

In the  
**Supreme Court of Ohio**

WILTON S. SOGG,	:	Case No. 2007-1452
	:	
Plaintiff-Appellant,	:	
	:	On Appeal from the
v.	:	Franklin County
	:	Court of Appeals,
DIRECTOR, OHIO DEPARTMENT OF	:	Tenth Appellate District
COMMERCE,	:	
	:	
Defendant-Appellee.	:	Court of Appeals Case
	:	No. 06AP-833
	:	

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**MERIT BRIEF OF DEFENDANT-APPELLEE  
OHIO DEPARTMENT OF COMMERCE**

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WILLIAM C. WILKINSON\* (0033228)

*\*Counsel of Record*

CRAIG A. CALCATERRA (0070177)

Thompson Hine LLP

10 West Broad Street, 7th Floor

Columbus, Ohio 43215

614-469-3200

614-469-3361 fax

william.wilkinson@thompsonhine.com

JOHN R. WYLIE

Futterman Howard Watkins Wylie & Ashley

122 South Michigan Avenue, Suite 1850

Chicago, Illinois 60603

312-427-3600

312-427-1850 fax

jwylie@futtermanhoward.com

ARTHUR T. SUSMAN

Susman Heffner & Hurst LLP

Two First National Plaza, Suite 600

Chicago, Illinois 60603

312-346-3466

312-346-2829 fax

asusman@shhllp.com

MARC DANN (0039425)

Attorney General of Ohio

WILLIAM P. MARSHALL (0038077)

Solicitor General

BENJAMIN C. MIZER (*pro hac vice*  
application pending)

Deputy Solicitor

WILLIAM J. COLE (0067778)

JOHN T. WILLIAMS (0024449)

Assistant Attorneys General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

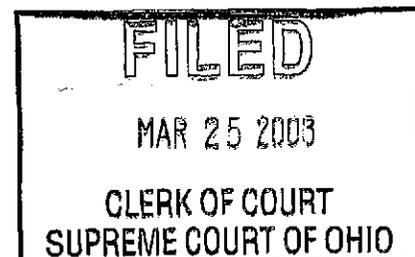
614-466-8980

614-466-5087 fax

wmarshall@ag.state.oh.us

Counsel for Defendant-Appellee

Ohio Department of Commerce



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## INTRODUCTION

This takings case challenges an Ohio law—the Unclaimed Funds Act (“UFA”), R.C. Chapter 169—that treats property as unclaimed when the owner fails to take certain minimum, statutorily required actions with respect to the property within a specified time frame (usually five years). The State then holds the unclaimed funds in perpetuity until the original owner comes forward to claim the money, at which point the State returns the principal but retains the interest that accrued while the funds were in the State’s possession.

Appellant Wilton S. Sogg claims that Ohio’s system effects an unconstitutional taking. He argues that the “interest follows principal” rule means that the interest on his unclaimed funds belongs to him, and that the State owes him compensation for keeping the interest even though it gave back his principal.

Sogg is incorrect. The constitutionality of the UFA rests on several straightforward and well-settled principles. First, States have the inherent sovereign authority to treat property interests as forfeited when the original owner fails to take any actions to preserve those interests. This rule is true whether or not the unclaimed property would independently qualify as “abandoned” within the meaning of the common law, because the government may reasonably condition retention of a property interest on the performance of certain minimal acts. Second, the States’ inherent sovereign authority includes the ability to take possession of unclaimed or forfeited property. Third, no compensable taking occurs when the State takes possession of unclaimed property, because the State is not required to compensate the owner for the consequences of his own neglect. The State therefore acts within its sovereign rights when it retains *all* of the unused property and declines to return any of it to the original, dilatory owner. And this greater power to keep all of the property necessarily includes the lesser power to return the principal but retain the interest. Finally, the State does not effect a compensable taking when

it keeps the interest while returning the principal, because the “interest follows principal” rule does not apply when the original owner, as a result of his or her own disuse, retains no background entitlement to the principal itself.

The many courts that have confronted similar takings claims widely agree that the State may keep the interest while returning the principal. Many other States—including California, Indiana, Pennsylvania, North Carolina, and Texas—have unclaimed funds laws that closely resemble Ohio’s. Both state and federal courts have considered challenges to the retention of interest under those statutes and have held that the government may keep the interest even if it returns the principal. There is no reason for this Court to heed Sogg’s request and depart from this broad consensus.

Nor should the Court entertain Sogg’s argument that the UFA violates due process. This Court has repeatedly explained that it will not consider claims that the plaintiff did not include in his complaint or present to any of the lower courts. Because Sogg neither stated a due process claim in his amended complaint nor briefed his due process argument in the courts below, he has abandoned his due process theory. Even assuming the argument is preserved, however, it is meritless. The UFA affords all of the process that is due to a property owner who forfeits his rights by inaction. And the UFA reasonably furthers the State’s legitimate interests in requiring property owners to act affirmatively to retain their rights, receiving reimbursement for services rendered, and raising revenue to benefit the citizens of Ohio.

In enacting the UFA, the General Assembly conferred a benefit on the original owners of forfeited property by taking custody of their unclaimed funds and safeguarding them for the owners to claim in perpetuity. The State was under no duty to undertake such a procedure; it could have just held the property in its entirety. Had the General Assembly not adopted the UFA

system, claimants for all practical purposes would have no property rights in their unclaimed funds whatsoever. The original owner's ability to claim the principal on unclaimed funds, in other words, is strictly a matter of legislative grace—not constitutional or common law right. In that light, Sogg's request is extraordinary: Having already received the principal to which he was entitled only at the State's election, he now wants also the interest that the State earned by investing money in its possession. This Court should join its sister courts in rejecting the view that interest must follow principal to which a claimant has no background entitlement. As the appeals court properly recognized, the Constitution simply does not require the all-or-nothing approach that Sogg advocates.

## STATEMENT OF THE CASE AND FACTS

### A. Ohio's Unclaimed Funds Program holds owners' unclaimed funds but retains the interest accrued from the State's investment of the money.

The General Assembly adopted the Unclaimed Funds Act ("UFA") in 1967. Amended Stipulation (Tr. Ct. R. 106) ("Am. Stip.") ¶ 4. The UFA applies to any financial asset—including, among other things, bank accounts, stocks and bonds, insurance proceeds, and travelers checks—for which an owner has not generated activity for an extended period of time. More specifically, the statute defines "unclaimed funds" to cover "any moneys, rights to money, or intangible property" with respect to which the owner has not taken any of the following acts for a statutorily prescribed (usually five-year) period:

(a) Increased, decreased, or adjusted the amount of such funds; (b) Assigned, paid premiums, or encumbered such funds; (c) Presented an appropriate record for the crediting of such funds or received payment of such funds by check, draft, or otherwise; (d) Corresponded with the holder concerning such funds; (e) Otherwise indicated an interest in or knowledge of such funds; [or] (f) Transacted business with the holder.

R.C. 169.01(B)(1)(a)-(f).

Among other purposes, the UFA is designed to protect the property interests of the owner, to provide a centralized contact location for potential owners, and, ultimately, to reunite the owner with his or her funds. Am. Stip. ¶ 9. The UFA also provides holders of unclaimed funds—such as banks and financial institutions—with relief from liability. *Id.* And the statute benefits the public by allowing the State to use the unclaimed funds in its possession and draw interest on those assets for public purposes.

The UFA requires holders to report annually to the Director of the Ohio Department of Commerce ("Director") any unclaimed funds in their possession. R.C. 169.03. When a holder reports that it possesses unclaimed funds greater than \$50, the holder may either (a) remit the entire amount to the Director, or (b) at the Director's discretion, remit 10% and retain 90%. Am.

Stip. ¶ 10. In the latter case, the holder must deposit the retained amount in an approved, income-bearing, FDIC-insured or United States Treasury account. *Id.* (citing R.C. 169.05). The holder must deliver all earnings on those invested funds to the Director. *Id.* If the holder reports less than \$50, it must remit the entire amount to the Director. *Id.* Once the property is reported, the Ohio Division of Unclaimed Funds (“Division”) sets up an account and credits the property to that account. *Id.* ¶ 6. The Director may deposit the funds in a trust fund or place them in a financial organization. R.C. 169.02, 169.05.

The State holds unclaimed funds in perpetual custody for the owner’s benefit; the State does not take title to the property. Am. Stip. ¶¶ 11, 24. In an effort to reunite owners with their funds, the Division regularly publishes notices of unclaimed funds in newspapers of general circulation. R.C. 169.06. Once they are aware that the State is in possession of their unclaimed property, owners may submit their claims to the Division at any time. R.C. 169.08(B). Successful claims are paid from the trust fund. R.C. 169.08(D).

The Division invests unclaimed funds and uses the earnings to fund both its expenses and other programs. Am. Stip. ¶¶ 12-14. The Division’s expenses include payroll, auditing, maintenance, advertising, equipment, operations, and mailing costs. *Id.* ¶ 18. The Division deposits amounts delivered as unclaimed property (including the 10% not retained by holders) and all interest on the 90% retained funds into a depository account at a financial institution. *Id.* ¶ 12. From that account, some of the funds are placed in income-bearing accounts that invest primarily in low-risk, short-term United States Treasury instruments and used for logistical cash-management purposes to fund the Division’s needs. *Id.* At the General Assembly’s discretion, some unclaimed funds are transferred to other state programs—primarily the Ohio Housing Finance Authority, to support much-needed housing development in Ohio. Am. Stip. ¶¶ 13-14.

The UFA originally provided that an owner was paid interest on a successful claim at the rate of actual earnings while the State held the unclaimed principal, or at a rate agreed to by the holder and the owner, whichever was greater. *Id.* ¶ 17. That provision was later amended so that an owner was paid 6% interest with the unclaimed principal. *Id.* Since July 26, 1991, the UFA has provided that interest is not payable on claims. The Division also retains a 5% administrative fee from the total amount paid. R.C. 169.08(D).

**B. Sogg filed a claim for unclaimed funds.**

As executor of his mother's estate, Appellant Wilton S. Sogg filed a claim with the Division for a \$40.52 insurance policy payment and \$292.86 in bank dividends. Am. Stip. ¶ 25. The Division had taken custody of the insurance payment in 1989 and of the dividends in 1998. *Id.* ¶ 26. The Division paid Sogg the principal amount of the two claims, plus interest statutorily earned before July 26, 1991, on the insurance payment, less the 5% administrative fee. *Id.* ¶¶ 27-28.

**C. After the trial court held that the State's retention of interest earned on unclaimed funds was unconstitutional, the court of appeals reversed.**

Sogg brought a class action suit against the State for damages, claiming that the interest-retention provision of R.C. 169.08(D) facially violated the Takings Clauses of the Fifth Amendment to the United States Constitution and Section 19, Article I of the Ohio Constitution. Tr. Ct. R. 8. He later amended his complaint, adding claims for equitable restitution and mandamus relief. Tr. Ct. R. 65. The State moved to dismiss; the trial court denied the motion except as to the mandamus claim. Tr. Ct. R. 79. The trial court then certified the case as a class action, Tr. Ct. R. 95, and, in a separate decision, held that a four-year statute of limitations period, rather than the two-year statute of limitations period applicable to personal injury claims, applies to Sogg's claims. Tr. Ct. R. 97.

After stipulating to the material facts, both parties moved for summary judgment on liability. Tr. Ct. R. 99, 102. The trial court declared the challenged statutory provision unconstitutional, severed that portion from the rest of the statute, and permanently enjoined its enforcement. *Sogg v. White* (Franklin County Comm. Pl.), 2006-Ohio-4223 ¶¶ 42, 47-48. The trial court also certified its decision for immediate appeal and stayed the effectiveness of the declaratory and injunctive relief pending appeal. *Id.* ¶¶ 49-50.

The State timely appealed with three assignments of error: (1) that the State's retention of interest earned on unclaimed funds is constitutional; (2) that the trial court could not award equitable and extraordinary relief for a governmental taking; and (3) that the statute of limitations for the class is two, not four, years. Ct. App. R. 8. Sogg cross-appealed, arguing that the class is not subject to any statute of limitations. Ct. App. R. 13.

The Tenth District Court of Appeals unanimously reversed the trial court opinion, sustaining the State's first assignment of error. *Sogg v. Dir., Ohio Dep't of Commerce* (10th Dist.), 2007-Ohio-3219 ¶¶ 33-36 ("Op."). The court of appeals overruled as moot the State's remaining assignments of error, as well as Sogg's cross-appeal. *Id.* ¶¶ 35-36.

Sogg filed a discretionary appeal with this Court. Ct. App. R. 84. This Court accepted Sogg's appeal. *11/21/2007 Case Announcements*, 116 Ohio St.3d 1410, 2007-Ohio-6140.

## ARGUMENT

### **The State's Proposition of Law:**

*The State may constitutionally keep the interest earned on unclaimed funds, and no taking occurs, when the original owner of the funds neglects to claim the property and the interest accrues while the funds are invested by the State.*

- A. Because the State possesses inherent sovereign authority to assume ownership of unclaimed property, the State need not pay interest on the property in its possession even if it chooses, by legislative grace, to return the principal to the original owner.**

The UFA is a statutory exercise of Ohio's inherent sovereign authority both to possess and to dispose of unclaimed property within its boundaries. For centuries at common law, the government has had the sovereign power to take title to unclaimed property, custody of the property, or both. See *Conn. Mut. Life Ins. Co. v. Moore* (1948), 333 U.S. 541, 547; *Anderson Nat'l Bank v. Lockett* (1944), 321 U.S. 233, 251. "[T]he right to regulate concerning the estate or property of absentees is an attribute, which, in its very essence, must belong to all governments, to the end that they may be able to perform the purposes for which government exists." *Cunnius v. Reading Sch. Dist.* (1905), 198 U.S. 458, 469. Consistent with this long-standing authority, states may declare private property rights to be less than absolute in duration, and they may require that owners who wish to retain their ownership rights must perform certain reasonable acts that show a present intention to retain the rights. *Texaco, Inc. v. Short* (1982), 454 U.S. 516, 526; *Hawkins v. Barney's Lessee* (1831), 30 U.S. (5 Pet.) 457, 467. That is what the UFA does: It defines rights in unused property as forfeited by owner inaction, places possession of that forfeited property in the State, and then retains the interest accrued while the property was in the State's possession.

At the margins of this case there is actually substantial agreement between the parties. Both Sogg and the State agree that the unused funds were properly defined as "unclaimed" under the UFA because neither Sogg nor his late mother (the previous owner of the funds) took any act

required by R.C. 169.01(B)(1)(a)-(f) within the statutory period to continue ownership of the funds. Moreover, Sogg does not argue that the UFA's requirements for asserting ownership—including the requisite acts and the specified time frame in which those acts must occur—are unreasonable. The point of contention, then, is whether the distinction between property “abandoned” at common law and property “unclaimed” under the UFA has any legal significance in this case. It does not, because the common law rule of abandonment is beside the point.

**1. The State may deem rights to unused property to be forfeited under reasonable conditions, irrespective of the common law definition of abandonment.**

The crux of Sogg's takings claim is that he retained a private property interest in his principal—and that the interest necessarily follows that principal—because “unclaimed property is *not* abandoned property.” Sogg Br. 37. Sogg assumes, in other words, that the principal belongs to him unless it was abandoned at common law. See *Kiser v. Bd. of County Comm'rs* (1911), 85 Ohio St. 129, 131 (discussing common law abandonment); *City of Hamilton v. Harville* (12th Dist. 1989), 63 Ohio App. 3d 27, 30 (same). But it is immaterial whether the UFA's definition of “unclaimed” property would satisfy the common law rule of abandonment, because the State's authority over unused property is not restricted solely to property that would be “abandoned” at common law.

The United States Supreme Court has made this point clear: “Common-law principles do not . . . entitle an individual to retain his property until the common-law would recognize it as abandoned. Legislatures can enact substantive rules of law that treat property as forfeited under conditions that the common-law would not consider sufficient to indicate abandonment.” *United States v. Locke* (1985), 471 U.S. 84, 106 n.15 (citing *Hawkins*, 30 U.S. (5 Pet.) at 467 (“What is the evidence of an individual having abandoned his rights to property? It is clear that the subject

is one over which every community is at liberty to make a rule for itself”). “Even with respect to vested property rights, a legislature generally has the power . . . to condition their continued retention on performance of certain affirmative duties.” *Id.* at 104. “The State has the power to condition the ownership of property on compliance with conditions that impose . . . a slight burden on the owner while providing . . . clear benefits to the State.” *Texaco*, 454 U.S. at 529-30.

Numerous cases confirm that States can treat property rights as forfeited without reference to the common law definition of abandonment. In *Hawkins*, for example, the Supreme Court upheld a Kentucky adverse possession law that barred a landowner from recovering property on which the defendant had resided under a claim of right for more than seven years. 30 U.S. (5 Pet.) at 466-67. The Court observed that “[t]he right to appropriate a derelict is one of universal law, well known to the civil law, the common law, and to all law: it existed in a state of nature, and is only modified by society, according to the discretion of each community.” *Id.* And in *Wilson v. Iseminger* (1902), 185 U.S. 55, the Supreme Court upheld a Pennsylvania statute that treated a property interest as extinguished if the owner failed to collect rent and made no demand for payment for a period of twenty-one years. “In each case, the Court upheld the power of the State to condition the retention of a property right upon the performance of an act within a limited period of time.” *Texaco*, 454 U.S. at 529.

Other courts have applied this settled rule to condition the retention of a property interest on the performance of certain minimal acts, regardless of the common law rule of abandonment. The Kansas Supreme Court, for instance, recently upheld a state statute that deemed water rights abandoned by an owner’s failure to make beneficial use of his or her water for five successive years, regardless of whether the owner actually intended to abandon the interest. *Hawley v.*

*Kansas Dep't of Agric.* (2006), 132 P.3d 870, 881. The court explained that “the right is abandoned by operation of law when required conditions have not been met.” *Id.* at 882. Similarly, the Michigan Supreme Court upheld a state dormant mineral statute that deemed subsurface oil and gas interests abandoned when the owner did not take certain required actions within a twenty-year period, explaining that it was “within the Legislature’s power and experience to conclude that the owners who have not developed, transferred or recorded their severed mineral interests for over 20 years have abandoned them.” *Van Slooten v. Larsen* (Mich. 1980), 299 N.W.2d 704, 714 (footnote omitted). Finally, a State may acquire title to private property through adverse possession, without effecting a taking, even where the original owner has not “abandoned” his or her interests within the meaning of the common law. See *Stanley v. Schwalby* (1893), 147 U.S. 508; *State ex rel. A.A.A. Invest. v. City of Columbus* (1985), 17 Ohio St. 3d 151, 152-53; *Bd. of County Comm’rs v. Flickinger* (Colo. 1984), 687 P.2d 975, 983-85 (following *Texaco* and observing that “Colorado clearly has the power to condition the ownership of an interest in property upon compliance with conditions that impose such a slight burden on the owner”).

The UFA—much like the statute at issue in *Hawley*, among other cases—defines “unclaimed funds” as assets with respect to which the owner has failed to take one of six enumerated actions within a specified time period. R.C. 169.01(B)(1). Any loss under the statute is caused not by state action, but by owner *inaction*. And as explained in the next section, the Supreme Court’s decision in *Texaco* means that a property owner cannot claim a compensable taking when the State disposes of property in which the owner has no right because of his own neglect.

**2. Under the Supreme Court’s holding in *Texaco*, the State does not effect a taking when it retains the interest earned on funds to which the owner has forfeited his or her rights through disuse or neglect.**

Given that the UFA properly treats an owner’s interests in unclaimed funds as forfeited by the owner’s inaction, the question becomes whether a taking occurs when the State retains the interest but not the principal on the forfeited asset after the owner eventually reclaims it.<sup>1</sup> In light of the Supreme Court’s decision in *Texaco*, the answer is simple: Because the Constitution does not obligate the State to return the *principal* to Sogg, it follows that the State does not owe compensation when it returns the principal but retains the interest that accrued while the property was in its possession. In other words, the State’s greater power to retain *all* of the property necessarily encompasses the lesser power to keep only the interest.

No compensable taking occurs when an owner forfeits his or her interest in property through disuse, because the State is not required “to compensate the owner for the consequences of his own neglect.” *Texaco*, 454 U.S. at 530. In *Texaco*, a mineral owner challenged an Indiana statute providing that a severed mineral interest lapsed and reverted to the surface owner of the property when the mineral owner failed for twenty years either to use the interest or to file a claim with the county recorder. *Id.* at 518. The Court began its analysis by observing that, “[f]rom an early time, this Court has recognized that States have the power to permit unused or abandoned interests in property to revert to another after the passage of time.” *Id.* at 526. The Court therefore explained that, “just as a State may create a property interest that is entitled to

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<sup>1</sup> The analysis for taking claims under the Ohio Constitution mirrors that under the federal Constitution. Although this Court has interpreted the “public use” prong of Ohio’s takings clause to afford landowners greater protection than its federal counterpart, see *Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799 ¶ 9, the “public use” prong is not at issue in this case. And aside from the public use requirement, this Court’s decisions have used federal and state case law interchangeably in takings analysis. See, e.g., *id.*; *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St. 3d 1, 7-8, 2002-Ohio-6716 ¶¶ 33-39; *State ex rel. Shemo v. City of Mayfield Hts.* (2002), 95 Ohio St. 3d 59, 63-67.

constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest.” *Id.*

In light of those background principles, the Court considered the mineral owner’s argument that the Indiana law took “private property without just compensation in violation of the Fourteenth Amendment.” *Id.* at 530. The Court noted that its prior cases “ruling that private property may be deemed to be abandoned and to lapse upon the failure of its owner to take reasonable actions imposed by law” had “never required the State to compensate the owner for the consequences of his own neglect.” *Id.* Having concluded “the State may treat a mineral interest that has not been used for 20 years and for which no statement of claims has been filed as abandoned,” the Court found that “it follows that, after abandonment, the former owner retains no interest for which he may claim compensation.” *Id.* “It is the owner’s failure to make any use of the property—and not the action of the State—that causes the lapse of the property right; there is no ‘taking’ that requires compensation.” *Id.*

*Texaco* means that the State in this case could have retained *all* of Sogg’s property—not just the interest—without effecting a compensable taking. Like the Indiana statute in *Texaco*, the UFA deems property to be unclaimed when the owner fails to take certain minimal acts with respect to the property. The *Texaco* Court squarely held not only that the State has the power to enact this statutory mechanism, but that the owner’s loss is not a taking that requires compensation. *Id.* at 530. “Regulation of property rights does not ‘take’ private property when an individual’s reasonable, investment-backed expectations can continue to be realized as long as he complies with reasonable regulatory restrictions the legislature has imposed.” *Locke*, 471 U.S. at 107.

Sogg tries to distinguish *Texaco* on four different grounds, all of which are unsuccessful. First, he claims that “the Takings Clause was irrelevant to the facts in *Texaco*” because the Indiana statute at issue there caused the property interest to revert from one private party to another private party rather than to the State. Sogg Br. 29. But that argument misses the point of takings analysis. The pertinent question for takings purposes is whether an action by the State deprived the owner of his or her property interest in a way that entitled the owner to compensation. Where the property ultimately ends up—whether in the hands of the State or of a private party—is irrelevant. A taking can occur just as surely when the State transfers possession from one private party to another as when the State itself takes possession. See *Hawaii Hous. Auth. v. Midkiff* (1984), 467 U.S. 229, 231-32 (considering whether a Hawaii statute that transferred title in real property from lessors to lessees rather than to the State satisfied the “public use” requirement for takings). Thus, it would have made no difference to the *Texaco* Court’s analysis if the State, rather than private parties, had taken possession of the unused property. What mattered in *Texaco* was that no compensable taking occurred because “the owner’s failure to make any use of the property—and not the action of the State”—had terminated the owner’s property interests, regardless of what happened to the property after the forfeiture. 454 U.S. at 530.

Second, Sogg attempts to distinguish *Texaco* by arguing that the Indiana statute in that case, unlike the UFA, was premised on the State’s police power. Sogg Br. 30. But Sogg is doubly wrong. First, the UFA is based on the same police power authority as the Indiana statute in *Texaco*: the State’s inherent sovereign authority to control the disposition of unclaimed property. See *Texaco*, 454 U.S. at 526. More to the point, the nature of the State’s power would be relevant, *if a taking had occurred*, to ascertain whether the taking was for a proper “public

use,” as required by the Constitution. See *Midkiff*, 467 U.S. at 240 (“The ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers.”). But Sogg cannot get to that step of the analysis because, as explained above, no taking has occurred. And because there has been no taking, the source of the State’s authority is of no moment. When Sogg failed to take any of the actions that the UFA requires, he lost his interest in the property, and the State had the inherent sovereign authority to take possession of the assets, regardless of what kind of power, police or otherwise, the State exercised in doing so.

Third, Sogg tries to escape *Texaco*’s square applicability by asserting that the Indiana statute, unlike the UFA, “allowed the aggrieved property owner the opportunity to contest the forfeiture and obtain the return of his mineral.” Sogg Br. 30. But that aspect of the Indiana law was irrelevant to the Supreme Court’s analysis of the takings claim in *Texaco*. The Court nowhere suggested that the property owner deserved a right to reclaim his property interest once he had forfeited it through inaction.

Finally, Sogg claims that “the Supreme Court itself must have recognized that the facts in *Texaco* had nothing whatever to do with the Takings Clause,” Sogg Br. 31, otherwise it would have mentioned its decision two years earlier in *Webb’s Fabulous Pharmacies, Inc. v. Beckwith* (1980), 449 U.S. 155. And because the Court failed to discuss *Webb’s*, Sogg maintains, the Court could not have meant to say “that a state could simply claim title to property by *ipse dixit*.” Sogg Br. 31. But the *Texaco* Court could not have been clearer in expressly stating that it was considering—and rejecting—a takings claim. 454 U.S. at 530 (rejecting “appellants’ argument[] . . . that the [Indiana statute] takes private property without just compensation in violation of the Fourteenth Amendment”). And the Court’s failure to mention *Webb’s* in *Texaco* is no mystery: The two cases were about altogether different kinds of property. *Texaco* addressed the question

of what the State could do with property it had deemed abandoned as a result of owner disuse (not, as Sogg mischaracterizes it, “by *ipse dixit*”). *Webb’s*, by contrast, dealt with disputed assets deposited with a court clerk while they were subject to an interpleader action. 449 U.S. at 155-56. The owner’s interests in, and the government’s powers over, unclaimed and interpleaded property are inherently different, and thus *Webb’s* had no bearing on the holding concerning unused property in *Texaco*.

Sogg’s heavy reliance on *Brown v. Legal Foundation of Washington* (2003), 538 U.S. 216, and *Phillips v. Washington Legal Foundation* (1998), 524 U.S. 156, is misplaced for the same reason. *Brown* and *Phillips* both concerned interest on lawyers trust account (“IOLTA”) programs. IOLTA systems generally pool client funds that are either nominal in amount or held for a short period of time into an interest-bearing trust account, with the interest used to pay for legal services for the needy. See, e.g., R.C. 4705.09 (Ohio’s IOLTA program). The Court held in *Phillips* that the interest earned on funds in IOLTA accounts is the private property of the owner of the underlying principal. 524 U.S. at 168. In *Brown*, however, the Court explained that no compensation was due under the IOLTA system at issue because the owner suffered no pecuniary loss. 538 U.S. at 236. These cases are immaterial because there was no question that the owner retained “a property right incident to the ownership of the underlying principal” while it was deposited in the IOLTA account. *Phillips*, 524 U.S. at 168. In other words, “[t]he holding in *Phillips*, as well as that in *Webb’s Fabulous Pharmacies*, assumes that the claimants had a traditional private property right in the principal and concludes only that, as an incident to that ownership, the claimants also had a property right in the interest.” *Washlefske v. Winston* (4th Cir. 2000), 234 F.3d 179, 185. Here, by contrast, *Texaco* instructs that the State has properly determined that the original owner has forfeited his interest in the unclaimed funds through

inaction. Thus, whereas the question in *Phillips* and *Brown* was what the government could do with the interest on principal that unquestionably remained at all times the owner's private property, here the question—answered by *Texaco*—is what the government may do with principal and interest to which the original owner has forfeited his or her rights. Given that fundamental difference, Sogg's efforts to invoke *Webb's*, *Brown*, and *Phillips* and to distinguish *Texaco* are unavailing.

**3. The common law rule that “interest follows principal” does not apply when the owner does not have a background entitlement to the principal, let alone to the interest.**

There is one notable difference between this case and *Texaco*: Whereas the mineral interests in *Texaco* were lost to the owner forever, the UFA, as a matter of legislative grace, holds the principal in perpetuity for the owner and returns it whenever the owner comes forward to claim it. The State retains only interest that accrues while the principal is in the State's possession. Sogg argues that the State cannot do this—that, under the common law rule that “interest follows principal,” the State must pay the interest if it is going to return the principal. But Sogg's all-or-nothing approach is mistaken, because the common law “interest follows principal” rule does not apply when the original owner does not have a background entitlement to the principal itself. Sogg has no background entitlement in his principal because, had the General Assembly not enacted the UFA, he would have no claim to anything at all. In other words, when the State has the sovereign authority to retain the principal plus the interest, it necessarily has the corresponding right to sever the interest and return only the principal.

Sogg is correct that the background common law rule holds that interest follows principal. See *Phillips*, 524 U.S. at 168; *Webb's*, 499 U.S. at 162. But that general rule presumes that the claimant retains a traditional private property interest in the principal itself. See *Phillips*, 524 U.S. at 164 (assuming that Texas's IOLTA rules at most regulated the use of the property and

that the funds remained “freely available to the client upon demand”). Put differently, “[w]hile it is true that at common law interest follows principal, it does so only ‘as a property right incident to the ownership of the underlying principal.’” *Washlefske*, 234 F.3d at 185 (quoting *Phillips*, 524 U.S. at 168).

A different rule applies when the original owner no longer has a traditional private property interest in the principal. The State, as explained in *Texas* and *Locke*, may treat property interests as forfeited when the original owner fails to take certain requisite actions. Once those original rights have been forfeited, the State may choose by statute to create a new property right in the property, and “the property interest so created is defined by the statute and may be withdrawn so long as the State affords due process in doing so.” *Washlefske*, 234 F.3d at 184. This means that the State has various options: It could keep both the principal and the interest and give nothing to the original owner; keep the principal but give the interest to the owner; or, as it does under the UFA, keep the interest but return the principal. The point is that the disposal of the property is in the State’s discretion. Indeed, the rule is so strong that it applies even when the underlying funds in dispute are earned wages. In *Washlefske*, for instance, a Virginia inmate, relying on the same “interest follows principal” theory as Sogg, argued that the State effected a compensable taking when it kept the interest earned on money deposited in the inmate’s account for work he had performed while incarcerated. In rejecting the inmate’s takings claim, the federal Fourth Circuit explained that, under traditional common law rules, a prisoner “has no property interest in any ‘wages’ from his work in prison except insofar as the State might elect, through statute, to give him rights.” *Id.* at 185. Thus, “[b]ecause Washlefske never had a private property interest in these accounts as defined by common law, but only an interest defined by statute—a statute

that gives him limited rights to those funds—he cannot claim that a property interest based on traditional principles of property law was taken.” *Id.* at 185-86.

What was true in *Washlefske* is even more compelling here. As explained above, the UFA treats the original owner’s interest in unclaimed property as forfeited—as *Texaco* says it may—and leaves the original owner with only a statutorily defined interest in the property if he or she fails to take the requisite action with respect to the property. Thus, Sogg’s own inaction (and that of his predecessor in interest) resulted in the forfeiture of his interest in his property as a whole. Were it not for the UFA, the State would have no obligation to return anything at all to Sogg. Because the UFA, consistent with *Texaco*, validly deems property forfeited under specific conditions, Sogg did not have a traditional private property right in the original property. Instead he had only the property interest that the UFA gave him: the right to reclaim the principal, without interest, at any time. As in *Washlefske*, Sogg’s “property interest was that given by statute, and the State never took from him what was created by statute. Therefore, there was not a taking of private property as addressed in the Fifth Amendment.” 234 F.3d at 186.

Sogg relies on a federal decision that took a different approach from *Washlefske*. In *Schneider v. California Department of Corrections* (9th Cir. 1998), 151 F.3d 1194, the Ninth Circuit confronted a California statute concerning inmates’ funds that was materially similar to the Virginia law at issue in *Washlefske*. Unlike the Fourth Circuit, the Ninth Circuit held that California was obliged to pay the inmate the interest on his earned funds. *Id.* at 1201. Sogg’s reliance on *Schneider* is misplaced for two reasons. First, *Schneider*’s analysis was simply wrong—as more than one of its sister courts has explained. See *Givens v. Ala. Dep’t of Corr.* (11th Cir. 2004), 381 F.3d 1064, 1069 (criticizing and declining to follow *Schneider*); *Washlefske*, 234 F.3d at 186 (same); see also *Young v. Wall* (D.R.I. 2003), 359 F. Supp. 2d 84,

92 (same). The flaw in the *Schneider* court's reasoning is clear from the above discussion of *Washlefske*. The Ninth Circuit failed to account for the fact that background common law principles do not entitle inmates to wages earned while incarcerated; thus, the interest does not automatically follow principal to which the inmate does not have a background entitlement. See *Washlefske*, 234 F.3d at 185-86. Second, even assuming *Schneider*'s reasoning is correct with respect to earned wages, it does not apply to unclaimed funds, because, as explained above, *Texaco* and *Locke* allow the State to require property owners to take certain minimal actions to retain their interests in unclaimed property.

**4. Other state and federal courts considering similar laws have held that no taking occurs when a State keeps the interest on unclaimed property while returning the principal to the original owner.**

The appeals court correctly applied the *Texaco* rule in this case, and its approach is the same as other state and federal courts that have considered a takings challenge to a state unused property statute. *Sogg* is asking this Court to depart from the clear consensus among state and federal courts that States may retain the interest on unused or forfeited property even when they opt to return the principal to the original owner.

In a case involving a state unclaimed property statute virtually identical to the UFA, the Indiana Court of Appeals upheld the Indiana Unclaimed Property Act against a takings challenge in *Smyth v. Carter* (Ind. Ct. App. 2006), 845 N.E.2d 219, *transfer denied*, 2006 Ind. Lexis 755, *cert. denied* (2007), 127 S. Ct. 1155. Under the Indiana statute, personal property is presumed abandoned—and the State takes custody—if the holder does not receive any indication of interest in the property for a statutorily prescribed period. *Id.* at 222 (citing Ind. Code Ann. 32-34-1-20(c), 32-34-1-21). After the State takes custody, the statute does not entitle the original owner to receive any dividends or interest. *Id.* at 223 (citing Ind. Code Ann. 32-34-1-30(b)). *Smyth*, like *Sogg*, alleged that Indiana's retention of interest earned on unclaimed property was

an unconstitutional taking. *Id.* Applying *Texaco*, the court held that Smyth's failure to act, and not the exercise of state power, deprived Smyth of his property interests. *Id.* at 224.

Two courts—one federal and one state—have sustained a similar Pennsylvania unclaimed funds law on takings grounds. In *Simon v. Wiessman* (E.D. Pa. Aug. 27, 2007), No. 04-941, 2007 U.S. Dist. Lexis 63417, a federal district court considered a takings challenge to Pennsylvania's Disposition of Abandoned and Unclaimed Property Act. Like the Ohio and Indiana unclaimed funds laws, the Pennsylvania statute treats property as abandoned if the original owner fails to claim it for a specified time period. The court called the Pennsylvania law "a custodial escheat statute," meaning that the "Commonwealth exercises its right to take "custody and control" of abandoned property, as opposed to taking absolute title, and [the statute] provides an entitled claimant the opportunity to recover his property from the Treasurer." 2007 U.S. Dist. Lexis 63417 at \*10 (quoting *Smolow v. Hafer* (Pa. Commw. 2005), 867 A.2d 767, 774-75). Relying on *Texaco* as well as numerous state court decisions, including the appeals court's decision in this case, see *id.* at \*16 (citing *Sogg*, 2007-Ohio-3219), the *Simon* court rejected the argument that the "interest follows principal" rule required Pennsylvania to pay interest on the unclaimed funds it returned to the original owner. A Pennsylvania state court reached the same conclusion, holding that "no unconstitutional taking occurs where a state exercises its right to take custody and control of abandoned property, as opposed to taking absolute title." *Smolow*, 867 A.2d at 774.

Four other state courts likewise have rejected takings challenges to unclaimed funds statutes that closely resemble the UFA. In *Clark v. Strayhorn* (Tex. Ct. App.), 184 S.W.3d 906, 913-14, *review denied*, 2006 Tex. Lexis 473, *cert. denied* (2006), 127 S. Ct. 508, a Texas appellate court held that no taking occurred when Texas retained interest while returning the

principal under its Unclaimed Property Act. Similarly, in *Hooks v. Kennedy* (La. Ct. App. 2007), 961 So. 2d 425, *writ denied*, 2007 La. Lexis 2579, a Louisiana appeals court upheld that State's unclaimed property act, which allows the State to hold unclaimed property in custody while using the property until it is claimed and keeping any interest. *Id.* at 430-31. Citing *Texaco, Smyth*, and *Smolow*, the *Hooks* court held that no taking occurs when the owner is dilatory and the State takes custody of the unclaimed property. *Id.* at 432. And appeals courts in California and North Carolina followed suit in rejecting takings challenges to the retention of interest under their respective States' unclaimed funds statutes. See *Fong v. Westly* (Cal. Ct. App. 2004), 12 Cal. Rptr. 3d 76, 84; *Rowette v. North Carolina* (N.C. Ct. App. Feb. 19, 2008), No. COA06-1036, 656 S.E.2d 619, 2008 N.C. App. Lexis 284, at \*21-\*22.

Sogg relies heavily on the Illinois Supreme Court decision of *Canel v. Topinka* (Ill. 2004), 818 N.E.2d 311, which he argues departs from this broad consensus concerning the validity of unclaimed funds statutes. But *Canel* is off point here for three reasons. First, the facts were materially different: *Canel* related to dividends, not interest, accruing on unclaimed stock held by Illinois under its unclaimed funds statute. *Id.* at 322-23. The same dispute could not arise in Ohio, because, under the UFA, Ohio liquidates the stock it holds and retains the liquidated sum as principal to return to the original owner. R.C. 169.05(A); Ohio Adm. Code 1301:10-5-02. Second, even assuming *arguendo* that the *Canel* court would apply the same analysis to interest—and it is not at all clear that it would—this Court should not treat *Canel* as persuasive authority. Nowhere in its decision did the Illinois Supreme Court even mention, let alone distinguish, *Texaco*. And understandably so, given that the State of Illinois's brief failed to discuss or even cite *Texaco*. See Brief of Defendants-Appellants, *Canel v. Topinka* (Ill. 2004), 818 N.E.2d 311 (No. 96755), 2004 WL 3243995. Finally, the *Canel* court, contrary to Sogg's

assertions, did not hold that “Illinois’[s] retention of accruals on property held under the Illinois unclaimed property act was a taking of private property for which the state owed compensation.” Sogg Br. 27. Instead, the court held only “that the dividends were private property” and remanded for a determination of whether just compensation was due. 818 N.E.2d at 325-26. Thus, *Canel* is not only distinguishable and erroneous, but it does not even go as far as Sogg suggests.

**B. The State’s retention of interest poses no due process problem because the lapse of the property right is a consequence of owner inaction.**

At its core this is a takings case. But Sogg tries to evade the clear weight of takings precedent in the State’s favor by first presenting a due process claim. There are two fatal flaws in Sogg’s due process argument. First, Sogg’s complaint does not state a due process claim, and he did not raise a due process argument in either of the courts below. Second, even assuming Sogg can assert a due process argument at the eleventh hour, the UFA does not offend due process requirements because it permissibly treats property interests as forfeited by the owner’s inaction.

**1. Sogg waived any potential due process claim by failing to state it in his amended complaint or to press it in the courts below.**

The Court should not consider Sogg’s due process argument because Sogg neither stated a due process claim in his amended complaint nor pressed a due process theory in the courts below. In his amended complaint, Sogg asserted five counts, all of which were takings claims under the Fifth Amendment to the United States Constitution and Section 19, Article I of the Ohio Constitution. (Am. Compl. ¶¶ 3, 37, 45, 48, 51, 54, 58, 59.) Although Count I is not labeled a takings claim as such, it invokes Section 19 of Article I, which provides that “[p]rivate property shall ever be held inviolate” and that just compensation is due for any taking. The State’s due process provision, by contrast, is found in Section 16, Article I of the Ohio

Constitution—which Sogg’s amended complaint never cites. Sogg cannot raise on appeal claims that are not even contained in his amended complaint. See *Akron Hydroelectric Co. v. City of Cuyahoga Falls* (9th Dist. 1998), 128 Ohio App. 3d 754, 757 (“Not having been raised in its twice-amended complaint, AHC’s contention is not a claim that can be addressed on summary judgment or appeal, since a claim cannot be raised in a brief.”); see also *Davis v. Agosto* (6th Cir. 2004), 89 F. App’x 523, 527 (“Davis . . . failed to raise this claim in his complaint and cannot now raise the claim for the first time on appeal.”).

Even if this Court were to construe Sogg’s amended complaint to state a due process claim under the Fifth Amendment, Sogg abandoned that claim by not arguing it in the courts below. This Court long ago settled the rule, followed consistently ever since, that the Court will not review on appeal issues—even constitutional issues—not presented in the proceedings below. See *Hoffman v. Staley* (1915), 92 Ohio St. 505, 505; see also *Foran v. Fisher Foods, Inc.* (1991), 17 Ohio St. 3d 193, 194 (per curiam) (“This court has long recognized that it will not consider a claimed error which was not raised and preserved in the appellate court.”). The appeals court did not discuss a due process theory because none was presented to it. See Combined Brief of Appellee & Cross-Appellant Wilton S. Sogg, *Sogg v. Dir., Ohio Dep’t of Commerce* (10th Dist.), 2007-Ohio-3219, No. 06AP-883 (“Sogg 10th Dist. Opening Brief”) (pressing only a takings theory and failing to raise a due process argument).

The completeness of Sogg’s waiver is starkly illustrated by the fact that the bulk of the cases on which his due process argument chiefly rests were never cited in either of his appellate briefs below. *Sensenbrenner v. Crosby* (1974), 37 Ohio St. 2d 43, *American Loan & Trust Co. v. Grand River Co.* (W.D. Ky. 1908), 159 F. 775, *State v. Savings Union Bank & Trust Co.* (Cal. 1921), 199 P. 26, and *Grieb v. Department of Liquor Control* (1950), 153 Ohio St. 77, among

others, all figure prominently in Sogg's due process argument before this Court, see Sogg Br. 10-22, but he cited none of those cases in his appeals court briefing, see Sogg 10th Dist. Opening Brief; see also Appellee & Cross-Appellant Wilton S. Sogg's Reply Brief Regarding His Cross-Appeal, *Sogg v. Dir., Ohio Dep't of Commerce* (10th Dist.), 2007-Ohio-3219, No. 06AP-883. And with good reason: He was not asserting a due process claim in the courts below. Sogg is limited to the takings claim that he actually asserted in his amended complaint and argued in the lower courts, rather than the newly hatched due process theory presented here for the first time.

**2. The UFA affords all of the process that is due to an original owner whose interest in unclaimed funds lapses by virtue of the owner's failure to act rather than any state action.**

Even if this Court were to consider Sogg's nascent due process theory despite his failure to state such a claim or brief it below, Sogg cannot identify a due process defect in the UFA. To raise a due process claim, some action by the State must have deprived the party of a liberty or property interest. *Blum v. Yaretsky* (1982), 457 U.S. 991, 1002. No state action deprived Sogg of a property right. Instead, under the UFA, "[i]t is the owner's failure to make any use of the property—and not the action of the State—that causes the lapse of the property right." *Texaco*, 454 U.S. at 530.

Even assuming that some state action deprived Sogg of a property interest, the UFA provided him with all the process that was due. First, Sogg was on notice that his property interest would lapse by inaction. "Generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply." *Texaco*, 454 U.S. at 532. "It is well established that persons owning property are charged with constructive knowledge of the relevant statutory provisions affecting the control or disposition of such property." *Id.* (citing *N. Laramie Land Co. v. Hoffman* (1925), 268 U.S. 276, 283). Constructive knowledge of the law, coupled with the publication required

by the UFA, R.C. 169.06, suffice “to satisfy all requirements of due process.” *Anderson Nat’l Bank*, 321 U.S. at 243.

Nor was Sogg entitled to a hearing before the State could retain the interest on his principal. It is not “an indispensable requirement of due process that every procedure affecting the ownership or disposition of property be exclusively by judicial proceeding.” *Id.* at 246. “In altering substantive rights through enactment of rules of general applicability, a legislature generally provides constitutionally adequate process simply by enacting the statute, publishing it, and, to the extent the statute regulates private conduct, affording those within the statute’s reach a reasonable opportunity both to familiarize themselves with the general requirements imposed and to comply with those requirements.” *Locke*, 471 U.S. at 108 (citing *Texaco* and *Anderson Nat’l Bank*). The UFA satisfies all of those requirements. With respect to unclaimed property, no additional process is due, because the original owner has forfeited his interest in the property, and thus “proceedings against [the property] deprive him of nothing.” *Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 316 (citing *Anderson Nat’l Bank*, 321 U.S. 233). That is why Sogg’s heavy reliance on *State v. Lilliock* (1982), 70 Ohio St. 2d 23, is misplaced: Whereas the property owner in *Lilliock* had not forfeited his right to title in his property, *id.* at 25, Sogg did, through disuse, and thus he has only the right to the principal that the UFA confers on him.

The remaining due process cases on which Sogg relies are similarly irrelevant. First of all, all of the cited cases pre-date *Texaco* and *Locke*, where the Court reiterated that “[l]egislatures can enact substantive rules of law that treat property as forfeited under conditions that the common-law would not consider sufficient to indicate abandonment.” *Locke*, 471 U.S. at 106 n.15. Although that rule had been settled since the Supreme Court decided *Hawkins* in 1831, its

clarification in *Texaco* and *Locke* calls into question the continuing validity of the stale cases from other jurisdictions on which Sogg leans. Even if those cases remain good law, however, they are not relevant. The issue in *American Loan & Trust Co. v. Grand Rivers Co.* (W.D. Ky. 1908), 159 F. 775, 780, was not a State's infringement of due process rights, but instead the *federal* government's taking possession of unused property. And as the court explained, "within the states respectively it is the state," not the "national government," that is the "parens patriae to which ownerless property of any sort in any state of the Union reverts." *Id.* Thus, *American Loan* does not call into doubt the ability of a *State*, rather than the federal government, to take possession of unused property. Meanwhile, the problem in *Grieb v. Department of Liquor Control* (1950), 153 Ohio St. 77, was that the Liquor Control Board did not provide the property owner with notice that it was revoking his liquor license before it seized the property that he lawfully possessed. *Grieb* is therefore irrelevant for two reasons: First, Sogg, unlike *Grieb*, had no background entitlement to his unused property; and second, Sogg, again unlike *Grieb*, was on constructive notice that he had forfeited his rights.

- 3. The UFA reasonably furthers the State's legitimate interests in requiring property owners to act reasonably and affirmatively to retain their rights, reimbursing the State for services rendered, and raising revenue to benefit the citizens of Ohio.**

In addition to claiming that the UFA does not afford sufficient procedural due process, Sogg argues that the UFA does not advance a legitimate state interest as required by *Lilliock*. See 70 Ohio St. 2d at 28 ("In order for a property disposition statute to be constitutional in its application it must be rationally related to a legitimate state concern, such as deterring criminal activity . . ."). As explained above, however, *Lilliock* is not relevant here because Sogg, unlike the property owner in *Lilliock*, forfeited his right to title through neglect. What is more, the "the

decision in *Lilloock* was superseded” when the statute at issue there “was amended in 1985.” *State v. Nixon* (5th Dist. 2001), No. 2001CA00184, 2001 Ohio App. Lexis 4177, \*3.

Even assuming that *Lilloock* applies, however, forfeiture under the UFA advances three important state interests. First, the State has a longstanding interest in requiring owners to take affirmative steps and to make reasonable use of their property to retain their interests in it. See *Hawkins*, 30 U.S. (5 Pet.) at 466. Sogg does not claim that the actions that R.C. 169.01(B)(1)(a)-(f) requires of owners—one of which simply allows the owner to “indicate[ ] an interest in or knowledge of [the] funds”—are unreasonably burdensome, or that statutory time requirements for asserting ownership rights in unclaimed funds is unreasonably short.

Retaining the interest is also a reasonable quid pro quo for services rendered. This includes perpetually safeguarding funds in a centralized location for the benefit of dilatory owners and preventing financial or other institutions from reaping a windfall from unclaimed funds that those institutions have no right to keep, publishing notices in newspapers of general circulation, R.C. 169.06, funding the Division’s expenses in administering the program, Am. Stip. ¶¶ 12-14, 18, and processing claims, R.C. 169.08(A).

The UFA also serves “a public purpose by raising revenue to benefit all citizens of the state.” Op. ¶ 30 (quoting *Smyth*, 845 N.E.2d at 222). The interest retained by the UFA provides an important and significant source of the State’s revenue. Am. Stip. ¶ 20. The interest is also used to fund other programs in Ohio, including housing development, job development, and savings and loan assurance. *Id.* ¶¶ 13-15, 31-32. Thus, the UFA advances legitimate purposes by conferring public benefits.

Finally, Sogg asserts that, because forfeiture is a “penal” action, the State’s interests in declaring forfeiture must be to abate a nuisance or to terminate unlawful activity. Sogg Br. at 19.

But again Sogg is wrong. Forfeiture is permissibly civil, not penal, when the original owner's property interests are lost through the owner's inaction or disuse under a valid statute. See *Texaco*, 454 U.S. at 526; *Mullane*, 339 U.S. at 316; *Anderson Nat'l Bank*, 321 U.S. at 243. *Kiser*, on which Sogg relies, is therefore beside the point, because in that case the common law rules of abandonment applied, so the owner, who had not evinced an intent to give up title, retained an interest in the property. 85 Ohio St. at 131. Here, by contrast, Sogg forfeited his property interests under the UFA—in a manner that *Texaco* allows—and he accordingly did not retain a background entitlement to the property.

**C. Should the Court reverse the appeals court and remand to the trial court, the Court should instruct the trial court to limit the class to a two-year statute of limitations.**

In ruling that the State is not liable, the court of appeals overruled as moot the State's assignment of error relating to the applicable statute of limitations for the class. Op. ¶¶ 35-36. Should the Court reverse the appeals court's decision on the takings question, the Court should instruct the trial court to limit the eligible class to a two-year statute of limitations, because Sogg's suit (which includes a constitutional claim under 42 U.S.C. § 1983) must be construed as an action for injury to person or personal property.

**1. Ohio's two-year general statute of limitations for unspecified personal injury actions, R.C. 2305.10(A), governs claims asserted under § 1983.**

Although 42 U.S.C. § 1983 does not contain a statute of limitations, as a matter of federal law, "§ 1983 claims are characterized as personal injury actions" and are subject to a state's "statute of limitations governing actions 'for an injury to the person or the reputation of any person.'" *Wilson v. Garcia* (1985), 471 U.S. 261, 266, 278, 280. If a State has more than one personal injury statute of limitations, the State's general or residual statute of limitations for unspecified personal injury actions applies. *Owens v. Okure* (1989), 488 U.S. 235, 236.

To be consistent with the characterization of § 1983 claims in *Wilson* and *Owens*, this Court must determine that Ohio's two-year statute of limitations for unspecified personal injury actions governs § 1983 claims. Although Ohio has two general or residual statutes of limitations, only the two-year limitations period prescribed by R.C. 2305.10(A) governs unspecified actions resulting from personal injury or injury to personal property. The four-year statute of limitations, R.C. 2305.09(D), is Ohio's "catch-all" statute of limitations for general negligence claims that do not involve personal or "bodily" injuries. See *Corpman v. Boyer* (1960), 171 Ohio St. 233, 234. The two-year limitations period, however, governs unspecified actions for personal injury or injury to personal property. R.C. 2305.10(A).

The issue of which statute of limitations applies to § 1983 actions is pending before this Court. See *Nadra v. Mbah*, No. 2007-0525 (oral argument held Feb. 27, 2008). The federal Sixth Circuit and nine Ohio appellate courts have held that the two-year period under R.C. 2305.10(A) applies to § 1983 claims. See, e.g., *Browning v. Pendelton* (6th Cir. 1989), 869 F.2d 989 (en banc); *Peoples Rights Org. v. Montgomery* (12th Dist. 2001), 142 Ohio App. 3d 443, 482. The Tenth and Eleventh District Courts of Appeal, however, have held that R.C. 2305.09(D) is Ohio's general or residual statute of limitations governing § 1983 claims. *Weethee v. Boso* (10th Dist. 1989), 64 Ohio App. 3d 532, 534-35; *Bojac Corp. v. Kutevac* (11th Dist. 1990), 64 Ohio App. 3d 368, 370-371. In *Nadra*, the State of Ohio submitted an amicus brief supporting the view that a two-year limitations period applies to § 1983 claims. See Merit Brief of *Amicus Curiae* State of Ohio in Support of Defendants-Appellants Susan Mbah and Mindy Grote, *Nadra v. Mbah*, No. 2007-0525. If the Court in *Nadra* agrees with the State of Ohio and holds that a two-year period applies, and if the Court in this case reverses the appeals court's

takings holding, then the Court should remand this case with instructs to apply the two-year statute of limitations.

**2. The no-limitations provision of R.C. 169.08(B) applies only to statutory claims for unclaimed principal, not to constitutional claims for interest.**

R.C. 169.08 sets specific rules and procedures for making a claim and provides that “[n]o statute of limitations shall bar the allowance of a claim.” R.C. 169.08(B). The same statute also prohibits claims for any interest earned on unclaimed funds. R.C. 169.08(D). Thus, no statutory claim to recover interest exists. Sogg admits as much. See Am. Compl. ¶ 19 (alleging the futility of making any request for interest because of the statute’s specific prohibition).

Since both R.C. 169.08(B) and 169.08(D) concern the same general subject matter, they must be read in *pari materia*, see *State ex rel. Gains v. Rossi* (1999), 86 Ohio St. 3d 620, 622, and construed consistently with legislative intent. *State ex rel. Choices for South-Western City Sch. v. Anthony*, 108 Ohio St. 3d 1, 2005-Ohio-5362 ¶ 40. The General Assembly did not intend R.C. 169.08(B)’s no-limitations provision to apply to claims for interest earned on unclaimed principal, because such claims are not allowed by R.C. 169.08(D). Instead, such claims constitute a collateral constitutional challenge on the UFA itself rather than the type of claim for contemplated by the General Assembly. The Court accordingly should construe R.C. 169.08(B)’s no-limitations provision to apply only to statutory claims for unclaimed principal, not to claims for interest.

**3. Sogg’s reliance on *State ex rel. Hudson v. Kelly* is unavailing because this Court effectively reversed that case in *State ex rel. McLeary v. Hilty*.**

Sogg argues that, even without R.C. 169.08(B)’s no-limitations provision, his equitable restitution claim is not subject to any statute of limitations. Relying on the intermediate appellate decision in *State ex rel. Hudson v. Kelley* (3d Dist. 1935), 55 Ohio App. 314, Sogg contends that the State holds the interest on unclaimed funds in trust, exempt from any statute of limitations.

*Hudson* held that a statutory reversion clause could not time-limit claims to unclaimed funds without violating the Ohio Constitution's Takings Clause. 55 Ohio App. at 322.

This Court effectively overruled *Hudson*, however, five years later in *State ex rel. McLeary v. Hilty* (1941), 139 Ohio St. 39. *McLeary* reached the Court from the Lucas County Court of Appeals, which, in ruling that an owner's claim for unclaimed funds was barred by the statute of limitations, certified its decision as in conflict with *Hudson*. *Id.* at 42. This Court affirmed, holding that the receipt of funds pursuant to statute did not constitute a continuing and subsisting trust, and therefore was not subject to the no-limitations provision of former G.C. 11236. *Id.*, syllabus ¶ 2 (approving and following *Townsend v. Eichelberger* (1894), 51 Ohio St. 213, syllabus ¶ 1). Thus, because "it is fundamental that the Legislature may provide a specific and reasonable method and limitation for the exercise of a right conferred in general terms by the Constitution," the Court held that the owner's claim was barred by the statute of limitations. *Id.* at 43. Sogg therefore not only relies on a case that this Court has rejected, but his argument is precluded by *McLeary's* reasoning.

**CONCLUSION**

For the above reasons, this Court should affirm the judgment of the court of appeals.

Respectfully submitted,

MARC DANN (0039425)  
Attorney General of Ohio



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WILLIAM P. MARSHALL (0038077)

Solicitor General

BENJAMIN C. MIZER (*pro hac vice*  
application pending)

Deputy Solicitor

WILLIAM J. COLE (0067778)

JOHN T. WILLIAMS (0024449)

Assistant Attorneys General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

wmarshall@ag.state.oh.us

Counsel for Defendant-Appellee  
Ohio Department of Commerce

**CERTIFICATE OF SERVICE**

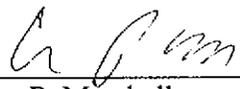
I certify that a copy of the foregoing Merit Brief of Defendant-Appellee Ohio Department of Commerce was served by U.S. mail this 25th day of March 2008 upon the following counsel:

William C. Wilkinson  
Craig A. Calcaterra  
Thompson Hine LLP  
10 West Broad Street, 7th Floor  
Columbus, Ohio 43215

John R. Wylie  
Futterman Howard Watkins Wylie & Ashley, Chtd.  
122 South Michigan Avenue, Suite 1850  
Chicago, Illinois 60603

Arthur T. Susman  
Susman Heffner & Hurst LLP  
Two First National Plaza, Suite 600  
Chicago, Illinois 60603

Counsel for Plaintiff-Appellant  
Wilton S. Sogg

  
\_\_\_\_\_  
William P. Marshall