funds... *are not expended*" in accord with the Constitution. (emphasis added)). 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 inextricably part 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 violates the Ohio Constitution. Appellees are absolutely entitled to challenge the collection of that fee simply because that money *cannot* be legally spent.

Third, Appellees' injury can be redressed by the declaratory relief requested. If Appellees are successful in this litigation, their stated injury can be redressed – the Amended Statute will be stricken and replaced with its predecessor – which will result in a reduction in the Abstract Fee from five dollars to two dollars. Indeed, this is precisely the remedy fashioned by both lower courts here.

Thus, Appellees have standing to assert their claims, and this Court (like the two courts below) should not entertain Defendants' arguments to the contrary. Amended R.C. § 4509.05 is facially unconstitutional, and Plaintiffs are properly situated to challenge its enactment.

Appellant BMV's Proposition of Law No. 2:

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

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.

Appellants rely heavily upon the presumption of constitutionality afforded to them under Ohio law, yet continue to ignore the plain language contained in Article XII, Section 5a. Specifically, Appellants seek to apply an overly narrow reading of the broad term "relating to,"[6]

[6] "Relating to" is a broad term. Ohio courts, citing to United States Supreme Court precedent, 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* (Hocking Cty. Aug. 6, 2003), No. 02CA28, 2003 WL 21904586, 2003-Ohio-4243, ¶ 22 (quoting *Morales v. Trans World Airlines, Inc.* (1992), 504

essentially arguing to have "relating to" read as "used for."[7] While narrow interpretation is proper in constitutional inquiries, courts must give credence to the plain meaning of terms.[8]

Section 5a states "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* (8th Cir. 2009), 581 F.3d 696, 712 ("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").

Indeed, prior to 1947, many states had passed constitutional amendments *similar* to

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U.S. 374, 383 (citing Black's Law Dictionary 1158 (5th ed. 1979)); *Kagy v. Toledo-Lucas County Port Auth.* (Fulton Cty. 1998), 126 Ohio App.3d 675, 680-81 (same) (quoting *Morales*, 504 U.S. at 383). See also *Schumacher v. Amalgamated Leasing, Inc.* (Hancock Cty. 2004), 156 Ohio App.3d 393, 2004-Ohio-1203, ¶ 17 (defining "related to" as "having a connection with or reference to" (quoting *Morales*, 504 U.S. at 383)). Given the flood of authority (both in and outside Ohio), this Court must "give meaning and effect to the plain meaning" of the phrase "relating to." *In re C.T.* (2008), 119 Ohio St.3d 494, 2008-Ohio-4570, ¶ 12 (citations omitted). *See also Estate of Stevic v. Bio-Med. Application of Ohio, Inc.* (2009), 121 Ohio St.3d 488, 2009-Ohio-1525, ¶ 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 v. Sheward* (1994), 71 Ohio St.3d 513 (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).

[7] In the Briefs before the Tenth District Court of Appeals, Appellants and/or the Amicus add the word "for" at least seven different times in an attempt to narrow the definition of "relating to." While Appellants may benefit from the presumption of constitutionality, such presumption cannot mean that the plain language of Article XII, Section 5a can be altered to save the legislation at issue.

[8] Chief Justice Moyer took this discussion one step further in his concurrence; he cautioned that the words of Ohio's Constitution must be given their plain meaning, regardless of the public policy implications a plain meaning approach might implicate. *See Maurer*, 71 Ohio St.3d at 527-28 (Moyer, C.J., Concurring) (writing "separately to discuss an aspect of the majority decision that demonstrates one of the very difficult responsibilities of being a judge;" and stating that "[t]he words of the Constitution can be given their plain meaning only as applied by the majority decision. To analyze away the words of the Constitution is to engage in an act of corroborating one's own belief that the Governor's actions were unwise").

Ohio's Section 5, but far more restrictive in scope than the "related to" language in Section 5a. For instance, Idaho's constitutional amendment, ratified in 1940, uses the narrow word "for" rather than the broad phrase "related to": "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 Const. Art. VII, § 17 (emphasis added). Likewise, Iowa's constitutional amendment, passed in 1942, does not use the "related to" language: "***All*** motor vehicle ***registration fees*** and ***all licenses*** and excise taxes **on** motor vehicle fuels..." Iowa Const., Art. VII § 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..." N.H. Const. Pt. Second, Art. 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..." N.D. Const. Art. X, § 11 (emphasis added). Or Texas's (1946): "collection **derived from** motor vehicle registration fees..." Tex. Const. Art. VIII, § 7-a (emphasis added). Or Washington's (1943): "All fees collected ... ***as license fees*** **for** motor vehicles..." Wash. Const. Art. II, § 40 (emphasis added). And another group of states chose to limit their amendments to fuel only. See, e.g., Michigan (Mich. Const. Art. IX, § 9).

Ohio, presumably aware of other states use of limiting language in their constitutional restrictions, chose to use "relating to," a much broader term. Thus, meaning must be given to this term. However, the narrow construction that Appellants endorse would effectively read "relating to" out of Ohio's Constitution.

In this case, 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),[9] a certified abstract is "relating to" the "operation, or use of vehicles."[10] Therefore, the certified abstract fee must 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. Therefore, the lower Courts' determination that the Amended Statute is unconstitutional is correct.

Appellant BMV's Proposition of Law No. 3:

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

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 upon the balancing test in *Geiger v. Geiger* (1927), 117 Ohio St. 451, now 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.

In Ohio, R.C. § 1.50 and *Geiger* set forth the standards applicable to severability. Under the *Geiger* test, this Court must determine:

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[9] A certified abstract issued pursuant to R.C. 4509.05 embodies an individual's driving record. *See* R.55, Jt. Stip. at ¶ 13, Ex. 1. It 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. See 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.*

[10] Like the Tenth District Court of Appeals' conclusion that driving record abstracts relate to a trucker's ability to operate a commercial vehicle on public highways, *see Ohio Trucking Association v. Director Thomas Stickrath* (Aug. 30, 2011), No. 10AP-673, at 16, the very same connection can be made between driving record abstracts and the ability of all drivers to lawfully operate vehicles in Ohio in compliance with Ohio's financial responsibility law. Because drivers must have proof of financial responsibility to drive in Ohio, *see* R.C. § 4509.101, (which virtually all Ohioans satisfy with automobile insurance), and because insurance underwriters require the review of driving record abstracts in order to underwrite automobile insurance, driving record abstracts, as a practical matter, relate to the operation or use of a vehicle.

> (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 is 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, 117 Ohio St. at 466 (quotation omitted).

Here, Defendants erroneously rely upon *State ex rel. Donahey v. Edmondson* (1913), 89 Ohio St.3d 93 to assert that severability here is fine because revenue collection and allocation are distinct and inherently severable. In *Edmondson*, the Supreme Court of Ohio 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 pieces of legislation.

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. Thus, both lower courts correctly applied *Geiger* to determine that Amended R.C. 4509.05 is not severable.

First, the constitutional and unconstitutional parts are not capable of separation so that each part can be read and stand by itself. 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, the first prong of the *Geiger* test to determine severability is not met here.

Second, the unconstitutional portion is so connected with the general scope of the whole statute that it is impossible to give effect to the apparent intent of the Legislature if the

unconstitutional portion is stricken out. The Amended Statute was not legislatively crafted from new cloth. 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. 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. Under both versions, the Bureau of Motor Vehicles received two dollars. Thus, the intent of the legislature in amending R.C. 4509.05 was not to generally "raise revenue," or to increase the certified abstract fee, but to specifically raise three additional dollars and specifically apportion that money to funds that are not the Bureau of Motor Vehicles fund. 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 both correctly held, under the second prong of the *Geiger* test severability is improper.

Third, severing Amended R.C. 4509.05 requires a re-draft of the statute. Indeed, if the unconstitutional provision is severed, the statute as a whole becomes internally inconsistent without modification. 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.[11] Appellants have contended 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 the Supreme Court of Ohio has "consistently held, the canon *expressio unius est exclusio alterius*[12] tells us that the express inclusion of one thing implies the exclusion of the other." *State ex rel. LetOhioVote.org v. Brunner* (2009), 123 Ohio St.3d 322, 2009-Ohio-4900, ¶ 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, thus, under *Geiger's* third prong, severability is improper.

[11]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 of the Ohio Constitution.

[12] "*Expressio unius est exclusion 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 (Stark Cty. Jul. 26, 2009), No. 2008CA00166, 2009 WL 2170982, 2009-Ohio-3574, ¶ 26)(citing *Harris v. Atlas Single Ply Sys., Inc.*(1992), 64 Ohio St.3d 171, 173; *Vincent v. Zanesville Civ. Serv. Comm.*(1990), 54 Ohio St.3d 30, 33).

Accordingly, the remedy – striking amended R.C. 4509.05 and replacing it with the prior version of the statute – was correctly fashioned by both lower courts.

CONCLUSION

For all the foregoing reasons, this Court should decline to accept jurisdiction over this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Opposition to Jurisdiction 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 14th day of November, 2011, on the following:

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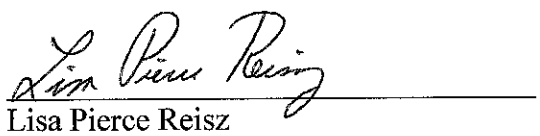

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