IN THE SUPREME COURT OF OHIO

WILTON S. SOGG, individually and on behalf of a class of all others similarly situated,	)	Case No. 2007-1452
Plaintiff-Appellee and Cross Appellant,	)	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
v.	)	
DOUG WHITE, Director of the Ohio Department of Commerce,	)	Court of Appeals No. 06AP-883
Defendant-Appellant.	)	

REPLY BRIEF OF APPELLANT WILTON S. SOGG

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. LAW AND ARGUMENT 2

A. Under Defendant's Argument, and the Holding of the Tenth District, the Act Denies Due Process 2

1. Mr. Sogg Did Not Waive His due Process Arguments 2

2. The Forfeiture of the Interest Earned on Unclaimed Property Does Not Further Any Legitimate State Interest 4

(a) The forfeiture of interest earned on unclaimed property is not a "quid pro quo" for the State's services; the State already recovers those costs through the imposition of a 5% administrative charge 5

(b) Raising Revenue Is Not A Proper Exercise of the Police Power 7

(c) "[R]equiring owners to take affirmative steps and to make reasonable use of their property" is not a proper purpose of the State's police power, nor is that purpose furthered by the Act 8

3. Contrary to Defendant's Argument, the Act Fails to Provide Procedural Due Process 10

4. The Cases Relied Upon By Defendant From Other States Were Wrongly Decided or Are Irrelevant, and Defendant Ignored Several Other Cases which Have Held That the Retention of Earnings on Unclaimed Property Is a Taking of Private Property 15

B. No Statute of Limitations Is Applicable to the Bulk of Plaintiff's Claims 19

III. CONCLUSION 20

PROOF OF SERVICE ..... unnumbered

TABLE OF AUTHORITIES

CASES

Alvarez v. Pappas
(Ill. April 17, 2008), No. 104922, 2008 WL 1746669 19
American Loan & Trust Co. v. Grand River Co.
(W. D. Ky. 1908), 159 F. 775 14
Anderson Nat. Bank v. Luckett
(1944), 321 U.S. 233, 64 S. Ct. 599 11
Canel v. Topinka
(Ill. 2004), 212 Ill. 2d 311, 818 N.E.2d 311 ..... 18, 19
City of Terre Haute v. Kersey
(Ind. 1902), 159 Ind. 300, 64 N.E. 469 7
Clark v. Strayhorn (Tex. App. 2006),
184 S.W. 3d 906, rev. denied, cert. denied (2006). 127 S. Ct. 508 17
Clovis National Bank v. Calloway
(N.M. 1961), 69 N.M. 119 14
Ex Parte Holt
(Okla. 1918), 178 P. 260 7
Fairmont Creamery Co. v. Minnesota
(1927), 274 U.S. 1, 47 S. Ct. 506 5
Fong v. Westly
(Cal. App. 2004), 117 Cal.App.4th 841, 12 Cal.Rptr.3d 76 17
Fuentes v. Shevin
(1972), 407 U.S. 67, 92 S. Ct. 1983 13
Grieb v. Department of Liquor Control of State
(1950), 153 Ohio St. 77 12
Hawkins v. Barney's Lessee
(1831), 30 U.S. (5 Pet.) 457 9
Hawley v. Kansas Dep't of Agric.
(2006), 132 P. 3d 870 17
Holeton v. Crouse Cartage Company
(2001), 92 Ohio St. 3d 115 5
Hooks v. Kennedy
(La. App. 2007), 961 So. 2d 425
writ denied (2007), 967 So.2d 507 17
Hyle v. Porter
(2006), 170 Ohio App. 3d 710 4
In re M.D.
(1988), 38 Ohio St. 3d 149 4
Logan v. Zimmerman Brush Co.
(1982), 455 U.S. 422, 102 S. Ct. 1148 13
Lucas v. South Carolina Coastal Council
(1992), 505 U.S. 1003, 112 S. Ct. 2886 8
M.W. Watson, Inc. v. City of Topeka
(Kan. 1965), 194 Kan. 585, 400 P. 2d 689 7

Mugler v. Kansas,
123 U.S. 623, 8 S. Ct. 273 (1887) 8
Pittsburgh, C. & St. L. R. Co. v. State
(1892), 49 Ohio St. 189 7
Pruneyard Shopping Center v. Robins
(1980), 447 U.S. 74, 100 S. Ct. 2035 14
Robinson v. City of Norfolk
(1908), 108 Va. 14, 60 S.E. 762 7
Sensenbrenner v. Crosby
(1974), 37 Ohio St. 2d 43 12
Simon v. Weissman
(E. D. Pa. Aug. 27, 2007), No. 04-941, 2007 WL 2461707 17
Small Engine Shop, Inc. v. Cascio
(5th Cir. 1989), 878 F. 2d 883 11
Smolow v. Hafer
(Pa. Commw. 2005), 867 A. 2d 767 17
State ex rel Pierce v. Gowdy
(Mont. 1922), 62 Mont. 119, 203 P. 1115 7
State ex rel. Hudson v. Kelly
(1935), 55 Ohio App. 314 19
State ex rel. McLeary v. Hilty
(1941), 139 Ohio St. 39 ..... 19, 20
State ex rel. Pizza v. Rezcallah
(1998), 84 Ohio St. 3d 116 5
State v. Anderson
(Tenn. 1920), 144 Tenn. 564, 234 S.W.2d 768 7
State v. Craig
(1969), 19 Ohio App.2d 29 5
State v. Lilliock
(1982), 70 Ohio St. 3d 23 ..... 2, 12
State v. Otis Elevator Company
(N.J. 1953), 12 N.J. 1 14
State v. Phoenix Savings Bank & Trust Co.
(Ariz. 1942), 60 Ariz. 138 14
State v. Roberts
(1995), 102 Ohio App. 3d 514 13
State v. Sav. Union Bank & Trust Co.
(Cal. 1921), 186 Cal. 294, 199 P. 26 14
State v. Sec. Sav. Bank
(Cal. 1921), 186 Cal. 419, 199 P. 791
aff'd. Sec Sav. Bank v. State (1923), 263 U.S. 282 14
Suever v. Connell
(N. D. Cal. 2007), No. C 03-00156 RS, 2007 WL 3313954 18
Taylor v. Westly
(9th Cir. 2005), 402 F. 3d 924 ..... 9, 18

Texaco, Inc. v. Short
(1982), 454 U.S. 516, 102 S. Ct. 781 ..... passim
U. S. v. Sperry Rand Corp.
(1989), 493 U.S. 52, 60, 110 S. Ct. 387 6
United States v. Locke
(1985), 471 U.S. 84, 105 S. Ct. 1785 ..... 11, 15, 16, 17
Van Slooten v. Larsen
(Mich. 1980), 299 N. W. 2d 704 17
Webb's Fabulous Pharmacies, Inc. v. Beckwith
(1980), 449 U.S. 155, 101 S. Ct. 446 ..... 6, 8
Weiler v. Department of Liquor Control
(May 26, 1994), Franklin App. No. 93AP109-1289, 1994 WL 232248 13

CONSTITUTIONS AND STATUTES

Art. I, §19 of the Ohio Constitution 10
Fifth Amendment to the United States Constitution 10
Fifth and Fourteenth Amendments to the United States Constitution 10
R.C. 169.08(D), Ohio Unclaimed Funds Chapter (the "Act") ..... passim

OTHER AUTHORITIES

Jed Rubenfeld, *Usings*, 102 Yale L. J. 1077 (1993) 8

I. INTRODUCTION

In the parties' Amended Stipulation of Facts presented to the trial court together with their cross motions for summary judgment, Defendant stipulated (1) that one "purpose of the Unclaimed Funds Chapter is [t]o protect the property rights of the owner and to reunite the owner with the funds," and (2) that "the unclaimed monies are held in trust in perpetuity for the benefit of the owners of the unclaimed property. The funds never become the property of the State of Ohio." (R.106, Amended Stipulation, ¶¶9, 11.)

Directly contradicting these stipulated facts, Defendant now argues to this Court that owners of unclaimed property held in trust by Defendant in fact have forfeited and lost a property right, the right to the earnings on their unclaimed property, and by implication that the State can and does in fact take title during the period that property is held in trust by Defendant. As discussed in Mr. Sogg's Merit Brief, and further discussed below, Defendant's argument fails because (1) the forfeiture of an owner's property rights bears no real or substantial relationship to any legitimate legislative purpose, and so is beyond the State's police power, and (2) with its automatic, immediate, and irrevocable severing of the owner's property right, it fails to provide constitutionally mandated procedural due process.

In denying the return of the interest earned on unclaimed property held in trust by Defendant pursuant to R.C. 169.08(D), the Ohio Unclaimed Funds Chapter (the "Act") authorizes the taking of private property without compensation and without due process. This Court should hold R.C. 169.08(D) unconstitutional, and therefore void and unenforceable, and reverse the judgment of the Tenth District. Further, as argued in

Plaintiff's Merit Brief, under the Act's express language there is no statute of limitations applicable to an owner's claim for the return of the unlawfully withheld interest.

II. LAW AND ARGUMENT

Defendant's entire argument is premised on the State's right to declare a statutory forfeiture of unclaimed property, in whole or in part, one that takes effect immediately, and which is irrevocable and affords no hearing. Defendant's argument fails for several reasons. As shown above, it contradicts Defendant's own statements as to the purpose and effect of the Act, which is to preserve and protect, not deny owners' rights in unclaimed property. More importantly, Defendant's argument is based on a wholly unwarranted and incorrect conclusion regarding the scope of the State's power with respect to property subject to the Act.

A. Under Defendant's Argument, and the Holding of the Tenth District, the Act Denies Due Process.

A statute that orders the forfeiture of private property is constitutional only if it "compl[ies] with the Rules of Civil Procedure," and is "rationally related to a legitimate state concern[.]" *State v. Lilliock* (1982), 70 Ohio St. 3d 23, 28. As shown in Plaintiff's Merit Brief, the Act fails both requirements. Defendant's effort to show otherwise in response falls short, as does his argument that Plaintiff waived these due process issues.

1. Mr. Sogg Did Not Waive His Due Process Arguments.

Defendant asserts that the Court should not consider the due process objections raised in Plaintiff's Merit Brief on the grounds that he "neither stated a due process claim in his amended complaint nor pressed a due process theory in the courts below." (Def.'s Br. at 23.) Both points are mistaken, and the Court should consider the important due process issues at stake in this case.

First, as a factual matter, the assertion that Mr. Sogg did not "press[] a due process theory in the courts below" is demonstrably untrue. While Mr. Sogg did not include a due process claim as a count in his complaint, he did raise the due process issue during summary judgment proceedings as an objection to the State's argument that an owner's right to collect interest earned on his or her property automatically passes to the State upon its delivery into the State's custody. (R. 103; Sogg's Reply Regarding Summary Judgment, March 30, 2006, at 2 (arguing that "[t]he State cannot take title to property, even truly abandoned property, without a judicial determination that the property is in fact ownerless") and 3 (arguing that adopting the State's position would allow it to "take any private property with impunity simply by declaring it subject to escheat . . . without regard to whether there was judicial intervention necessary to provide due process".) The trial court relied, in part, upon that reasoning in granting Mr. Sogg summary judgment and denying the State summary judgment. (Appx. A 37-38, 41-42 at ¶¶ 20, 30–32.)

Mr. Sogg's response to the State's Opening Brief in the Court of Appeals discussed the issue in greater detail, devoting a separate point heading to the proposition that the State's interpretation of the Act would "Deprive Property Owners of Procedural Due Process Rights."[1] (Combined Brief of Appellee & Cross-Appellant Wilton S. Sogg, Dec. 4, 2006, at 14–15.) The State replied to Mr. Sogg's due process objections in its Combined Response/Reply Brief, at 7–8. Clearly, therefore, the due process issue was "pressed" in the lower courts.

[1] Ironically, the State cites this brief for the proposition that Mr. Sogg "fail[ed] to raise a due process argument" before the Court of Appeals. (Def.'s Br. at 24.) It stands for the opposite proposition.

Second, the fact that Mr. Sogg's Amended Complaint does not include a count alleging a due process violation misses the point. Mr. Sogg raised his due process objections *in response to* the State's contention that there is no taking in this case because a property owner's common-law right to collect interest earned on his or her property passes to the State automatically upon its delivery into the State's custody as unclaimed property.

Even if Mr. Sogg had not raised his due process objection in the trial court, or on appeal, this Court would still have discretion to address the issue. *See Hyle v. Porter* (2006), 170 Ohio App. 3d 710, 718 (holding that "appellate courts have discretion to review a claimed denial of constitutional rights not raised below," citing *In re M.D.* (1988), 38 Ohio St. 3d 149). Here, the Tenth District's decision, if left to stand, and the Defendant's argument, would allow the destruction of private property rights merely upon the enactment of a statute, without any proper justification for the exercise of the State's police power, and without affording a hearing or any opportunity to be heard. Plaintiff's challenge points to the serious due process issues inherent in that position. This Court should not lightly disregard these serious constitutional issues that go the very heart of the government's power over private property rights by finding a waiver.

2. The Forfeiture of the Interest Earned on Unclaimed Property Does Not Further Any Legitimate State Interest.

The protections afforded private property by the Takings Clauses give way to the police power only when its exercise "bears a substantial relationship to the public health, morals, and safety." *State ex rel. Pizza v. Rezcallah* (1998), 84 Ohio St. 3d 116, 131 (citations omitted). "Before the police power can be exercised to limit an owner's control of private property, it must appear that the interests of the general public *require* its

exercise and the means of restriction must not be unduly oppressive upon individuals." *Id.* (emphasis added). Absent a real and substantial relationship between the forfeiture and some legitimate public necessity, "the statute is unconstitutional." *State v. Craig* (1969), 19 Ohio App.2d 29, 30, citing, *inter alia, Fairmont Creamery Co. v. Minnesota* (1927), 274 U.S. 1, 47 S. Ct. 506. As this Court has held, "[t]o be truly in the public welfare within the meaning of Section 19, and thus superior to private property rights, any legislation must be reasonable, not arbitrary, and must confer upon the public a benefit commensurate with its burdens upon private property." *Holeton v. Crouse Cartage Company* (2001), 92 Ohio St. 3d 115, 121.

Here, the State's forfeiture of a basic property interest, the right to the earnings on one's private property, fails that test. Plainly, unclaimed property poses no threat to public health or safety. It is not a nuisance. Nor can it reasonably be argued that it is immoral to allow property to become subject to the Act. This is especially true of those owners who did not even know they owned the property before it came into the Defendant's custodial trust, or which was mistakenly or improperly reported to the Defendant by its third party holder. Simply put, there is no *public necessity* sufficient to support the forfeiture of any interest in the property subject to the Act. The three State interests suggested by Defendant do not change that conclusion.

(a) The forfeiture of interest earned on unclaimed property is not a "quid pro quo" for the State's services; the State already recovers those costs through the imposition of a 5% administrative charge.

Defendant claims that the forfeiture is proper because it acts a "quid pro quo for services rendered." (Def.'s Br. at 28.) But the State already retains, "as a fee for administering the funds, five percent of the total amount of unclaimed funds payable to

the claimant." R.C. 169.08 (D). Thus, the State cannot justify its retention of the interest earned on the unclaimed property as a fee for services. The Supreme Court rejected the very same argument in *Webb's Fabulous Pharmacies, Inc. v. Beckwith* (1980), 449 U.S. 155, 101 S. Ct. 446. There, the government charged an administrative fee and also, by ordinance, kept the interest earned on private funds while held by the clerk of the court. The Supreme Court held:

> It is obvious that the interest was not a fee for services, for any service obligation to the county was paid for and satisfied by the substantial fee charged ... and described specifically ... as a fee 'for services' by the clerk's office.

Id., 449 U.S. at 162, 101 S. Ct. at 451. Rather, the Court held, the retention of interest earned on private funds held by a clerk of the court "where there is a separate and distinct state statute authorizing a clerk's fee for services rendered based upon the amount of principal deposited" violated the Takings Clause. *Id.*, 449 U.S. at 164, 101 S. Ct. at 452 (internal quotation marks omitted).[2]

Even without the five per cent administrative fee already charged, the forfeiture still could not be justified as an administrative fee. Although such fees need not be "precisely calibrated," the government may only recover an amount which is a "fair approximation of the cost of benefits supplied." *U. S. v. Sperry Rand Corp.* (1989), 493 U.S. 52, 60, 110 S. Ct. 387, 394 (internal quotations omitted). Therefore, any fee charged for services must be reasonably related to the actual costs incurred by the State in providing the services. *Id.*, 493 U.S. at 60, 110 S. Ct. at 394. The government may not, as Defendant claims here, simply appropriate the entire amount earned, and "label [ ] the

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[2] The Supreme Court also found in *Webb's* that the fact that the state had "mandated the accrual of interest does not mean the State or its designate is entitled to assume ownership of the interest." *Id.*, 449 U. S. at 162, 101 S. Ct. at 451.

booty as a user fee." *Id.*, 493 U.S at 62, 110 S. Ct. at 394-95. When the fees "authorized ... are ... so clearly excessive," they "belie their purported character as user fees." *Id.*

That is the case here, where the State exacts 100% of the interest earned on the private property it holds in trust under the Act, regardless of how much is earned, and without any showing that amount reasonably approximates its actual costs. The forfeited amount is not a user fee, and cannot be justified as such.

(b) Raising Revenue Is Not A Proper Exercise of the Police Power.

As another justification, Defendant states that "[t]he interest retained by the Act provides an important and significant source of the State's revenue." (Def.'s Br. at 28.) This Court has previously held, however, that raising revenues is not a proper exercise of the police power. *See e.g., Pittsburgh, C. & St. L. R. Co. v. State* (1892), 49 Ohio St. 189, 202.

The *Pittsburgh* decision comports with the holdings of supreme courts of numerous other states, all of which also have held that the police power cannot be used for the purpose of raising revenue. *See, e.g., State v. Anderson* (Tenn. 1920), 144 Tenn. 564, 234 S.W.2d 768, 776-77; *M.W. Watson, Inc. v. City of Topeka* (Kan. 1965), 194 Kan. 585, 592, 400 P. 2d 689, 695; *City of Terre Haute v. Kersey* (Ind. 1902), 159 Ind. 300, 64 N.E. 469, 471; *Robinson v. City of Norfolk* (1908), 108 Va. 14, 60 S.E. 762, 764; *Ex Parte Holt* (Okla. 1918), 178 P. 260, 261-62; *State ex rel Pierce v. Gowdy* (Mont. 1922), 62 Mont. 119, 127, 203 P. 1115, 1117.

There is a sound basis for this prohibition. If accepted, Defendant's argument would allow the State to declare any property forfeited, without compensation, as a means of raising revenue for the public benefit. But that is exactly what the Takings

Clauses of the State and Federal Constitutions are meant to prevent. In fact, it is this *use* of private property for public benefit without compensation that lies at the heart of the Takings Clauses. A taking occurs when the government exploits "some productive attribute or capacity of private property[.]" Jed Rubenfeld, *Usings*, 102 Yale L. J. 1077, 1114-15 (1993). As Professor Rubenfeld states,

> [T]he impressment of property into state service is the true constitutional danger to avoid. Thus from *Mugler* [*v. Kansas*, 123 U.S. 623, 8 S. Ct. 273 (1887)] to *Lucas* [*v. South Carolina Coastal Council*](1992), 505 U.S. 1003, 112 S. Ct. 2886], the [Supreme Court] ha[s] repeatedly invoked the language of usings to support a finding of a taking. And for good reason: judges have always known, beneath the vagaries of takings doctrine, that the strongest case for compensation is presented by facts ... indicating that the state has in effect taken over property and exploited it for some government-dictated use.

Id. at 1129. That was the basis for the Supreme Court's holding in *Webb's*: "The county's *appropriation of the beneficial use of the fund*" represented a taking of private property for which compensation was due." 449 U.S. at 163-64, 101 S. Ct. at 452 (emphasis added).

Thus, the State cannot justify its retention of the interest earned on unclaimed property as an exercise of the police power designed to raise revenue. It is exactly that use of private property that is subject to the Takings Clauses of the State and Federal Constitutions.

(c) "[R]equiring owners to take affirmative steps and to make reasonable use of their property" is not a proper purpose of the State's police power, nor is that purpose furthered by the Act.

Finally, Defendant contends that forfeiture of the interest earned on unclaimed property while it is held in trust by the Defendant furthers the State's "longstanding interest in requiring owners to take affirmative steps and to make reasonable use of the

property to retain their interest in it." (Def.'s Br. at 28.) What exactly this means Defendant does not explain, and in any event it is hard to see what *public* purpose it serves. Unclaimed property is held by third parties such as banks and insurance companies, which undoubtedly invest the property themselves; they do not let those funds sit idle. The "affirmative steps" and "reasonable use" by the owner would produce no greater public benefit than the uses to which the property is already put by those third party holders.

Nor does the Act even require the owner to use his or her property in order to avoid forfeiture. Under the Act, property will not be reported to the State as unclaimed under the Act if the owner merely "indicates an interest in or knowledge of such funds." R.C. 169.01(B)(1)(e). The owner need not take possession of his property, nor make any use of it whatsoever.[3] Moreover, some property is reported to the Defendant as unclaimed because of the holder's mistake, *see, Taylor v. Westly* (9th Cir. 2005), 402 F. 3d 924, or because its owner does not even know of its existence, such as in the case of an heir to a deceased distant relative. In such cases, the owner will have had no opportunity to take "affirmative steps" and make "reasonable use" of the property before losing his property interest to the State.

Thus, while the Act may provide some benefit to an individual property owner, by providing a centralized location for an owner to discover and retrieve private property, the *public* benefit garnered by this purpose is at best attenuated. Plainly, this justification

[3] Defendant's reliance on *Hawkins v. Barney's Lessee* (1831), 30 U.S. (5 Pet.) 457 does not suggest a different result. That case dealt with what was in essence an adverse possession statute, by which a real property owner lost his right to eject an occupier. Here, the owner is always recognized as such, and there is no adverse claim by the third party holder that he or she succeeded to title due to the owner's alleged inaction.

for the forfeiture of a basic property interest long recognized in Ohio bears no relation to the "health, safety, morals or general welfare of the public," and is insufficient to overcome the protections afforded by the State and Federal Constitutions.

* * *

Unclaimed property is not inimical to the public health, safety, morals, or general welfare, and the forfeiture of interest earned on that property bears no real and substantial relationship to a legitimate State interest. The forfeiture called for in R.C. 169.08(D) is arbitrary and capricious, and is nothing more than an unconstitutional taking of private property without compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Art. I, §19 of the Ohio Constitution. The State has no basis to exercise its police power to forfeit the interest on unclaimed property.

3. Contrary to Defendant's Argument, the Act Fails to Provide Procedural Due Process.

Defendant also argues that the mere existence of the Act provides "all the process that was due," and that because "he has forfeited his interest in the property," an owner of unclaimed property is not "entitled to a hearing before the State could retain the interest on his principal." (Def.'s Br. at 25-26.)

Defendant's argument mistakes the *effect* of a legislative enactment with the *process* necessary to support that effect. Thus, in *Texaco, Inc. v. Short* (1982), 454 U.S. 516, 102 S. Ct. 781, the primary case upon which Defendant relies, while the Court found that under the circumstances of that case the state could exercise its police power to declare a dormant mineral interest forfeited to the surface owner, not the state, the state still had to provide the full range of due process protections – including notice and an opportunity to be heard – before the owner of those mineral interests lost title. The Court

in *Texaco* noted that "it is essential to recognize the difference between the self-executing feature of the statute and a subsequent judicial determination that a particular lapse did in fact occur." *Id.*, 454 U.S. at 533, 102 S. Ct at 794. Thus, even if a statute appears to deny a property right automatically, as Defendant argues occurs with the Act, there still must be a hearing to determine whether the statute was properly applied. The Supreme Court held in *Texaco*:

> It is undisputed that, before judgment could be entered in a quiet title action that would determine conclusively that a mineral interest has reverted to the surface owner, the full procedural protections of the Due Process Clause – including notice reasonably calculated to reach all interested parties and a prior opportunity to be heard – must be provided.

454 U.S. at 534, 102 S. Ct. at 794.[4]

As explained by the Fifth Circuit in *Small Engine Shop, Inc. v. Cascio* (5th Cir. 1989), 878 F. 2d 883, consistent with the due process discussion in *Texaco*, the effect of a legislative enactment and the procedure necessary to support that effect are two different things. While in proper circumstances a statute may dictate the loss of property, the predicate for the application of the statute must be established in a hearing with an opportunity for the owner to be heard. As the Fifth Circuit found, "[A]ny other

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[4] Defendant also relies on *United States v. Locke* (1985), 471 U.S. 84, 105 S. Ct. 1785 and *Anderson Nat. Bank v. Luckett* (1944), 321 U.S. 233, 64 S. Ct. 599 as support for his argument that no hearing is required before the State obtains title to the interest earned on unclaimed property. Those cases hold no such thing, and in fact recognize the necessity of a hearing before title is finally divested. In *Locke*, the Court noted that "notice and a hearing on the adjudicative fact of whether the required filings were actually made" had been provided by the Bureau of Land Management, and that the owners had in fact availed themselves of that process. *Id.*, 471 U.S. at 109, n. 16, 105 S. Ct. at 1800, n. 16. In *Anderson*, which dealt with an unclaimed property act in the State of Kentucky, the Supreme Court also specifically noted that while the state has the power to take custody of dormant bank accounts, exercise of that power did not affect the owner's title. "[P]rior to a judicial decree of actual abandonment the [owners] will not be deprived of their property by surrender of their bank accounts to the state." *Id.*, 321 U.S. at 241, 64 S. Ct. at 604.

conclusion would allow the State to destroy at will virtually any State-created property interest." *Id.* at 891.

> Issues of fact, then, if raised and proven by a mineral interest owner in a [*Texaco*] context, may prevent the ultimate loss of her mineral interest even after the statute has worked its effect. [*Texaco*] envisions such a contest as a separate due process issue from the process due in the enactment of the statute.

Id. at 892.

Thus, the fact that the Act provides, as Defendant argues, for the forfeiture of the property interest at issue in this case, does not mean that that forfeiture can be determined without a hearing to establish the facts necessary to enforce the forfeiture. No such hearing is contemplated by the Act, and so the forfeiture advocated by Defendant would be a denial of the due process protections long recognized by this Court and the United States Supreme Court.

As discussed in more detail in Plaintiff's Merit Brief, this Court has repeatedly held that "an adversary hearing ... complying with the Rules of Civil Procedure, is constitutionally mandated," even if not provided in a forfeiture statute. *Lilliock*, 70 Ohio St. 2d at 28; *see also*, *Grieb v. Department of Liquor Control of State* (1950), 153 Ohio St. 77, 80 (plaintiff's property right "could not be taken away without judicial inquiry and determination"); and *Sensenbrenner v. Crosby* (1974), 37 Ohio St. 2d 43, 44. In such a hearing, it is the State's burden to establish the facts to support forfeiture. *State v. Roberts* (1995), 102 Ohio App. 3d 514, 518; *Weiler v. Department of Liquor Control* (May 26, 1994), Franklin App. No. 93API09-1289, 1994 WL 232248, at *4.

The holdings of this Court are consistent with the repeated holdings of the United States Supreme Court. In *Logan v. Zimmerman Brush Co.* (1982), 455 U.S. 422, 433, 102 S. Ct. 1148, 1156, for example, the Supreme Court admonished:

> As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus it has become a truism that "some form of hearing" is required before the owner is finally deprived of a protected property interest. . . . To put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement (internal citations omitted).

Under the Act, the owner's loss of the right to the interest happens automatically and immediately upon the third party holder reporting the property to the State as unclaimed. That right is irrevocably lost, even if the property should not have been turned over to the State in the first place. The Act provides the owner with no mechanism to challenge the loss of his property right, nor does it require the State to prove the facts necessary to support its forfeiture.

Notice and hearing are especially important in the case of property subject to the Act, which is not in the owner's possession but rather is held by a third party prior to its delivery to the Defendant as unclaimed property and then taken by the State. Without notice and a hearing, an owner's property right is at the mercy of the third party holder, and the owner must rely on that party's good faith and diligence. *See Fuentes v. Shevin* (1972), 407 U.S. 67, 80, 92 S. Ct. 1983, 1994 (holding that "[t]he constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions," and is designed to prevent the unfair or mistaken deprivation of property).

It was just such an immediate and irrevocable loss of property rights without due process protections that led the Supreme Courts in Arizona, New Mexico, New Jersey, and California to strike down unclaimed property acts in those states. *See*, Plaintiff's Merit Brief at 12-15, citing *State v. Sav. Union Bank & Trust Co.* (Cal. 1921), 186 Cal. 294, 199 P. 26; *State v. Sec. Sav. Bank* (Cal. 1921), 186 Cal. 419, 199 P. 791, *aff'd. Sec Sav. Bank v. State* (1923), 263 U.S. 282; *State v. Phoenix Savings Bank & Trust Co.* (Ariz. 1942), 60 Ariz. 138; *Clovis National Bank v. Calloway* (N.M. 1961), 69 N.M. 119; and *State v. Otis Elevator Company* (N.J. 1953), 12 N.J. 1. Defendant failed to even address these cases.[5]

Defendant's argument, if accepted, would create the anomalous situation that the law would give greater protection to property whose owner has either died without heir or legatee, or which was actually abandoned in the common law sense, or which is itself a nuisance or was used in a criminal activity, than it would to property simply left in a bank account or uncollected from an insurance company. Surely, due process protections of unclaimed property, including the opportunity to be heard to contest the loss of a property right, must be at least equal to that afforded these other properties. Defendant's argument to the contrary is mistaken. Unless and until the State has proved the facts to support a

[5] As also discussed in Plaintiff's Merit Brief, at 11-12, the lack of due process also led the court in *American Loan & Trust Co. v. Grand River Co.* (W. D. Ky. 1908), 159 F. 775, to strike down a Federal statute that automatically after the passage of ten years gave title to unclaimed property in the court's registry to the United States. *Id.* at 781-83. Defendant's effort to distinguish *American Loan* on the basis that it involved a Federal, not state, statute is unpersuasive. The decision there was clearly based on the Fifth Amendment's prohibition against the taking of property without compensation or due process. *Id.* A "State is, of course, bound by the Just Compensation Clause of the Fifth Amendment." *Pruneyard Shopping Center v. Robins* (1980), 447 U.S. 74, 84, 100 S. Ct. 2035, 2042.

forfeiture, after having provided notice and an opportunity to an owner to be heard, the State cannot take title to private property.

4. The Cases Relied Upon By Defendant From Other States Were Wrongly Decided or Are Irrelevant, and Defendant Ignored Several Other Cases Which Have Held that the Retention of Earnings on Unclaimed Property Is a Taking of Private Property.

Defendant relies primarily on the decisions in *Texaco, Inc. v. Short* and *United States v. Locke*, to support his theory of forfeiture. These cases are inapposite. Unlike here, in both *Texaco* and *Locke* the Court found that the government had a sufficient basis for the exercise of its police power, allowing the government to regulate the property interests at stake in those cases. In *Texaco*, which dealt with an Indiana statute regulating the development of subsurface mineral interests, the Court, quoting the opinion of the Indiana Supreme Court in an earlier decision in that case, determined that there existed a valid justification for the state to exercise its police power:

> The existence of such stale and abandoned interests creates uncertainties in titles and constitutes an impediment to the development of the mineral interests that may be present and to the development of the surface rights as well. The Act removes this impediment by returning the severed mineral estate to the surface rights owner. There is a decided public interest to be served when this occurs. The extinguishment of such an interest makes the entire productive potential of the property again available for human use.

Id., 454 U.S. at 523, 102 S. Ct. at 789 (quotation marks omitted).

Similarly, in *Locke*, the Court noted that the government's prior "laissez-faire regime" in allowing mining claims on Federal land "had created virtual chaos with respect to public lands." *Id.*, 471 U.S. at 86, 105 S. Ct. at 1788. The regulation at issue, which required the owners of mining claims to make an annual filing, was "designed both to rid federal lands of stale mining claims and to provide federal land managers with up-

to-date information that allows them to make informed land management decisions." *Id.*, 471 U.S. at 87, 105 S. Ct. at 1789. The Court also found that "the power to qualify existing property rights is particularly broad with respect to the "character" of the property rights at issue" in *Locke*. *Id.*, 471 U.S. at 104, 105 S. Ct. at 1798. Those mining interests were a "unique form of property," and the United States, as surface owner, retained "broad powers over the terms and conditions upon which the public lands [could] be used, leased, and acquired." *Id.* (Citations omitted). As the Court stated, "[c]laimants thus must take their mineral interests with the knowledge that the Government retains substantial regulatory power over those interests." *Id.*, 471 U.S. at 105, 105 S. Ct. at 1798. Thus, the Court held, there were substantial bases for the government's use of its police power.

Conversely, as discussed above, the State here has no legitimate purpose in exercising its police power to cause the forfeiture of the interest on unclaimed property. Unclaimed property is not a unique form of property; it consists for the most part of cash and securities.[6] Its existence creates no "chaos" for the government or any other property owner, and its delivery to the State solves no intractable problems in title to or development of scarce resources. In fact, any "problem" created by the fact that an owner has lost contact with his or her property is purely the problem of the owner, not the public, and is remedied by the State taking it into custody so that it can be returned more easily to the owner. As shown above, it is not sitting unused. There is nothing to suggest,

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[6] *See* R.C. 169.02. (Appx. A 4-7; R. 106, Amended Stipulation at 2, ¶ 5.) Although not provided in the Act, the State at times takes custody of intangible non-cash and tangible property. If not returned to its owner, the State sells that property, and as with other money it holds in trust under the Act, the resulting funds are invested. (R. 106, Amended Stipulation at 2, ¶¶ 7, 8.)

certainly Defendants have never articulated. a reason for the State's concern, apart from its interest in appropriating the use of unclaimed property to generate revenue for the State. *Texaco* and *Locke* are inapposite at best, and provide no support for the State's attempt to forfeit the private property right at issue in this case.[7]

Nor do the decisions of other state courts cited by Defendant provide support. (Def.'s Br. at 20-22.) None of those cases discussed the due process implications of its holding. or considered whether the state had a valid basis to exercise its police power in enacting a statutory forfeiture of interest earned on unclaimed property. Several of those cases held simply that no taking occurred when the state obtained custody of the unclaimed property, a claim not at issue here. *See Smolow v. Hafer* (Pa. Commw. 2005), 867 A. 2d 767; *Hooks v. Kennedy* (La. App. 2007), 961 So. 2d 425, writ denied (2007), 967 So.2d 507; *Fong v. Westly* (Cal. App. 2004), 117 Cal.App.4th 841, 12 Cal.Rptr.3d 76. In addition, the courts in *Clark v. Strayhorn* (Tex. App. 2006), 184 S.W. 3d 906, 908, rev. denied, cert. denied (2006), 127 S. Ct. 508, and *Smolow* based their decisions on the failure of the state to pay interest, which is also not at issue here, not whether the interest belonged to the property owner and whether the state could pursuant to the constitution keep that interest without compensation.

Finally, the decision in *Simon v. Weissman* (E. D. Pa. Aug. 27, 2007), No. 04-941, 2007 WL 2461707, currently on appeal before the Third Circuit, was expressly rejected by the court in *Suever v. Connell* (N. D. Cal. 2007), No. C 03-00156 RS, 2007 WL

[7] Defendant also cited two state cases, *Hawley v. Kansas Dep't of Agric.* (2006), 132 P. 3d 870, and *Van Slooten v. Larsen* (Mich. 1980), 299 N. W. 2d 704, for the same proposition for which Defendant relies upon *Texaco* and *Locke*. Those cases also dealt with real property interests, and in each the court identified a legitimate interest for the state's exercise of its police power.

3313954, *1, a case not cited by Defendant.[8] The *Suever* court held: "Having unequivocally declared that it is holding the property on behalf of its true owner, the state cannot thereafter constitutionally refuse to return interest that is, under long established common law principles, *part* of that property[.]" *Id.* (Emphasis in original.) Defendant also failed to cite *Taylor v. Westly*, 402 F. 3d at 931, which held that the state held unclaimed funds in custodial trust for the owner's benefit, and those funds were not the state's property.

As noted, Defendant also ignored the holdings of the California, Arizona, New Mexico, and New Jersey Supreme Courts, discussed at Plaintiff's Merit Brief at 12-15, all of which held state unclaimed property statutes unconstitutional because they ordered the forfeiture or escheat of unclaimed property to the state without affording due process.

Defendant's effort to distinguish the decision of the Illinois Supreme Court in *Canel v. Topinka* (Ill. 2004), 212 Ill. 2d 311, 818 N.E.2d 311 also fails. That court held that under the Illinois unclaimed property statute, the state's rights are merely derivative of the owner's rights. Because "[a]t all times the shares of stock remained the private property of plaintiff[,] [u]nder the circumstances, the dividends, as an incident of ownership, were also private property." *Id.* 212 Ill. 2d at 331. Further, the fact that the *Canel* court limited its decision to dividends is of no moment. That court recently reaffirmed its holding in *Canel*, making clear that it applies to all property, not simply dividends: "the state [merely] assumes custody of the property and is responsible for its safekeeping. ... Ownership of the property remains with the owner and never vests in the state." *Alvarez v. Pappas* (Ill. April 17, 2008), No. 104922, 2008 WL 1746669, at *5.

[8] The *Suever* court also expressly rejected the Tenth District's holding in the present case.

Moreover, the fact that the Illinois Supreme Court did not discuss *Texaco* in *Canel* does nothing to take away from the relevance of that court's holding here because, as shown here and in Plaintiff's Merit Brief, *Texaco* is irrelevant here save for its due process holding.

Like the Tenth District's decision in this case, the cases from other jurisdictions relied upon by Defendant provide no guidance here. Simply put, there is little or no support for Defendant's claim that the State of Ohio can forfeit private property interests in unclaimed property simply by passing a statute.

B. No Statute of Limitations Is Applicable to the Bulk of Plaintiff's Claims.

Finally, the State argues that if the Court rules in Mr. Sogg's favor, it should instruct the trial court to apply a two-year statute of limitations because (1) Ohio's two-year statute governs §1983 claims, (2) the legislature "did not intend" the Anti-Limitations Provision of the Act to apply to constitutional claims for interest, and (3) *State ex rel. Hudson v. Kelly* (1935), 55 Ohio App. 314, does not apply because it was "effectively reversed" in *State ex rel. McLeary v. Hilty* (1941), 139 Ohio St. 39. (Def.'s Br. at 29–32.)

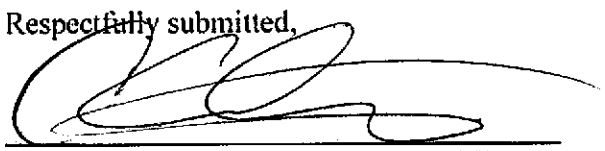
First, as the State notes, the question of the applicable statute of limitations in §1983 actions is pending before this Court. And even if Mr. Sogg's §1983 claim is subject to a statute of limitations, there is no reason why it would apply to his other claims. Second, the State provides no evidence of any legislative intent to impose a limitations period with respect to claims for unclaimed property. Third, this Court never discussed *Hudson* in *McLeary*. In addition, the property at issue in *McLeary* was not private property that came into the government's custody, as in *Hudson* and here, but rather money that had never been in the plaintiff's possession in the first place. Finally, unlike here where Defendant stipulated that

property is held in trust under the Act, this Court found there was no intent to create a trust in *McLeary*. That case has no relevance here.

III. CONCLUSION

Defendant's arguments, and the holding the Tenth District, would grant the State extraordinary powers over private property, and would in effect lead to the negation of the Takings Clauses of the Federal and State Constitutions. Moreover, Defendant's arguments, and the Tenth District's holding, contradict the very purpose of the Unclaimed Funds Chapter – to protect private property rights. This Court should reverse the Tenth District's judgment.

Respectfully submitted,



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PROOF OF SERVICE

The undersigned hereby certifies that a trust copy of the foregoing, Reply Brief of Appellant Wilton S. Sogg, was served by ordinary U. S. Mail, postage prepaid, on the 5th day of May, 2008, upon Benjamin C. Mizer and William J. Cole, Office of the Ohio Attorney General's, Executive Agencies Section, 30 East Broad Street, 26th Floor, Columbus, Ohio 43215, attorneys for Appellee Doug White, Director of the Ohio Department of Commerce.

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