

In the
Supreme Court of Ohio

BOARD OF TRUSTEES OF THE
TOBACCO USE PREVENTION AND
CONTROL FOUNDATION, et al.,

Plaintiffs-Appellants,

v.

KEVIN L. BOYCE, TREASURER OF
STATE, et al.,

Defendants-Appellees.

Case No. 2010-0118

On Appeal from the
Franklin County
Court of Appeals,
Tenth Appellate District

Court of Appeals Case
Nos. 09AP-768, 09AP-785,
09AP-832

ROBERT G. MILLER, JR., et al.,

Plaintiffs-Appellants,

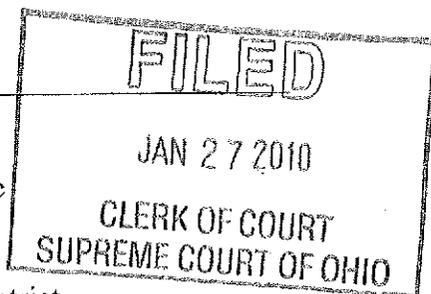
v.

STATE OF OHIO, et al.,

Defendants-Appellees.

On Appeal from the
Franklin County
Court of Appeals,
Tenth Appellate District

Court of Appeals Case
Nos. 09AP-769, 09AP-786,
09AP-833



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TABLE OF CONTENTS

| | Page |
|---|------------|
| TABLE OF CONTENTS..... | i |
| INTRODUCTION | 1 |
| STATEMENT OF CASE AND FACTS | 3 |
| THIS CASE DOES NOT PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION OR A QUESTION OF PUBLIC OR GREAT GENERAL INTEREST | 5 |
| A. The General Assembly’s authority to reallocate public funds is well settled..... | 5 |
| B. The operation of Ohio’s Open Meetings Act is also well settled. | 7 |
| C. This case is a poor vehicle for resolving either of Appellants’ propositions..... | 9 |
| D. Continued litigation will harm the public’s interests. | 10 |
| ARGUMENT | 11 |
| <u>Defendants-Appellees’ Proposition of Law No. I:</u> | |
| <i>The General Assembly did not, and constitutionally could not, establish the TUPCF endowment fund as an irrevocable trust.</i> | |
| | 11 |
| <u>Defendants-Appellees’ Proposition of Law No. II:</u> | |
| <i>Under the Open Meetings Act, a state board may not agree to the transfer of public funds to a private entity during a closed executive session.</i> | |
| | 14 |
| CONCLUSION..... | 15 |
| CERTIFICATE OF SERVICE | unnumbered |

INTRODUCTION

In 2008, the General Assembly transferred funds from anti-smoking efforts to economic stimulus programs. That decision spawned significant *policy* debate. But as the Tenth District properly recognized, there is no debate as to the General Assembly's *legal* authority to make that policy choice and to reallocate the public funds to a different purpose. As such, this case does not present a substantial constitutional question or a question of public or great general interest warranting this Court's review.

In 2000, the General Assembly distributed the tobacco settlement funds to various projects, most of them unrelated to anti-smoking efforts. The legislation also created the "tobacco use prevention and control endowment fund" and allocated to it some of the settlement funds. The legislature also created a new state agency, the Tobacco Use Prevention and Control Foundation ("TUPCF"), to administer the fund and anti-tobacco programs. But after Ohio's economy declined dramatically, the General Assembly and the Governor bipartisanly determined that the money previously apportioned to TUPCF was needed for economic relief, and that a different agency could administer anti-tobacco programs on a smaller budget. (This was only one of countless decisions made during that time to cut funding or transfer funds from one set of priorities to another). The General Assembly passed a law in 2008 dissolving TUPCF and the endowment fund and directing the State Treasurer to liquidate the fund and transfer most of the money to a newly created jobs fund. The legislation also directed \$40 million from the fund to the Department of Health for smoking cessation programs and to cover TUPCF's outstanding obligations.

TUPCF obstructed that process, first, by trying to secrete most of the money—\$190 million—to the American Legacy Foundation ("ALF"), a Washington, D.C. non-profit corporation; and second, by advancing the novel legal theory that the endowment fund was an

irrevocable charitable trust whose monies were permanently dedicated to anti-tobacco programs. TUPCF, ALF, and two ex-smokers sued, challenging the legislature's power to reallocate the endowment fund monies.

The Tenth District unanimously affirmed the propriety of the General Assembly's action. The court correctly recognized that, absent a provision in the Ohio Constitution restricting the settlement funds to a particular purpose—and there is none—the legislature had plenary power to reallocate the funds as it saw fit. Thus, Appellants' "irrevocable trust" theory is baseless, as are the Retroactivity and Contract Clause claims that hinge on it. Any contrary finding would violate the well-established constitutional tenet that one General Assembly may not bind the hands of a future one. The Tenth District also dismissed claims that ALF was entitled to \$190 million from the endowment fund. The court found that the contract between TUPCF and ALF was invalid under the Open Meetings Act because TUPCF had decided to transfer the money to ALF during an improper, closed-door executive session. *Id.* ¶ 77.

Neither ruling is remarkable. The Tenth District applied unassailable constitutional principles and this Court's case law to reject Appellants' fanciful claims to these funds. Not only is further review unnecessary, but it would gravely harm the State and its citizens. In 2008, the legislature reallocated the endowment fund monies for economic stimulus efforts. Then, in 2009, as the economic crisis intensified—and after the stimulus appropriations expired unused while the funds were frozen during this litigation—the General Assembly reallocated the funds to even more urgent needs, including child Medicaid programs and other vital health and social welfare services. The public continues to suffer from the deprivation of these funds.

From the start, this case has been nothing more than a public policy disagreement dressed up in a costume and masqueraded before the courts as a set of legal questions. To the great

detriment of the people of Ohio, Appellants and their amici continue to confuse an important public policy question with “a matter of public and great general interest” over which this Court may exercise jurisdiction. They are not one and the same. Simply stated, this Court may exercise jurisdiction over matters of public and great general interest *only when the courts have an appropriate role in settling questions regarding those matters.*

For instance, whether the Ohio General Assembly can best stimulate job growth through business incentives, tax cuts, or some combination thereof, is most certainly a matter of public and great general interest. But the courts should not—and cannot properly—determine how state resources are best invested to stimulate job growth.

So too here: Whether the General Assembly should spend scarce resources on laudable anti-tobacco programs or on critical health and welfare programs (such as Medicaid), is a matter of public and great general interest. But it is simply not an issue for the courts to resolve.

Given the absence of any support for Appellants’ position and this Court’s lack of dominion over public policy questions, this Court should deny jurisdiction. And given the excessive length of time this case already languished in the courts below and the State’s urgent need for these funds for vital medical and welfare programs, this Court should expedite its jurisdictional determination.

STATEMENT OF CASE AND FACTS

In 1998, 46 states entered into a Master Settlement Agreement (“MSA”) with four tobacco companies to recoup expenses (paid primarily through State Medicaid funds) for tobacco-related illnesses. The settlement promised \$10.1 billion in unrestricted revenue to Ohio through 2025. In 2000, the General Assembly passed Am.Sub.S.B. 192, which distributed the MSA revenue for an assortment of purposes—school construction, law enforcement, and biomedical research, among others. Former R.C. 183.02. The General Assembly created one fund, the “tobacco use

prevention and control endowment fund,” for anti-tobacco efforts, and a new state agency, TUPCF, to administer it. Former R.C. 183.04 and 183.08. The legislature specified that the endowment fund “shall be in the custody of the treasurer of state but shall not be a part of the state treasury.” Former R.C. 183.08. The legislature then apportioned \$235 million to the fund.

In 2008, the nation’s and Ohio’s economy declined precipitously. On April 2, 2008, the Governor and General Assembly announced a \$1.57 billion jobs bill. The bill was to be funded in part by reallocating approximately \$230 million from the TUPCF endowment fund. Two days later, in an attempt to secrete the funds from the General Assembly’s reach, TUPCF’s Board tried to transfer \$190 million from the endowment fund to ALF. On April 8, TUPCF’s executive director executed a purported contract with ALF agreeing to the transfer.

That same day, the General Assembly passed Am.S.B. 192, directing then-Treasurer Cordray to liquidate the endowment fund, reserving \$40 million for anti-tobacco programs and TUPCF’s outstanding obligations, and to transfer the remaining money (\$230 million) to the newly created jobs program. TUPCF sued the State Treasurer alleging that Am.S.B. 192 unlawfully appropriated non-treasury funds. The State and the Attorney General intervened to defend the law. On April 10, 2008, the trial court denied TUPCF’s motion for a temporary restraining order to freeze the money. Inexplicably, however, and without any procedural underpinning, the trial court sua sponte froze the funds. ALF then intervened in the case, asserting contractual rights to \$190 million from the endowment fund.

On May 6, 2008, the General Assembly passed H.B. 544, which dissolved TUPCF and transferred its authority and obligations to the Ohio Department of Health. It again instructed the Treasurer to transfer the endowment fund proceeds to the jobs program.

On May 27, 2008, two ex-smokers—Miller and Weinmann—sued the State, the Attorney

General, and the Treasurer, alleging constitutional claims premised on the theory that (1) the fund was an irrevocable charitable trust, (2) they were its beneficiaries, and (3) the fund's dissolution impaired their rights. The court consolidated that action with the others before it.

A three-day preliminary injunction hearing was held in June 2008. In October, the court ordered the parties to supplementally brief whether the endowment fund was an irrevocable trust. Three months later, the court denied a preliminary injunction to ALF, finding that it had no rights to the \$190 million, and granted a preliminary injunction to Miller and Weinmann, finding that they had standing and were likely to prevail on their irrevocable charitable trust claim.

After a one-day trial, the trial court in August 2009 entered judgment against ALF on its contract claim, and in favor of Miller and Weinmann on their irrevocable trust claim. The court appointed itself as the fund's administrator and barred the Treasurer from removing the money.

The State appealed. The Tenth District continued the trial court's injunction pending appeal, but ordered expedited briefing by the parties. In a unanimous opinion, the court reversed the trial court's finding that the endowment fund was an irrevocable charitable trust and affirmed the court's ruling that ALF had no contractual entitlement to any endowment funds. Despite finding no merit to Appellants' claims, the Tenth District continued the trial court's injunction prohibiting the State from transferring the funds pending appeal to this Court.

**THIS CASE DOES NOT PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION
OR A QUESTION OF PUBLIC OR GREAT GENERAL INTEREST**

A. The General Assembly's authority to reallocate public funds is well settled.

As Appellants acknowledge, their constitutional claims hinge entirely on their theory that the endowment fund was an irrevocable trust. Because the irrevocable trust theory is meritless, those constitutional claims present no reviewable issue for this Court.

The State recognizes that the policy choice underlying the General Assembly's decision to

transfer TUPCF's endowment fund to other vital programs is an issue of public interest. As is often the case, the legislature was forced to choose between competing goods. "[T]he General Assembly is charged with making the difficult policy decisions on such issues," and it did so here. *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948, ¶ 71. However, this case does not present a *legal* question of public or great general interest.

Insofar as Appellants dress up their policy dispute in legal garb, the legislature's decision does not present any substantial constitutional question—let alone *any* legal question that is not already well settled. The General Assembly has plenary power "to pass any law unless it is specifically prohibited by the state or federal Constitutions." *State ex rel. Jackman v. Cuyahoga Cty. Court of Common Pleas* (1967), 9 Ohio St. 2d 159, 162. As the Tenth District recognized, there is no constitutional restraint on the use of the tobacco funds; therefore, the legislature has plenary power "to reallocate the tobacco settlement money" from the endowment fund to other state priorities. App. Op. ¶ 35. It is not for the courts to second-guess those policy decisions.

Indeed, the only scenario that would justify this Court's review is if the Tenth District had *adopted* the trial court's eccentric "irrevocable charitable trust" theory, which grafted the law of private charitable trusts onto the General Assembly's spending power. The Tenth District, however, thoroughly discredited that theory. As the court correctly observed, the General Assembly could not have established an irrevocable trust with public money because that would prevent future General Assemblies from reallocating those funds—a clear violation of Section 1, Article II of the Ohio Constitution. As this Court has long held, "[n]o general assembly can guarantee the continuity of its legislation or tie the hands of its successors." *State ex rel. Public Inst. Bldg. Auth. v. Griffith* (1939), 135 Ohio St. 604, 619.¹ The fund was not an irrevocable

¹ Also, there is no reason for this Court to give second thought to a theory that was not more than an afterthought to begin with. It was not until six months into the case, and four months *after* the

trust, and therefore Appellants' Retroactivity and Contract Clause claims have no leg to stand on.

Appellants have not justified their invitation for this Court to review the Tenth District's incontrovertible legal conclusion. They fail to cite any authority supporting their theory that a legislature can create an irrevocable trust with public funds. Nor can they cite any policy rationale for their position. To the contrary, permitting one General Assembly to permanently restrict another's use of public funds is *antithetical* to responsible governance. If recognized, such power would forever leave future General Assemblies powerless to react to changed economic circumstances, priorities, and fiscal emergencies. *Griffith*, 135 Ohio St. at 619 ("Who knows what demands for public revenues and public funds may be more pressing within the next quarter-century?"). This is precisely why this Court has long recognized that "[t]he power of a subsequent general assembly either to acquiesce or to repeal is always existent." *Id.* at 620.

In short, the Tenth District's analysis of the General Assembly's legislative powers is a straightforward and unremarkable application of the Ohio Constitution and this Court's well-worn precedents. Because the lower court broke no new ground, no further review is needed.

B. The operation of Ohio's Open Meetings Act is also well settled.

Appellants' claim that ALF was contractually entitled to \$190 million in the endowment fund is also baseless. As both lower courts ruled, the purported contract between TUPCF and ALF was invalid because TUPCF's Board clearly violated the Open Meetings Act when it tried to transfer the funds. Because this ruling is not subject to reasonable debate—and because the Open Meetings Act claim is a factual claim, the resolution of which below is entitled to great deference—this Court should deny jurisdiction.

preliminary injunction hearing, that the trial court sua sponte ordered the parties to brief the question of whether the endowment fund was an irrevocable trust. Thus, the centerpiece of the trial court's ruling was not much more than a blip until it was hurriedly broached and briefed well into the trial court proceedings.

On April 4, 2008, TUPCF's Board met in executive session for over two hours to discuss various issues: whether the Board should transfer the endowment fund to an outside entity, how much and to whom the transfer should be made, the likelihood of litigation if the transfer proceeded, and whether TUPCF's executive director, Michael Renner, should be authorized to execute a contract. The Board then returned from executive session and, without discussion, passed a resolution authorizing Renner to transfer \$190 million from the endowment fund to one of three non-profit organizations.

The Tenth District found two violations of the Open Meetings Act, which imposes a strict duty on public bodies to “conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law.” R.C. 121.22(A). First, the court held that the Board improperly convened in executive session because it did not use the session to “conference[] with an attorney for the public body,” nor was the meeting convened to discuss “pending or imminent court action.” App. Op. ¶¶ 65-70 (citing R.C. 121.22(G)(3)). Second, the Tenth District held that the Board secretly deliberated over “basic policy decisions... that should have been discussed in open session”—specifically, the proposal to transfer \$190 million to an outside entity. *Id.* ¶¶ 71, 73.

These rulings are unimpeachable and unremarkable. The TUPFC Board did not meet in executive session to consult “with an attorney for the public body” at the April 4, 2008, meeting. R.C. 121.22(G)(3). Under R.C. 109.02, the Board's legal counsel is an assistant attorney general or special counsel appointed by the Attorney General. No such official was present. And while three members of the Board and Renner are attorneys, they “expressly stated that their responses [in the meeting] were not made in any official capacity as the board's attorneys.” *Id.* ¶ 66.

Moreover, the TUPFC Board's resolution to enter executive session did not reference

“pending or imminent court action,” R.C. 121.22(G)(3), but simply stated that there were “confidential legal matters” before the Board, App. Op. ¶ 70. But the Open Meetings Act does not allow a private meeting to discuss the “myriad of subjects which may or may not be related to, or result in, court action.” *Id.* Appellants’ contrary position ignores the Act’s clear language.

Third, the Board’s discussion went well beyond the bounds of what may be discussed in executive session. The Board deliberated over an array of policy matters—whether to transfer the endowment funds to a private organization and to whom, and what amount to transfer. App. Op. ¶ 73. Because the Board’s later adoption of the transfer resolution “result[ed] from deliberations in a meeting not open to the public,” the resolution “is invalid.” R.C. 121.22(H).

Both lower courts rejected Appellants’ far-fetched attempts to argue that the Attorney General somehow forced them to violate the Open Meetings Act. TUPCF was told in advance of the meeting that the assistant attorney general assigned to the Board could not be present, and no one from TUPCF requested a different attorney or chose to reconvene when the appropriate counsel could be present. App. Op. ¶ 55.

In short, two courts have already declared the obvious: A body of public officials deliberating in secret about the transfer of \$190 million in *public money* to an out-of-state corporation unmistakably violates both the letter and spirit of the Open Meetings Act. There is no need for this Court’s review of that issue.

C. This case is a poor vehicle for resolving either of Appellants’ propositions.

Even if Appellants’ irrevocable trust and Open Meetings Act arguments were colorable (and they are not), this case is a poor vehicle for resolving those issues. To prevail on either claim, Appellants would still have to clear a number of other minefields that the Tenth District declined to traverse but that are fatal to Appellants’ claims.

For instance, even assuming that the endowment fund were an irrevocable trust, Appellants

must still demonstrate a “sufficient interest in the trust to create standing to maintain an action.” *Papiernik v. Papiernik* (1989), 45 Ohio St. 3d 337, 342. A sufficient interest is a vested interest in the trust. *Id.* at 344. Yet Miller and Weinmann, as ex-smokers, have no vested rights in the fund. They are not specifically identified in the statutes creating the fund, they are not part of a small definable group, and they never had any certainty of receiving benefits from the fund. More to the point, they are not differently situated from *any other member of the public* with respect to the anti-tobacco programs. As its name made clear, TUPCF’s purpose was to promote tobacco “prevention” and “cessation”—i.e., to prevent non-smokers and ex-smokers from using tobacco, and to help current smokers quit. That covers *every single person in Ohio*. Miller and Weinmann are unexceptional and therefore lack standing to pursue these claims.

Appellants’ secondary claim—that ALF has a contractual right to \$190 million of the endowment fund—is also plagued. Independent of the Open Meetings Act violations, the trial court found that the contract between TUPCF and ALF was invalid on *three other grounds*: (1) the Board unlawfully delegated its statutory duties to a private, unaccountable non-profit; (2) the transfer contract was never approved by the Board, as required by former R.C. 183.08; and (3) the contract failed to meet State contracting requirements under R.C. 9.231. App. Op. ¶ 18.

Thus, even if Appellants’ propositions of law were worth considering, there are many other defects that prevent Appellants from prevailing. Those defects plainly undercut Appellants’ request for jurisdiction.

D. Continued litigation will harm the public’s interests.

Finally, the procession of this case through the lower courts has already inflicted significant harm on the State and its citizens. Despite repeated entreaties from the State for expedited review, this case languished in the trial court for 16 months, during which time the State could not use the funds. And despite a unanimous finding that Appellants’ claims lacked any merit, the

Tenth District has maintained the trial court’s injunction, presumably on the assumption that the status quo causes the least harm. But that is wrong, and continued litigation will only cause further harm. In total, the lower courts have prohibited the State from accessing some \$270 million in public funds for nearly two years. These delays have impaired (and continue to impair) the State’s ability to provide vital medical, health, and welfare services. For example, approximately 25,000 Ohio children continue to have no health insurance because the settlement funds, which are now earmarked for Medicaid and other healthcare programs, remain encumbered in this litigation. This predicament further violates this Court’s clear admonishment that courts should “take ‘particular caution in granting injunctions, especially in cases affecting a public interest where the court is asked to interfere with or suspend the operation of important works or control the action of another department of government.’” *Danes Clarkco Landfill Co. v. Clark County Solid Waste Mgmt.* (1995), 73 Ohio St. 3d 590, 604 (citation omitted).

All of these factors—this Court’s precedents affirming the General Assembly’s constitutional dominion over public monies, the Tenth District’s well-reasoned rejection of Appellants’ legal theories, the lack of conflicting authorities from this Court or other jurisdictions, the other fatal defects in Appellants’ claims, and the urgent need to release the funds to vital medical and welfare programs—confirm why jurisdiction should be denied.

ARGUMENT

Defendants-Appellees’ Proposition of Law No. I:

The General Assembly did not, and constitutionally could not, establish the TUPCF endowment fund as an irrevocable trust.

Appellants argue that the General Assembly permanently shielded TUPCF’s endowment fund from dissolution or reallocation. They are wrong. The General Assembly has plenary power to pass laws and appropriate money “unless th[at] legislative discretion has been qualified

or restricted by the constitution in reference to the subject matter in question.” *State ex rel. Poe v. Jones* (1894), 51 Ohio St. 492, 504. Because the Ohio Constitution places no limits on how the tobacco settlement money is used, the General Assembly has clear constitutional authority to allocate—and reallocate—those public funds as it sees fit.²

Appellants nevertheless claim that the funds were untouchable by virtue of their designation as a custodial account—that is, “in the custody of the treasurer of state but... not... part of the state treasury.” Former R.C. 183.08(A). That is wrong on three levels.

First, nothing in former R.C. Chapter 183 expressly (or even implicitly) limits the legislature’s power to reallocate the endowment fund monies. Appellants, however, say that because the General Assembly did not reserve the right to dissolve the fund, it must have meant to make it an irrevocable trust. But this approach—divining legislative intent from the *absence* of certain magic words—ignores the plain language of former R.C. Chapter 183. *State v. Elam* (1994), 68 Ohio St. 3d 585, 587 (“The polestar of statutory interpretation is legislative intent, which a court best gleans from the words the General Assembly used.”). Nothing in this chapter shows the legislature’s desire to establish the endowment fund as an irrevocable trust. The tobacco settlement money came to Ohio with no strings attached and the General Assembly has never passed any law purporting to limit its authority to reallocate that money later. Nor does any language support Appellants’ belief that the legislature intended to confer vested rights on them, as ex-smokers, to enforce the endowment fund. See *State ex rel Horvath v. State Teachers Ret. Bd.* (1998), 83 Ohio St. 3d 67, 76 (“[W]e begin with a presumption that, absent a clearly stated intent to do so, statutes do not create contractual rights that bind future legislatures.”).

² By contrast, states that have wanted to permanently restrict the use of their tobacco settlement money have done so through constitutional amendments. See, e.g., Fla. Const., Art. X, § 27; Idaho Const. Art. VII, § 18; Mont. Const. Art. XII, § 4; Okla. Const. Art X, § 40. And Ohioans have passed similar provisions to restrict other types of revenue. See, e.g., Ohio Const., Art. XV, § 6(A) (restricting lottery revenue to educational purposes).

Second, Appellants are thoroughly misguided in characterizing custodial accounts as permanent, irrevocable trusts. The legal character of these funds is best understood in the context of the State funding process more broadly. That is, most State programs are funded through biennial appropriations from the state treasury. At the end of each fiscal year, unspent money automatically “revert[s] to the funds from which the appropriations were made,” usually the General Revenue Fund. R.C. 131.33(A). In certain instances, however, the legislature employs a different funding mechanism. Under R.C. 113.05(B)-(C), the General Assembly may create a custodial account—an account maintained by the Treasurer that is not part of the State treasury. Unlike biennial appropriations, unspent funds in such accounts do not revert automatically to the General Revenue Fund but, rather, remain in the custodial account. App. Op. ¶32. This mechanism is especially well-suited for directing a lump sum to an agency—particularly a sum in excess of what is needed in a single biennium, as was the case with TUPCF.

The General Assembly has discretion to determine how to fund a specific state program—through biennial appropriations or a custodial account. “But the fact that the General Assembly chooses the latter path does not mean . . . that custodial funds are shielded in perpetuity from the General Assembly’s plenary power to determine where state money is needed and to reallocate public funds as it sees fit.” *Id.* at ¶ 33. It simply means that the funds are shielded in a much narrower sense—that is, they are shielded from automatic reversion to the General Revenue Fund at the end of each fiscal year. *Id.* Indeed, the General Assembly orders the liquidation or transfer of funds from custodial accounts *all the time*.³

Third, Appellants fail to recognize that the Ohio Constitution prohibits irrevocable trusts

³ See, e.g., Am. Sub. H.B. 119 (2007) (Attorney General Education Fund, the Secretary of State’s Alternative Payment Program Fund, and Ohio’s Best Rx Program Fund); H.B. 67 (2007) (Community Resolution Fund); Am. Sub. H.B. 94 (2001) (Penalty Enforcement Fund and Forestry Development Trust Fund).

for public funds. “No general assembly can guarantee the continuity of its legislation or tie the hands of its successors.” *Griffith*, 135 Ohio St. at 619. An irrevocable trust of public funds would do just that. It would tie the hands of successor General Assemblies by permanently dedicating public money to a specific purpose, regardless of “the necessities of [those] future general assemblies.” *Id.* at 620. This restriction is unconstitutional because, as this Court has repeatedly held, only the U.S. or Ohio Constitutions can impair a General Assembly’s plenary legislative authority under the Ohio Constitution, § 1, Art. II. See *Jackman*, 9 Ohio St. 2d at 162. The Colorado Supreme Court recently considered the identical issue and easily reached the same conclusion. *Barber v. Ritter* (Colo. 2008), 196 P.3d 238, 253-54 (funds were not irrevocable trusts because legislature cannot limit its own plenary power by creating such “trusts”).

In an attempt to say otherwise, Appellants repeat their tired analogy to public employee retirement funds. But the pension funds are simply not “public” funds. App. Op. ¶ 42. They “consist of compulsory contributions made by specific individuals, i.e., public employees, and their employers” which are “held in trust for the sole benefit of the public employee contributors.” *Id.* By contrast, there is no dispute that the endowment fund is a *public fund* through and through. “These are *public* funds, at all times subject to legislative control.” *Griffith*, 135 Ohio St. at 619 (emphasis added). As such, “[a] future general assembly may revoke this grant and divert these funds to other purposes.” *Id.*

In sum, the General Assembly did not establish TUPCF’s endowment fund as an irrevocable trust, nor could it have under the Ohio Constitution and this Court’s precedents.

Defendants-Appellees’ Proposition of Law No. II:

Under the Open Meetings Act, a state board may not agree to the transfer of public funds to a private entity during a closed executive session.

As recounted above, the Open Meetings Act requires public bodies “to conduct all

deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law.” R.C. 121.22(A). Both courts below correctly held that TUPCF’s Board violated the Act during its April 4, 2008, meeting.

First, the decision to convene in executive session was improper. The Act allows public bodies to meet privately to “conference[] with an attorney for the public body concerning disputes involving the public body that are the subject of pending or imminent court action.” R.C. 121.22(G)(3). This exception does not apply here. The Board did not conference with its attorney during this session because the Board’s attorney was not present. Moreover, the Board’s resolution to convene in executive session was defective because it did not reference “pending or imminent court action.” *Id.*

Second, the discussions in the executive session clearly exceeded legal bounds. The Board discussed basic policy decisions—whether to transfer the endowment fund monies to another entity; in what amount; to whom; and whether Mr. Renner should carry out the transfer. After two hours of closed-door debate, the Board returned to open session and, without any public deliberation, agreed to the transfer.

In light of these clear violations, the TUPCF Board’s resolution agreeing to the transfer of \$190 million of public funds to ALF—a private, unaccountable, out-of-state non-profit corporation—is invalid under the Open Meetings Act. R.C. 121.22(H).

CONCLUSION

For these reasons, this Court should decline jurisdiction over this appeal. Further, Appellees respectfully ask the Court to expedite its ruling on jurisdiction so that the funds that remain encumbered in this litigation can be used for the vital medical, health, and welfare services for which they were appropriated in the most recent budget.

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