[Cite as *Rowitz v. Tax Commr. of Ohio*, 2019-Ohio-5438.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Stephanie Rowitz,	:	
Appellant-Appellant,	:	
		No. 18AP-191
v.	:	(BTA No. 2017-250)
[Jeff McClain], Tax Commissioner of Ohio,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	
Jamie Weisbarth,	:	
Appellant-Appellant,	:	
		No. 18AP-192
v.		(BTA No. 2017-251)
[Jeff McClain], Tax Commissioner of Ohio,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	
Madison Weisbarth,	:	
Appellant-Appellant,	:	
	:	No. 18AP-193
v.		(BTA No. 2017-252)
[Jeff McClain], Tax Commissioner of Ohio,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	
McKenna Weisbarth,	:	
Appellant-Appellant,	:	
		No. 18AP-194
v.	:	(BTA No. 2017-253)
[Jeff McClain], Tax Commissioner of Ohio,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on December 31, 2019

On brief: *Murray & Murray Co., L.P.A., John T. Murray*, and *Leslie O. Murray*; *Ray Robinson Law Co., L.P.A., Sandra M. Kelly*, and *Christopher D. Kuebler*. **Argued**: *John T. Murray* and *Sandra M. Kelly* for appellants.

On brief: *Dave Yost*, Attorney General, *Daniel W. Fausey*, and *Raina Nahra Boulos*, for appellee. **Argued:** *Raina Nahra Boulos*.

APPEALS from the Ohio Board of Tax Appeals

BEATTY BLUNT, J.

{¶ 1} Appellants in this consolidated action appeal a decision from the Ohio Board of Tax Appeals ("BTA") affirming the Tax Commissioner's decision denying their applications for a refund of sales taxes they paid for purchasing feminine hygiene products.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} Appellants Stephanie Rowitz, McKenna Weisbarth, Madison Weisbarth, and Jamie Weisbarth filed applications for refunds of sales tax they paid for feminine hygiene products, such as tampons and menstrual pads, to appellee Ohio Tax Commissioner Jeff McClain ("Commissioner") on May 20, 2016. They included receipts for each of their purchases with their applications.

{¶ 3} Their claims for refunds were denied. In the denial letter, the Ohio Department of Taxation found that "[a] thorough review of R.C. 5739.02 reveals that there is not an applicable exemption." (July 22, 2016 Letter.)

{¶ 4} Appellants filed an appeal with the Commissioner on August 9, 2016. Appellants submitted a letter from Dr. Edwina Simmons, who purported to provide an expert opinion. In that letter, Dr. Simmons stated "[m]enstrual products are not a Luxury for women and [t]herefore do not qualify for a Luxury Tax." (Attachment to Appellants'

October 27, 2016 letter.) Dr. Simmons said that feminine hygiene products are necessary to protect furniture, floors, and clothing from blood-borne illnesses.

{¶ 5} The Commissioner issued his final determination and denied the applications on December 16, 2016. In his decision, the Commissioner found the Department of Taxation is "without power to exercise any jurisdiction beyond that conferred by statute" such that he could not address appellants' constitutional arguments. Addressing the taxability of feminine hygiene products solely under Ohio's statutory scheme, the Commissioner found that feminine hygiene products do not fit within the definition of a drug, prosthetic device, durable medical equipment, or mobility enhancing equipment.[1] The Commissioner determined the products are not "drugs" because they "are not compounds or substances." (Dec. 16, 2016 Final Determination at 4.) They are not "durable medical equipment" because they "are worn in or on the body." (Dec. 16, 2016 Final Determination at 4.) They are not "prosthetic devices" because "they do not artificially replace a missing portion of the body or prevent or correct a physical deformity or malfunction, or support a weak or deformed portion of the body." (Dec. 16, 2016 Final Determination at 4-5.) Rather, the Commissioner found that "menstruation is a normal bodily function, 'necessary for continued reproduction and continuation of the human species.' " (Dec. 16, 2016 Final Determination at 5, quoting unidentified documentation provided by appellants.)

{¶ 6} The Commissioner went on to find that:

> [F]eminine menstrual products are not dispensed pursuant to a prescription as required under the exemptions set forth in R.C. 5739.02(B)(18) and (19). Hence, sales of such products cannot be exempt in any case, regardless of whether they meet the definitions of drugs, prosthetic devices, [or] durable medical equipment * * *.

(Dec. 16, 2016 Final Determination at 5.)

{¶ 7} Appellants appealed the Commissioner's decision to the BTA.

{¶ 8} On February 20, 2018, the BTA issued its Decision and Order affirming the Final Determination of the Commissioner. The BTA found that appellants failed to meet

[1] Appellants argued before the Commissioner that feminine hygiene products fit within the statutory definition of a "mobility enhancing device." Appellants abandoned that argument in their appeal to the BTA, and they do not present any arguments related to that provision here.

their burden to show they are entitled to an exemption. Specifically, "the provisions in R.C. 5739.01(FFF) through (JJJ) relate to an exemption in R.C. 5739.02(B)(18)-(19) for items meeting such definitions that are provided under a prescription." (Feb. 20, 2018 Decision at 2.)

{¶ 9} Appellants appealed this decision.[2] In addition to appealing the BTA's determination that the products are not exempt from taxation under Ohio law, appellants also raise two constitutional arguments. First, they argue that the taxation of feminine hygiene products violates the federal and state Equal Protection Clauses. Second, they argue that Ohio's sales tax law, to the extent it requires taxation of feminine hygiene products, is preempted by federal law.

II. ASSIGNMENTS OF ERROR

{¶ 10} Appellants submit the following assignments of error:

> [1.] Pursuant to the Constitutional issue raised before the Board of Tax Appeals, but not addressed by that body on jurisdictional grounds, the taxation of feminine hygiene products violates the equal protection clauses of the United States and Ohio Constitution because it discriminates against women.
>
> [2.] Pursuant to the Constitutional issue raised before the Board of Tax Appeals, but not addressed by that body on jurisdictional grounds, the Tax Commissioner's failure to exempt feminine hygiene products from Ohio sales tax is preempted by the Federal Food and Drug Administration's identification of these products as medical devices.
>
> [3.] Contrary to the Board of Tax Appeals' conclusion, the Tax Commissioner's failure to exempt feminine hygiene products from Ohio sales tax is unlawful because they are "drugs" as defined by R.C. § 5739.01(FFF), "durable medical equipment" as defined by R.C. § 5739.01(HHH) and/or "prosthetic devices" as defined by R.C. § 5739.01(JJJ).

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[2] Appellants also filed a companion case in the Franklin County Court of Common Pleas, and that case has been stayed pending resolution of this appeal. Franklin C.P. No. 16CV-3518. Pursuant to R.C. 5717.04, however, the appeal of the BTA's final decision on a request for a refund of a retail sales tax, including unadjudicated questions about whether the statute is constitutional, was properly appealed to this court. *See Brown v. Levin*, 10th Dist. No. 11AP-349, 2012-Ohio-5768; *Stines v. Limbach*, 61 Ohio App.3d 461 (10th Dist.1988).

III. STANDARD OF REVIEW

{¶ 11} In reviewing a decision of the BTA, appellate courts must determine whether the decision is "reasonable and lawful." *Accel, Inc. v. Testa*, 152 Ohio St.3d 262, 2017-Ohio-8798, ¶ 11, citing *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, ¶ 14; *Witt Co. v. Hamilton Cty. Bd. of Revision*, 61 Ohio St.3d 155, 157 (1991); *Miracit Dev. Corp. v. Zaino*, 10th Dist. No. 04AP-322, 2005-Ohio-1021, ¶ 7. The court may not "substitute its judgment for that of the BTA on factual issues." *Miracit Dev. Corp.* at ¶ 7, citing *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420, 2004-Ohio-1749, ¶ 18. Rather, the court must affirm the BTA's factual findings " 'if they are supported by reliable and probative evidence,' " and the court " 'afford[s] deference to the BTA's determination of the credibility of witnesses and its weighing of the evidence subject only to an abuse-of-discretion review on appeal.' " *Accel, Inc.* at ¶ 16, quoting *HealthSouth Corp. v. Testa*, 132 Ohio St.3d 55, 2012-Ohio-1871, ¶ 10; *see also Miracit Dev. Corp.* at ¶ 7 ("the BTA's factual determinations must be supported by sufficient probative evidence"), citing *Bethesda Healthcare*; *Hawthorn Mellody, Inc. v. Lindley*, 65 Ohio St.2d 47 (1981), syllabus.

{¶ 12} Nonetheless, an appellate court " 'will not hesitate to reverse a BTA decision that is based on an incorrect legal conclusion.' " *Accel, Inc.* at ¶ 11, quoting *Satullo* at ¶ 14; *see also Gahanna-Jefferson Local School Dist. Bd. of Edn. v. Zaino*, 93 Ohio St.3d 231, 232 (2001). "Thus, legal conclusions are reviewed de novo." *Summer Rays, Inc. v. Testa*, 10th Dist. No. 17AP-32, 2017-Ohio-7901, ¶ 10, citing *Terraza 8, L.L.C. v. Franklin Cty. Bd. of Revision*, 150 Ohio St.3d 527, 2017-Ohio-4415, ¶ 7.

IV. LEGAL ANALYSIS

A. Taxation of feminine hygiene products does not violate the Equal Protection Clauses of the United States and Ohio Constitutions—Assignment of Error 1.

{¶ 13} Appellants first argue that taxing feminine hygiene products violates the Equal Protection Clauses of the Ohio and United States Constitution. The BTA correctly determined that it does not have authority to adjudicate constitutional questions. *See generally Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229 (1988), paragraph three of the syllabus ("The question of whether a tax statute is unconstitutional when applied to a particular state of facts must be raised in the notice of appeal to the Board of Tax Appeals, and the Board of Tax Appeals must receive evidence concerning this question if presented,

even though the Board of Tax Appeals may not declare the statute unconstitutional."); *MCI Telecommunications Corp. v. Limbach*, 68 Ohio St.3d 195 (1994); *S. S. Kresge Co. v. Bowers*, 170 Ohio St. 405 (1960), syllabus ("The Board of Tax Appeals of Ohio is an administrative agency and is without jurisdiction to determine the constitutional validity of a statute."). Under R.C. 5717.04,[3] appellants properly appealed their decision from the BTA to this court. *See also Stines v. Limbach*, 61 Ohio App.3d 461 (10th Dist.1988); *Brown v. Levin*, 10th Dist. No. 11AP-349, 2012-Ohio-5768, ¶ 22.

{¶ 14} The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Similarly, Article I, Section 2 Ohio Constitution states that "[a]ll political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly." "Simply stated, the Equal Protection Clauses require that individuals be treated in a manner similar to others in like circumstances." *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, ¶ 6. "The limitations placed upon governmental action by the federal and state Equal Protection Clauses are essentially the same." *Id.* at ¶ 7.

{¶ 15} In analyzing the constitutionality of a statute, we must first recognize that "[a]ll statutes have a strong presumption of constitutionality." *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶ 25, citing *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 418-19 (1994); *see also State ex rel. Swetland v. Kinney*, 69 Ohio St.2d 567, 574 (1982) ("[C]ourts must afford legislation a very strong presumption in favor of constitutionality."). "It is difficult to prove that a statute is unconstitutional." *Arbino* at ¶ 25. As such, "[b]efore 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*, 164 Ohio St. 142 (1955), paragraph one of the syllabus.

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[3] R.C. 5717.04 provides the procedure by which appeals from the BTA are taken. R.C. 119.12(C) specifically exempts BTA decisions from the purview of typical process for appealing administrative agency decisions.

{¶ 16} "A party seeking constitutional review of a statute may proceed in one of two ways: present a facial challenge to the statute as a whole or challenge the statute as applied to a specific set of facts." *Id.* at ¶ 26, citing *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, ¶ 37. A facial challenge requires that the party challenging the statute demonstrate that there is "no set of circumstances" in which the statute would be valid. *Id.*, citing *Harrold* at ¶ 37; *see also United States v. Salerno*, 481 U.S. 739, 745 (1987). "The fact that a statute might operate unconstitutionally under some plausible set of circumstances is insufficient to render it wholly invalid." *Harrold* at ¶ 37.

{¶ 17} "An as-applied challenge, on the other hand, alleges that application of the statute in a particular factual context is unconstitutional." *Simpkins v. Grace Brethren Church of Del.*, 149 Ohio St.3d 307, 2016-Ohio-8118, ¶ 20, citing *Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d 106, 2004-Ohio-357, ¶ 14. If a statute is declared unconstitutional "as applied," future application of the statute in a similar context is prohibited, "but it does not render the statute wholly inoperative." *Id.*, citing *Yajnik* at ¶ 14. "A party raising an as-applied constitutional challenge must prove by clear and convincing evidence that the statute is unconstitutional when applied to an existing set of facts." *Id.* at ¶ 22, citing *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546.

{¶ 18} Courts apply different levels of scrutiny in determining whether a statute violates the Equal Protection Clause: rational basis, heightened or intermediate scrutiny, or strict scrutiny. *State v. Thompson*, 95 Ohio St.3d 264, 2002-Ohio-2124, ¶ 13; *Clark v. Jeter*, 486 U.S. 456, 461 (1988). The "first step" is determining what standard of review is proper. *Arbino* at ¶ 64.

1. Strict scrutiny does not apply.

{¶ 19} When legislation infringes upon a fundamental constitutional right or the rights of a suspect class, courts review the law under a strict scrutiny test. *Thompson* at ¶ 13; *Arbino* at ¶ 64. "This latter level of scrutiny demands that a discriminatory classification be narrowly tailored to serve a compelling state interest." *Thompson* at ¶ 13, citing *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 813 (2000); *Painesville Bldg. Dept. v. Dworken & Bernstein Co., L.P.A.*, 89 Ohio St.3d 564, 567 (2000). "[A] suspect class is one 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as

to command extraordinary protection from the majoritarian political process.' " *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976), quoting *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). To this end, courts have recognized suspect classes of race and national origin. *Thompson* at ¶ 13; *Grutter v. Bollinger*, 539 U.S. 306 (2003). They have rejected gender and age as suspect classes. *United States v. Virginia*, 518 U.S. 515, 533-34 (1996) (sex is not a proscribed classification like race and national origin); *Murgia* (age classification is not a suspect class or a fundamental right).

{¶ 20} We reject appellants' arguments that a strict scrutiny analysis applies to the Ohio's sales tax statutes and the taxation of feminine hygiene products.

{¶ 21} Appellants' argument that the statutes burden the exercise of their fundamental rights also fails. Whether a right is fundamental stems first from the constitution. *Rodriguez* at 33 ("It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."). The court's job is to assess whether the right at issue is "explicitly or implicitly guaranteed by the Constitution." *Id.* To this end, courts have recognized a fundamental right to vote, to marry, to procreate, parental rights, and of privacy. *See M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (parental rights); *Obergefell v. Hodges*, __ U.S. __, 135 S.Ct. 2584 (2015) (marry); *Sullivan v. Benningfield*, 920 F.3d 401 (6th Cir.2019) (procreate); *Troxel v. Granville*, 530 U.S. 57 (2000) (parental rights). Courts have rejected classifying things such as education, safe housing, and public welfare assistance as fundamental rights. *See Rodriguez* (education); *Lindsey v. Normet*, 405 U.S. 56 (1972) (housing); *Dandridge v. Williams*, 397 U.S. 471 (1970) (public assistance). Likewise, wealth discrimination and the social importance of the discrimination are also not adequate for invoking strict scrutiny. *See Rodriguez* at ¶ 29; *Lindsey*.

{¶ 22} Appellants argue that Ohio's sales tax law infringes upon a "fundamental right or discriminates against a protected class" and is therefore subject to strict scrutiny. (Appellants' Brief at 15.) Appellants did not identify a specific fundamental right in their appellate brief, though. At the oral argument in this matter, appellants identified two fundamental rights that they believe are implicated here: the right to travel and the right to work. Appellants did not provide legal support, either by reference to a constitutional provision or by citation to any legal authority, for the argument that these rights are fundamental, and they did not develop any argument explaining how Ohio's retail sales tax

statutes burden the right to work or travel. Nonetheless, appellants suggest that menstruation affects a woman's ability to work and travel, and a taxation on feminine hygiene products imposes a burden on the exercise of these two fundamental rights.

{¶ 23} Appellants' failure to develop their argument that the Ohio sales tax statutes violate one or more of their fundamental rights would generally result in the waiver of such arguments. *See Gen. Start Natl. Ins. Co. v. Administratia Asigurarilor De Stat*, 289 F.3d 434, 441 (6th Cir.2002); *Lycourt-Donovan v. Columbia Gas of Ohio*, 152 Ohio St.3d 73, 2017-Ohio-7566; *United States v. Hook*, 471 F.3d 766, 775 (7th Cir.2006) ("perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived"); *see generally Roby v. Commr. of Social Sec.*, 48 Fed.Appx. 532, 536 (6th Cir.2002) (considering equal protection claim and noting that the failure to develop an argument generally results in its waiver). As the Sixth Circuit has recognized:

> "Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to put flesh on its bones."

United States v. Stewart, 628 F.3d 246, 256 (6th Cir.2010), quoting *McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir.1997). Nonetheless, in the interest of fully analyzing the standard to apply to appellants' constitutional challenge, we address appellants' fundamental right argument.

{¶ 24} Numerous courts have found that "[t]he right to 'make a living' is not a 'fundamental right,' for either equal protection or substantive due process purposes." *Medeiros v. Vincent*, 431 F.3d 25, 32 (1st Cir.2005), *abrogated in part on other grounds by Bond v. United States*, 564 U.S. 211 (2011); *see also Murgia* (citation omitted.) ("we have expressly stated that a standard less than strict scrutiny 'has consistently been applied to state legislation restricting the availability of employment opportunities.' "); *Doe v. Nebraska*, 734 F.Supp.2d 882, 926 (N.D.Neb.2010); *New York State Trawlers Assn. v. Jorling*, 16 F.3d 1303, 1309-12 (2d Cir.1994); *Hull v. Rose, Schmidt, Hasley & Disalle, P.C.*, 700 A.2d 996 (Pa.1997). Appellants have not provided support for their statement that the right to work is a fundamental right, and the court declines to find one on its own. Appellants' argument for a strict scrutiny analysis on this basis, therefore, fails.

{¶ 25} The right to *interstate* travel has been recognized as a fundamental right.[4] *See Shapiro v. Thompson*, 394 U.S. 618, 631 (1969), *abrogated on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974); *Jones v. Helms*, 452 U.S. 412, 417-18 (1981); *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 535 (6th Cir.2007). Although the United States Supreme Court has not recognized a fundamental right to *intrastate* travel, Ohio has. *See State v. Burnett*, 93 Ohio St.3d 419, 427-28 (2001). But even when the right to travel is implicated, the application of a strict scrutiny analysis is not automatic.

{¶ 26} "[N]ot every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." *Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992). A fundamental right will only be implicated by government action that, at a minimum, "significantly interferes with the exercise of a fundamental right." *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978); *see also Beydoun v. Sessions*, 871 F.3d 459, 467 (6th Cir.2017), citing *Zablocki*. "The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive" is not enough to invalidate the legislation. *Planned Parenthood* at 874 (addressing abortion restrictions under the due process clause). If the regulation "merely has an incidental effect" on the exercise of a fundamental right, strict scrutiny does not apply. *Schlittler v. State*, 488 S.W.3d 306, 317 (Tex.App.2016) (strict scrutiny not triggered on the basis of disparate treatment where the statute only "incidentally" burdened the parent-child relationship for some incarcerated sex offenders); *see also Johnson v. Rodriguez*, 110 F.3d 299, 316 (5th Cir.1997) ("Thus, any burden which customary consideration in the parole process of litigation activity generally may impose upon a 'fundamental right' is 'incidental' and does not warrant strict scrutiny under an equal protection analysis."), citing *Planned Parenthood*, and *Younger v. Harris*, 401 U.S. 37, 49-52 (1971). In these situations, equal protection requires only a "conceivable rational relationship." *Johnson* at 306, citing *Stern* at 1054. It is only when there exists a real and appreciable impact on, or a significant interference with the exercise of the fundamental right that the strict scrutiny doctrine will be applied. *Murgia* at 388.

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[4] Contrast this with the right to international travel, the restriction of which is subject to rational basis analysis instead of a strict scrutiny analysis. *See Haig v. Agee*, 453 U.S. 280 (1981); *Eunique v. Powell*, 302 F.3d 971 (9th Cir.2002).

{¶ 27} Applying this concept to the right to travel, courts have explained that a state law "implicates the right to travel when it actually deters travel, when impeding travel is its primary objective, or when it uses a classification that serves to penalize the exercise of the right." *Bredesen* at 535, citing *Atty. Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986). "Burdens that are incidental or negligible are 'insufficient to implicate [the] denial of the right to travel.' " *Beydown* at 468, quoting *Bredesen* at 535; *see also Pollack v. Duff*, 793 F.3d 34, 45 (D.C. Cir.2015) (if the law's effect on the right to travel is negligible, strict scrutiny does not apply); *Matsuo v. United States*, 586 F.3d 1180, 1183 (9th Cir.2009); *Tobe v. Santa Ana*, 9 Cal.4th 1069, 1100-01 (1995) (there must be a "direct restriction of the right to travel").

{¶ 28} Appellants have not made any arguments explaining how Ohio's sales tax statutes "significantly interfere" with their right to travel. The statutes impose a tax on the purchase of all retail sales, including feminine hygiene products, without regard to travel implications. There is nothing in the record to suggest that the imposition of the tax "actually deters travel," has as its "primary objective" the goal to impede travel, or uses any classification to serve to penalize exercising the right to travel. Without any support for the proposition that the tax burdens travel in any way that is not negligible, we decline to apply strict scrutiny on this basis.

{¶ 29} Because gender classifications are not subject to strict scrutiny, there is no fundamental right to work, and there is no evidence that a tax on feminine hygiene products significantly burdens the right to travel, there is no basis upon which to apply a strict scrutiny analysis to the Ohio sales tax statutes.

2. Heightened scrutiny does not apply.

{¶ 30} When a discriminatory classification based on sex is at issue, courts generally employ "heightened or intermediate scrutiny and require that the classification be substantially related to an important governmental objective." *Thompson* at ¶ 13, citing *Clark* at 461; *see also Virginia* at 515. The party seeking to uphold the legislation must then establish an "exceedingly persuasive justification" for the classification. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), syllabus. "To succeed, the defender of the challenged action must show 'at least that the classification serves important governmental

objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.' " *Virginia* at 524, quoting *Hogan* at 724.

{¶ 31} But where the sex-based classification is not overt, as is the case with facially neutral laws, we apply a somewhat different analysis. *See Keevan v. Smith*, 100 F.3d 644, 650 (8th Cir.1996) ("A facially neutral policy * * * is not subject to the same exacting standard as it does not categorize on the basis of a quasi-suspect class."). "Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law." *Personnel Admr. of Massachusetts v. Feeney*, 442 U.S. 256, 271-72 (1979). The Fourteenth Amendment guarantees "equal laws, not equal results." *Id.* at 273. But "[c]lassifications based upon gender * * * have traditionally been the touchstone for pervasive and often subtle discrimination." *Id.*, citing *Caban v. Mohammed*, 441 U.S. 380, 398 (1979) (Stewart, J., dissenting). As such, "when a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may still be at work." *Id.*, citing *Washington v. Davis*, 426 U.S. 229 (1976), and *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977). Nonetheless, if "a neutral policy * * * has a disproportionately adverse effect upon women, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose." *Keevan* at 650, citing *Feeney* at 272 (No discriminatory intent where officials countered the allegations of gender-motivated discrimination with a plausible explanation for the alleged disparate impact.). In this context, the Supreme Court applies the following standard:

> When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionably adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. *See Arlington Heights v. Metropolitan Housing Dev. Corp., supra*. In this second inquiry, impact provides an "important starting point," 429 U.S., at 266, but purposeful discrimination is "the condition that offends the Constitution." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 [1971].

Id. at 274. It is appellants' burden to establish that the alleged disparate impact is the result of a discriminatory purpose. *Keevan* at 651. " 'Discriminatory purpose' * * * implies more

than intent as volition or intent as awareness of consequences. It implies that the decisionmaker * * * selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.' " *Keevan* at 651, quoting *Feeney* at 279. (Citation and fn. omitted.)

{¶ 32} In considering the law that gave preference to the hiring of veterans, which had a disparate effect on women, the *Feeney* Court considered whether the disparate impact could be "plausibly explained on a neutral ground." *Feeney* at 275. If it could not, the disparate "impact itself would signal that the real classification" was discriminatory. *Keevan* at 650. Because the law adversely affected both men and women, it did not permit an inference that the statute's stated purpose to elevate veterans was "pretext" for gender discrimination. *Id*. According to the court, "[t]he dispositive question, then, [was] whether the appellee [showed] that a gender-based discriminatory purpose ha[d], at least in some measure, shaped the Massachusetts veterans' preference legislation." *Feeney* at 276. The court rejected the appellee's arguments that the nature of the preference was inherently gender-based and that the discriminatory impact of the statute was "too inevitable to have been unintended." *Id*. There was simply no evidence to suggest that gender was "a factor that ha[d] influenced the legislative choice." *Id*. at 277. "[N]othing in the record demonstrate[d] that this preference for veterans was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place." *Id*. at 279. In the end, the appellee "simply failed to demonstrate that the law in any way reflects a purpose to discriminate on the basis of sex." *Id*. at 281.

{¶ 33} Applying this analysis here, Ohio's sales tax statutes survive the disparate impact analysis. First, the statutes are gender-neutral. Appellants have not pointed to any evidence, and the court can find none in the record, that the statutes make any overt or covert sex-based classifications. R.C. Chapter 5739 imposes a sales tax on all retail sales subject to some exceptions. Nothing in the relevant statutes explicitly requires or excludes from taxation feminine hygiene products separate from other retail products. Without regard to whether they are used predominantly by women, feminine hygiene products are taxed because they fit within the statute that broadly provides for imposition of a sales tax on all retail sales and they do not fit within any of the gender-neutral statutory exemptions.

{¶ 34} The next part of the inquiry is whether there is "purposeful discrimination." This part of the analysis presumes that there is evidence of a disparate impact. *See, e.g*.,

Feeney (analysis of the statistics involving male and female veterans and such statistics as compared to the non-veteran population); *Keevan* (comparing statistics regarding gender disparities in the number of incarcerated individuals, average sentence lengths, the types of security classifications required depending on the status of the offenders incarcerated, and the differences in the size and location of the institutions). Here, despite the scant evidence put forth by appellants, we acknowledge that "discrimination does not become less so because the discrimination accomplished is of a lesser magnitude." *Feeney* at 277. Even assuming appellants have shown a disparate impact on women based upon taxation of feminine hygiene products, they have not shown—or made any argument—that any discrimination is purposeful. R.C. 5739.02 broadly taxes retail sales purchases for the purpose of raising revenue. The plausible explanation for the disparate impact is that some women have to buy and use feminine hygiene products, a retail product, and men presumably do not. There is no evidence that gender was a factor in the legislature's failure to expressly exclude feminine hygiene products from taxation. Appellants "simply failed to demonstrate that the law in any way reflects a purpose to discriminate on the basis of sex." *Id*. at 281.

3. Ohio's sales tax scheme withstands a rational basis analysis.

{¶ 35} Finally, "all statutes are subject to at least rational-basis review." *Thompson* at ¶ 13. In the absence of a fundamental right or a suspect class, and where intermediate scrutiny is not appropriate, rational basis review "requires that a statutory classification be rationally related to a legitimate government purpose." *Id*., citing *Clark* at 461; *Williams* at 530; *see also Arbino* at ¶ 64-66; *Lawrence v. Texas*, 539 U.S. 558, 579 (2003). "Under such a review, a statute will not be invalidated if it is grounded on a reasonable justification, even if its classifications are not precise." *Arbino* at ¶ 66, citing *McCrone* at ¶ 8; *see also Groch* at ¶ 82 ("[A] challenged statute will be upheld if the classifications it creates bear a rational relationship to a legitimate government interest or are grounded on a reasonable justification, even if the classifications are not precise.").

{¶ 36} The Supreme Court of Ohio has laid out the "two-step analysis" required for the rational basis test:

> We must first identify a valid state interest. Second, we must determine whether the method or means by which the state has chosen to advance that interest is rational. *See Buchman v.*

> *Wayne Trace Local School Dist. Bd. of Edn.* (1995), 73 Ohio St.3d 260, 267, 1995-Ohio-136, 652 N.E.2d 952. A statute will not be held to violate the Equal Protection Clause, and this court will not invalidate a plan of classification adopted by the General Assembly, unless it is clearly arbitrary and unreasonable. *State ex rel. Lourin v. Indus. Comm.* (1941), 138 Ohio St. 618, 620, 21 Ohio Op. 490, 37 N.E.2d 595, overruled on other grounds, *Caruso v. Alum. Co. of Am.* (1984), 15 Ohio St.3d 306, 15 OBR 436, 473 N.E.2d 818.

McCrone at ¶ 9.

{¶ 37} This deferential standard is " 'especially deferential' " for " 'classifications arising out of complex taxation law.' " *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, ¶ 92, quoting *Park Corp. v. Brook Park*, 102 Ohio St.3d 166, 2004-Ohio-2237, ¶ 23. "States have great leeway in making classifications and drawing lines that in their judgment produce reasonable systems of taxation." *Id.*, citing *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992). As such, "[l]aws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster." *Lawrence* at 579. "[T]he assessment of taxes is fundamentally a legislative responsibility and a taxpayer challenging the constitutionality of a taxation statute bears the burden to negate every conceivable basis that might support the legislation." *Columbia Gas Transm. Corp.* at ¶ 91, citing *Lyons v. Limbach*, 40 Ohio St.3d 92, 94 (1988).

{¶ 38} Applying the first step of the rational basis analysis, we identify whether a valid state interest exists. Fundamentally, states have a valid state interest in raising revenue through taxation. *See Nordlinger* at 11. Specifically, the statute at issue here lays out the legislature's intent in imposing a sales tax:

> For the purpose of providing revenue with which to meet the needs of the state, for the use of the general revenue fund of the state, for the purpose of securing a thorough and efficient system of common schools throughout the state, for the purpose of affording revenues, in addition to those from general property taxes, permitted under constitutional limitations, and from other sources, for the support of local governmental functions, and for the purpose of reimbursing the state for the expense of administering this chapter, an excise tax is hereby levied on each retail sale made in this state.

R.C. 5739.02.

{¶ 39} Second, "we must determine whether the method or means by which the state has chosen to advance that interest is rational." *McCrone* at ¶ 9. Imposing a tax on all retail sales in order to raise revenue for the state is rational. Appellants have not argued that the legislature's choice to impose a broad sales tax or its choice to exempt from the tax certain drugs, medical devices, and prosthetic devices only when they are made or dispensed pursuant to a prescription is in any way arbitrary or unreasonable. The court finds nothing arbitrary or unreasonable in the state's sales tax scheme. Appellants' first assignment of error, challenging the validity of Ohio's sales tax statutes on equal protection grounds, is overruled.

B. Ohio's sales tax scheme is not preempted by the Food and Drug Administration's identification of these products as medical devices—Assignment of Error 2.

{¶ 40} Having found that the statutes at issue do not violate the Equal Protection Clauses, we turn to appellants' next assignment of error and determine whether the statutes have been preempted by federal law.

{¶ 41} Appellants argue that the Medical Device Amendments to the Food, Drug, and Cosmetic Act ("MDA"), specifically, 21 U.S.C. 360k(a), and labeling regulations[5] promulgated by the Food and Drug Administration ("FDA") preempt Ohio's sales tax laws because the FDA classifies tampons and pads as "medical devices." (Appellants' Brief at 11.) Appellants cite to the following federal regulations to support their preemption arguments: 21 C.F.R. 884.5425; 884.5435; 884.5460; 884.5470; and 801.430(f)(1).

{¶ 42} The Supremacy Clause is the source of congressional power to preempt state law. *Columbia Gas Transm. Corp.* at ¶ 80. The Supremacy Clause of the United States Constitution, Art. VI, Section 2, provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The ultimate question is one of congressional intent; did Congress intend to preempt state law? *Columbia Gas Transm. Corp* at ¶ 80, citing *Michigan Consol. Gas Co. v. Panhandle E. Pipe Line Co.*, 887 F.2d 1295 (6th Cir.1989); *California Fed. S. & L. Assn. v. Guerra*, 479 U.S. 272, 281 (1987). "Consideration under the Supremacy

[5] "Federal regulations have no less pre-emptive effect than federal statutes." *Fid. Fed. S. & L. Assn. v. de la Cuesta*, 458 U.S. 141, 153 (1982).

Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981), citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The intent to preempt must be clear and manifest. *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992), citing *Rice* at 230.

{¶ 43} The United States Supreme Court outlined the way in which federal law can preempt state law in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001):

> State action may be foreclosed by express language in a congressional enactment [] by implication from the depth and breadth of a congressional scheme that occupies the legislative field, [] or by implication because of a conflict with a congressional enactment * * *.

{¶ 44} When a federal statute contains express preemption language, the court must look to the statutory language to ascertain the scope of the preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-85 (1996), citing *Cipollone*. "[A]ny understanding of the scope of a pre-emption statute must rest primarily on a 'fair understanding of *congressional purpose*.' " (Emphasis in original.) *Id.* at 485, quoting *Cipollone* at 530, fn. 27.

{¶ 45} "In the absence of express statutory language, Congress may implicitly intend to occupy a given field to the exclusion of state law." *Columbia Gas Transm. Corp.* at ¶ 80. "Such intent may be properly inferred if (1) the pervasiveness of the federal regulation precludes supplementation by the states, (2) the federal interest in the field is sufficiently dominant, or (3) the object of the federal law and the obligations imposed by it reveal the same purpose." *Id.* Federal law also preempts state law if the two conflict such that it is impossible to comply with both laws or "the state law is an obstacle to fulfilling the purposes and objectives of Congress." *Id.* But express preemption language in a statute forecloses any claim of implied preemption. As the Supreme Court recognized, "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Cipollone* at 517. Specifically, "the express preemption provision in the MDA, 21 U.S.C. § 360k, forecloses inquiry into implied preemption, because the fact that Congress included it in the MDA implies that matters beyond its reach are not preempted." *King v. Collagen Corp.*, 983 F.2d 1130, 1134 (1st Cir.1993); *see also Kemp v. Medtronic, Inc.*, 231 F.3d 216, 222 (6th Cir.2000). Therefore, the court "need only identify the domain expressly pre-empted" by 21 U.S.C. 360k. *Cipollone* at 517.

{¶ 46} 21 U.S.C. 360k(a) provides the following express preemption language:

> (a) General rule. Except as provided in subsection (b), no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—
>
> (1) which is different from, or in addition to, any requirement applicable under this Act [21 USCS 301 et seq.] to the device, and
>
> (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this Act [21 USCS 301 et seq.].[6]

{¶ 47} The FDA, pursuant to authority granted to it in the MDA, promulgated regulations related to 21 U.S.C. 360k. One of these regulations, 21 C.F.R. 808.1(b), contains preemption language. It provides:

> [21 U.S.C. 360k(a)] contains special provisions governing the regulation of devices by States and localities. That section prescribes a general rule that * * * no State or political subdivision of a State may establish or continue in effect any requirement with respect to a medical device intended for human use having the force and effect of law (whether established by statute, ordinance, regulation, or court decision), which is different from, or in addition to, any requirement applicable to such device under any provision of the act and which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under the act.

And under 21 C.F.R. 808.1(d):

> * * * The following are examples of State or local requirements that are not regarded as preempted by [360k(a)]:
>
> (1) Section 521(a) does not preempt State or local requirements of general applicability where the purpose of the requirement relates * * * to other products in addition to devices * * *.
>
> * * *
>
> (8) [360k(a)] does not preempt a State or local requirement whose sole purpose is raising revenue * * *.

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[6] Inexplicably, appellants did not include this second requirement from the statute in their brief, quoting only 360k(a)(1) as the relevant language to apply and representing that the subsection was punctuated with a period instead of ", and".

{¶ 48} Taken together, the statute and regulations make it clear that FDA statutory preemption is narrow. As the Supreme Court has outlined the limited scope of preemption:

> State requirements must be "with respect to" medical devices and "different from, or in addition to," federal requirements. State requirements must also relate "to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device," and the regulations provide that state requirements of "general applicability" are not pre-empted except where they have "the effect of establishing a substantive requirement for a specific device." Moreover, federal requirements must be "applicable to the device" in question, and, according to the regulations, pre-empt state law only if they are "specific counter-part regulations" or "specific" to a "particular device." The statute and regulations, therefore, require a careful comparison between the allegedly pre-empting federal requirement and the allegedly pre-empted state requirement to determine whether they fall within the intended pre-emptive scope of the statute and regulations.

Medtronic at 500 (state common law claims for negligent manufacturing and failure to warn were not preempted by the FDA's "labeling and manufacturing" requirements).

{¶ 49} In *Moore v. Kimberly-Clark Corp.*, 867 F.2d 243, 244 (5th Cir.1989), the court considered the reach of the express preemption language in 21 U.S.C. 360k(a) as it relates to regulation of tampons and recognized that the "FDA did not intend to preempt all state laws and regulations pertaining to tampons." The court analyzed whether "the governing statutes and regulations" showed "a clear intent on the part of Congress or the FDA to preempt the entire field of tort liability with the [Toxic Shock Syndrome] labeling requirements." *Id.* at 246. In finding that 21 U.S.C. 360k did not preempt the plaintiff's state tort liability claims, the court stated:

> The only federal requirements regarding tampons are those which prescribe certain labeling and warning statements. There are no federal regulations on tampon design, composition, or construction. Therefore, we find that the tampon labeling requirements promulgated pursuant to the statutory scheme regulating medical devices do not preempt plaintiff's state law claims based on the design, composition, and construction of tampons.

Moore at 246; *see also Bejarano v. Internatl. Playtex, Inc.*, 750 F.Supp. 443, 446 (D.Idaho 1989) ("The only state law claims that are pre-empted by § 360k(a) are those dealing with inadequate warnings or labeling.").

{¶ 50} Under this standard, it is clear that Ohio's sales tax laws cannot be preempted by the MDA and related regulations because implementation of a sales tax under R.C. Chapter 5739 does not "relate[] to the safety or effectiveness" of any product or "to any other matter included in a requirement applicable to [a] device under [the MDA]." 12 U.S.C. 360k(a)(2). Rather, Ohio's sales tax law is intended to "provid[e] revenue with which to meet the needs of the state." R.C. 5739.02. Raising revenue has nothing to do with the safety and effectiveness of feminine hygiene products, medical devices, or any other product. And 21 U.S.C. 360k(a) expressly "does not preempt a State or local requirement whose sole purpose is raising revenue." 21 C.F.R. 808.1(d).

{¶ 51} Although appellants cite to specific regulations to support their arguments, those regulations do not contain express preemption language. The express preemption language in 21 U.S.C. 360k(a) forecloses consideration of whether there is implied preemption. Even if the court could consider whether those regulations impliedly preempt Ohio's sales tax statutes, the regulations clearly do not.

{¶ 52} 21 C.F.R. 801.430, a regulation titled "user labeling for menstrual tampons" provides specific warning label requirements for tampons and absorbency standards and testing for the tampon manufacturing process. It is silent regarding taxation of tampons. 21 C.F.R. 884 et seq. "sets forth the classification of obstetrical and gynecological devices." 21 C.F.R. 884.01. 21 C.F.R. 884.5460 provides an identification and classification for "scented or scented deodorized menstrual tampon[s]." Likewise, 21 C.F.R. 884.5470 provides an identification and classification for "unscented menstrual tampon[s]"; 21 C.F.R. 884.5425 provides an identification and classification for "scented or scented deodorized menstrual pad[s]"; 21 C.F.R. 884.5435 provides an identification and classification for "unscented menstrual pad[s]"; and 21 C.F.R. 884.5400 provides an identification and classification for "menstrual cup[s]." All of the regulations for these products are contained within the "therapeutic devices" section of the regulations. None of the regulations contain any language implicating any intent to regulate taxation of the products they target for regulation. The classification systems assigned to each of these products also does not, by its language, implicate the permissibility of taxing feminine

hygiene products. Rather, the classification system governs the extent to which the products are regulated by the FDA. *See* 21 C.F.R. 860.3. For example, a Class I product, like an unscented menstrual pad, is:

> [S]ubject to only the general controls authorized by or under sections 501 (adulteration), 502 (misbranding), 510 (registration), 516 (banned devices), 518 (notification and other remedies), 519 (records and reports), and 520 (general provisions) of the act. A device is in class I if (i) general controls are sufficient to provide reasonable assurance of the safety and effectiveness of the device, or (ii) there is insufficient information from which to determine that general controls are sufficient to provide reasonable assurance of the safety and effectiveness of the device or to establish special controls to provide such assurance, but the device is not life-supporting or life-sustaining or for a use which is of substanial [sic] importance in preventing impairment of human health, and which does not present a potential unreasonable risk of illness of injury.

21 C.F.R. 860.3(c)(1).

{¶ 53} A Class II product, like a menstrual cup, is subject to additional regulation:

> A device is in class II if general controls alone are insufficient to provide reasonable assurance of its safety and effectiveness and there is sufficient information to establish special controls, including the promulgation of performance standards, postmarket surveillance, patient registries, development and dissemination of guidance documents (including guidance on the submission of clinical data in premarket notification submissions in accordance with section 510(k) of the act), recommendations, and other appropriate actions as the Commissioner deems necessary to provide such assurance. For a device that is purported or represented to be for use in supporting or sustaining human life, the Commissioner shall examine and identify the special controls, if any, that are necessary to provide adequate assurance of safety and effectiveness and describe how such controls provide such assurance.

21 C.F.R. 860.3(c)(2).

{¶ 54} Neither the FDA regulations nor the MDA reflects any intention to supersede Ohio's sales tax laws. The regulations target the safety of products, providing adequate warnings, and product labeling. This is completely unrelated to state taxation of retail

products. Appellants' argument for express preemption fails because there is no federal statute or regulation that establishes requirements applicable to the taxation of feminine hygiene products.

{¶ 55} Appellants argue that the fact the FDA seems to classify some feminine hygiene products as medical devices alone preempts Ohio from taxing them. Just as the argument that a definitional section of a statute or regulation can somehow confer tax exemption confounds reason, the court will also not find that a definition-type regulation that relates to product labeling will somehow have preemptive effect on state sales tax laws. As the Supreme Court recognizes,

> To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.

Hillsborough Cty. v. Automated Med. Laboratories, Inc., 471 U.S. 707, 717 (1985).

{¶ 56} Appellants have plainly not shown that Ohio's retail sales tax statute contains provisions that are different from a requirement that the FDA regulations apply to a feminine hygiene product, 21 U.S.C. 360k(a)(1), let alone the additional requirement of showing that Ohio's retail sales tax statute "relates to the *safety or effectiveness* of [feminine hygiene products] or to any other matter included in a requirement applicable to the device under [21 USCS 301 et seq.]." (Emphasis added.) 21 U.S.C. 360k(a)(2).

{¶ 57} Even if appellants were successful in arguing that feminine hygiene products must be classified as "medical devices" based upon federal preemption, appellants' ultimate request for a tax exemption would still fail. "Medical devices" is not a term used in the Ohio sales tax statute. Furthermore, as we have already concluded, R.C. 5739.02(B)(18) and (19) would not preclude taxation of the items because they are not made or dispensed pursuant to a prescription. Appellants' second assignment of error is overruled.

C. The Commissioner's failure to exempt feminine hygiene products from Ohio sales tax is not unlawful because those items do not meet any exception to taxation—Assignment of Error 3.

{¶ 58} Turning to appellants' final assignment of error, we consider whether the Commissioner acted improperly in failing to exempt the feminine hygiene products appellants purchased from Ohio sales tax under R.C. Chapter 5739.

{¶ 59} R.C. 5739.02 provides for the collection of a sales tax "on each retail sale made in this state." The purpose of this tax is included in the statute:

> For the purpose of providing revenue with which to meet the needs of the state, for the use of the general revenue fund of the state, for the purpose of securing a thorough and efficient system of common schools throughout the state, for the purpose of affording revenues, in addition to those from general property taxes, permitted under constitutional limitations, and from other sources, for the support of local governmental functions, and for the purpose of reimbursing the state for the expense of administering this chapter, an excise tax is hereby levied on each retail sale made in this state.

R.C. 5739.02.

{¶ 60} Under the express language of the statute, "it is presumed that all sales made in this state are subject to the tax until the contrary is established." R.C. 5739.02(C). As such, "[i]n order for a sale to be exempted or excepted from taxation there must be an applicable statutory exemption or exception." *Shugarman Surgical Supply v. Zaino*, 97 Ohio St.3d 183, 2002-Ohio-5809, ¶ 9.

{¶ 61} Statutory exceptions are contained in R.C. 5739.02(B), which provides that the "tax does not apply to the following:"

> (10) Sales not within the taxing power of this state under the Constitution or laws of the United States or the Constitution of this state;
>
> * * *
>
> (18) Sales of drugs for a human being that may be dispensed only pursuant to a prescription;
>
> (19) Sales of prosthetic devices, durable medical equipment for home use, or mobility enhancing equipment, when made pursuant to a prescription and when such devices or equipment are for use by a human being.

{¶ 62} "Exemptions or exceptions from taxation are to be strictly construed." *Am. Cyanamid Co. v. Tracy*, 74 Ohio St.3d 468, 470 (1996), citing *Natl. Tube Co. v. Glander*, 157 Ohio St. 407 (1952); *see also Summer Rays, Inc.* at ¶ 11, citing *Seven Hills Schools v. Kinney*, 28 Ohio St.3d 186 (1986) ("Because exemption is the exception to the general rule, statutes granting exemptions must be strictly construed."). "It is the taxpayer's burden to

prove entitlement to an exemption." *Id.*, citing *250 Shoup Mill, L.L.C. v. Testa*, 147 Ohio St.3d 98, 2016-Ohio-5012, ¶ 24.

{¶ 63} R.C. 5739.01 provides definitions for terms used in the sales tax statutes. R.C. 5739.01(FFF) defines "drug" as:

> [A] compound, substance, or preparation, and any component of a compound, substance, or preparation, other than food, dietary supplements, or alcoholic beverages that is recognized in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States, or official national formulary, and supplements to them; is intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease; or is intended to affect the structure or any function of the body.

{¶ 64} R.C. 5739.01(HHH) defines "durable medical equipment" as:

> [E]quipment, including repair and replacement parts for such equipment, that can withstand repeated use, is primarily and customarily used to serve a medical purpose, generally is not useful to a person in the absence of illness or injury, and is not worn in or on the body. "Durable medical equipment" does not include mobility enhancing equipment.

{¶ 65} R.C. 5739.01(JJJ) defines "prosthetic device" as:

> [A] replacement, corrective, or supportive device, including repair and replacement parts for the device, worn on or in the human body to artificially replace a missing portion of the body, prevent or correct physical deformity or malfunction, or support a weak or deformed portion of the body.

{¶ 66} Regardless of whether feminine hygiene products fit within the definition of a "drug," "durable medical equipment," or a "prosthetic device," those definitional terms do not, themselves, create an exemption to the collection of sales tax.[7] The exemption encompassing those terms is contained in R.C. 5739.02(B)(18) and (19). Therefore, a party seeking to show that a drug, durable medical equipment, or prosthetic device is exempt from taxation must show that the product at its sale satisfies the requirements in R.C.

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[7] " '[F]inding an enforceable right solely within a purely definitional section is antithetical to requiring unambiguous congressional intent.' " *T.F. v. Hennepin Cty.*, D.Minn. No. 17-1826 (Feb. 16, 2018), quoting *Midwest Foster Care & Adoption Assn. v. Kincade*, 712 F.3d 1190, 1197 (8th Cir.2013); *see also, generally*, *31 Foster Children v. Bush*, 329 F.3d 1255, 1271 (11th Cir.2003) (definitional statutes "cannot and do not supply a basis for conferring rights enforceable under § 1983."); *B.H. v. Johnson*, 715 F.Supp. 1387, 1401 (N.D.Ill.1989) ("It would be strange for Congress to create enforceable rights in the definitional section of a statute.").

5739.02(B)(18) and (19), not just that a product meets a definition in R.C. 5739.01. Under those provisions, drugs, durable medical equipment, and prosthetic devices are exempt from taxation only where such items are made or dispensed "pursuant to a prescription." R.C. 5739.02(B)(18) and (19).

{¶ 67} Accordingly, in order to qualify for a sales tax exemption under R.C. 5739.02(B)(18), or a refund if such tax was collected, a consumer must show three things: (1) she purchased a retail product that meets the definition of a "drug" in R.C. 5739.01(FFF); (2) the drug is for a human being; *and* (3) the drug "may be dispensed only pursuant to a prescription."[8] Failure to meet any one of these requirements precludes application of the exemption such that the general mandate under R.C. 5739.02(A) applies and the product is subject to a sales tax.

{¶ 68} Likewise, there are three preconditions for qualifying for an exemption under R.C. 5739.02(B)(19). First, the consumer must have purchased one of the qualifying products: (1) a prosthetic device, defined in R.C. 5739.01(JJJ); (2) durable medical equipment, defined in R.C. 5739.01(HHH), which has an additional condition that it must be purchased for "home use"; or (3) mobility enhancing equipment, defined in R.C. 5739.01(III). Second, the product at issue must have been "made pursuant to a prescription." And finally, the qualifying product mush be "for use by a human being." Failure to satisfy any of these conditions precludes application of the exemption.

{¶ 69} Appellants have not presented any arguments related to the application of subsections R.C. 5739.02(B)(18) and (19). They have not suggested that another statutory provision provides an exemption for drugs, durable medical equipment, and prosthetic devices in the absence of a prescription. And this court cannot find one. Appellants also have not presented any evidence that the feminine hygiene products they purchased, for which they seek a refund of sales tax, were dispensed pursuant to a prescription. In contrast, all evidence before the BTA shows that the products were purchased without a

[8] R.C. 5739.02(B)(18) also carves out a specific and narrow exception for: "insulin as recognized in the official United States pharmacopoeia; urine and blood testing materials when used by diabetics or persons with hypoglycemia to test for glucose or acetone; hypodermic syringes and needles when used by diabetics for insulin injections; epoetin alfa when purchased for use in the treatment of persons with medical disease; hospital beds when purchased by hospitals, nursing homes, or other medical facilities; and medical oxygen and medical oxygen-dispensing equipment when purchased by hospitals, nursing homes, or other medical facilities." That portion of the provision is not implicated in this appeal.

prescription.[9] In fact, there is no evidence before the court that *any* feminine hygiene products are dispensed pursuant to a prescription or that sales tax is collected for any prescription feminine hygiene products that may exist. Appellants have not presented any evidence or arguments that Ohio's sales tax statutes are being implemented inconsistently or in a discriminatory way, i.e. that other items constituting drugs, durable medical equipment, or prosthetic devices are dispensed without a prescription but are not taxed. As such, the court need not undertake an analysis that a feminine hygiene product meets the definition of a drug, durable medical equipment, or prosthetic device under R.C. 5739.02. Even if a feminine hygiene product could be so classified, appellants' arguments under this statute would still fail pursuant to R.C. 5739.02(B)(18) and (19). The General Assembly has spoken clearly in R.C. 5739.02(B)(18) and (19), and there is no room for interpretation. *See Am. Cyanamid Co.* at 470.

D. Streamlined Sales and Use Tax Agreement

{¶ 70} Appellants argue extensively that a list published by the Commissioner outlining a streamlined classification of products provides a right to their requested relief. To understand why appellants' argument fails, it is necessary to review the history of the list, the Streamlined Sales and Use Tax Agreement ("SSUTA"), and the relevant Ohio statutes relating to the SSUTA.

{¶ 71} In 2002, Ohio enacted R.C. Chapter 5740, the Simplified Sales and Use Tax Administration Act, whereby Ohio agreed to participate in a joint effort with other states to develop a "streamlined sales and use tax system to reduce the burden and cost for all sellers to collect the state's sales and use taxes." R.C. 5740.02(A)(1). The result of the multi-state effort was the SSUTA. "The [SSUTA] agreement provides a mechanism among the member states to establish and maintain a cooperative, simplified system for the application and administration of sales and use taxes under the duly adopted laws of each member state." R.C. 5740.04(B). As explained by the U.S. Supreme Court:

> This system standardizes taxes to reduce administrative and compliance costs: It requires a single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules. It also

[9] For example, in Rowitz's responses to appellee's discovery requests, she answered "No" when asked whether she "purchased a feminine hygiene product pursuant to a prescription during the subject time period." (Answers attached as Ex. B to Appellee's Mot. to Compel.)

> provides sellers access to sales tax administration software paid for by the State. Sellers who choose to use such software are immune from audit liability.

South Dakota v. Wayfair, Inc., ___ U.S. ___, 138 S.Ct. 2080, 2100 (2018). It is uncontroverted that Ohio is a member state of that agreement.

{¶ 72} The list appellants attach to their brief here and which they also submitted in their brief to the BTA, defines and classifies certain products that might be used in health care. (*See* Appellants' Consolidated Brief, Healthcare Item List, Ex. 1 in BTA case No. 2017-250). For example, "Birth control (pills and implants)" is classified as a "drug." (Healthcare Item List at 2.) "Breast Implants" are classified as a "prosthetic device." (Healthcare Item List at 3.) The list also contains categories for durable medical equipment, mobility enhancing equipment, clothing, grooming and hygiene products, over the counter drugs, food, and items that are not defined by a classification.[10]

{¶ 73} But the inclusion of an item on the list and its classification on the list does not automatically mean that it is exempt from sales tax. Appendix C of the SSUTA addresses product definitions.[11] It expressly allows states to limit the tax exemption for drugs, durable medical equipment, and prosthetic devices to only those instances in which the product is made or dispensed pursuant to a prescription. In its section defining "drug," the SSUTA provides that "[a] member state may independently * * * [d]raft its exemption for 'drug' to specifically add insulin and/or medical oxygen so that no prescription is required, even if the state requires a prescription under its exemption for drugs." SSUTA at 112, Appendix C. That is exactly what Ohio has done. *See* R.C. 5739.02(B)(18). Likewise, "[a] member state may limit its exemption to 'durable medical equipment:' [b]y requiring a prescription." SSUTA at 113, Appendix C. "A member state may limit the application of ['prosthetic device'] by requiring a 'prescription.' " SSUTA at 115, Appendix C.

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[10] Appellants have not indicated from where they accessed the list they included in their brief, which is dated 2006. The current version of the Health Care Item List is available from the Streamlined Sales Tax Governing Board, Inc. through their website. *See* Health Care Item List–Appendix L, available at: https://www.streamlinedsalestax.org/docs/default-source/agreement/appendixes/appendix-l-health-care-list-2018-5-2.pdf?sfvrsn=a76303b3_8 (Accessed April 10, 2019).

[11] SSUTA, available at https://www.streamlinedsalestax.org/docs/default-source/agreement/ssuta/ssuta-as-amended-2018-12-14.pdf?sfvrsn=8a83c020_6 (Accessed April 11, 2019).

{¶ 74} Furthermore, the SSUTA, by itself, is not binding. In R.C. 5740.04(A), the Ohio legislature expressed its intent that the SSUTA would not have the force of law in Ohio without express legislative action:

> No provision of the [SSUTA], in whole or in part, invalidates or amends the law of this state. Adoption of the agreement by this state does not amend the law of this state. Implementation in this state of any condition of the agreement, whether adopted before, at, or after membership of this state in the agreement, must be by the action of this state.

Similarly, the Ohio legislature made it clear that the SSUTA does not confer any rights to Ohio consumers. Pursuant to R.C. 5740.06:

> (A) The [SSUTA] binds and inures only to the benefit of this state and the other member states. No person, other than a member state, is an intended beneficiary of the agreement. Any benefit to a person other than a state is established by the law of this state and the other member states and not by the terms of the agreement.
>
> (B) Consistent with division (A) of this section, no person shall have any cause of action or defense under the agreement or by virtue of this state's approval of the agreement. No person may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of this state, or any political subdivision of this state, on the ground that the action or inaction is inconsistent with the agreement.
>
> (C) No law of this state, or the application thereof, may be declared invalid as to any person or circumstance on the ground that the law or application of it is inconsistent with the agreement.

As such, the SSUTA does not confer any separate rights onto appellants, and their arguments using the SSUTA definitions and classification system fail.

{¶ 75} Having determined that the feminine hygiene products at issue here are not exempt from taxation under R.C. Chapter 5739 because they are not made or dispensed pursuant to a prescription, we overrule appellants' third assignment of error.

V. CONCLUSION

{¶ 76} All three of appellants' assignments of error fail. Ohio's sales tax statute does not violate the state or federal Equal Protection Clause because it does not infringe upon a

fundamental right and the state's taxation of retail products, including feminine hygiene products, is rationally related to the state's interest in raising revenue. Ohio's state tax statutes are not preempted by the federal MDA because the state statutes' sole purpose is raising revenue and the statutes do not deal with the "safety or effectiveness" of feminine hygiene products. Feminine hygiene products are not exempt from sales tax because they are not made or dispensed pursuant to a prescription. With this limitation in the statute, it is not relevant whether the products may be classified as "drugs," "durable medical equipment," or "prosthetic devices."

{¶ 77} The court is sympathetic to appellants' arguments. But it is not the role of the court to legislate or create policy. That role lies squarely with the legislative branch. As the judiciary, we are constrained to apply the law, even when we do not agree with the law or the policy decisions that the legislature has made. As the *Arbino* court recognized, "the General Assembly is charged with making the difficult policy decisions on such issues and codifying them into law. This court is not the forum in which to second-guess such legislative choices: we must simply determine whether they comply with the Constitution." *Arbino* at ¶ 71. Appellants' three assignments of error are overruled, and we affirm the decision of the Ohio Board of Tax Appeals.

Judgments affirmed.

BROWN, J. concurs.

BRUNNER, J., dissents.

BRUNNER, J., dissenting.

{¶ 78} I respectfully dissent from the decision of the majority because I would find the statute challenged is unconstitutional as applied, violating equal protection and having an insufficient rational basis to support the legislation and rules at issue.

{¶ 79} The impact here is clearly disparate—men do not menstruate—women do. The rote, automaton-like function of collecting taxes and providing the State with revenue is not designed to recognize the disparate impact on women of taxing tampons, which only they use. This lack of recognition operates to act as unequal classification of men and women in the taxation of feminine hygiene supplies—with no rational basis for the difference. Money is not a good enough reason.

{¶ 80} Moreover, the impact of the majority decision is to too quickly dispose of the level of scrutiny of the statutes and rules involved even while avoiding specifically stating that gender is not a suspect classification. This Court has previously recognized federal constitutional law that "the United States Supreme Court has consistently applied a heightened rationality test to such gender-based regulations sometimes referring to a requirement that the proponents must show that the classification is tailored to further an important governmental interest and must demonstrate an exceedingly persuasive justification for the classification." (Internal quotation marks omitted.) *Preterm Cleveland v. Voinovich*, 89 Ohio App.3d 684, 702 (10th Dist.1993), quoting *Kirchberg v. Feenstra*, 450 U.S. 455 (1981).

{¶ 81} Since this case was heard on oral argument, the Ohio General Assembly has modified the statute[12] and provided women tampon users prospective tax relief. Only we can provide the relief sought heretofore. We should recognize this disparate impact on women and reverse the decision of the BTA, providing relief up to the point that the legislature saw fit to change this disparately impacting statute.

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[12] On October 23, 2019, the 133rd General Assembly enacted Sub.S.B. No. 26 which, among other things, enacted new provisions to R.C. 5729.01(TT) and 5739.01(B)(57) to exempt sales of feminine hygiene products from the state sales tax effective February 5, 2020.