ORIGINAL

In the
Supreme Court of Ohio

BOARD OF TRUSTEES OF THE TOBACCO USE PREVENTION AND CONTROL FOUNDATION, et al.,	:	Case No. 2010-0118
Plaintiffs-Appellants,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
v.	:	
KEVIN L. BOYCE, TREASURER OF STATE, et al.,	:	Court of Appeals Case Nos. 09AP-768, 09AP-785, 09AP-832
Defendants-Appellees.	:	

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ROBERT G. MILLER, JR., et al.,	:	
Plaintiffs-Appellants,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
v.	:	
STATE OF OHIO, et al.,	:	Court of Appeals Case Nos. 09AP-769, 09AP-786, 09AP-833
Defendants-Appellees.	:	

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INTRODUCTION

One General Assembly gives. Another General Assembly takes away. It is a story that has been told countless times in Ohio budget history and its iteration through this case is unremarkable but for the passionate disappointment of anti-tobacco interests in seeing Ohio's tobacco agency dissolved and its funding reallocated. The State does not begrudge anyone their disappointment. The laudability of anti-tobacco efforts is indisputable. But it is beside the point here. This case concerns nothing more than the creation of a State agency and a fund to support it, the dissolution of that agency by the General Assembly, and the reallocation of its funds. These legislative decisions spawned significant *policy* debate. But as the Tenth District unanimously recognized, there is no debate as to the General Assembly's *legal* authority to make that policy choice to reallocate the funds to other priorities.

It was the 123rd General Assembly that gave. In 2000, it passed legislation to distribute the money flowing into Ohio from the Master Settlement Agreement with the tobacco companies. The legislature allocated funds to various programs, most of them unrelated to anti-smoking efforts. The General Assembly also created a new State agency for anti-tobacco programming (the "tobacco use prevention and control foundation"), and a public fund to support the agency (the "tobacco use prevention and control endowment fund"). The legislature then allocated approximately $235 million in settlement money to fund the agency.

Eight years later, the 127th General Assembly took away. After Ohio's economy dramatically declined, the Governor and legislature evaluated State agency budgets and made numerous decisions to move funds from certain programs to other priorities. Among these decisions, the General Assembly determined that the money previously apportioned to the tobacco agency was needed for economic relief, and that a different agency—the Ohio Department of Health—could administer anti-tobacco programs on a smaller budget. As a result, the General Assembly passed H.B. 544 in 2008. The bill dissolved the tobacco agency and its endowment fund and directed the State Treasurer to transfer most of the money to a newly created jobs fund. Still recognizing the importance of anti-tobacco programming, the General Assembly transferred $40 million from the endowment fund to the Department of Health to continue those programs and to cover any of the tobacco agency's outstanding obligations.

The tobacco agency sought to obstruct that process, first, by attempting to siphon off 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 money was permanently dedicated to anti-tobacco programs. The tobacco agency, ALF, and two ex-smokers sued, challenging the legislature's power to reallocate the endowment fund money.

The Tenth District unanimously affirmed the propriety of the General Assembly's action. The court correctly recognized that Appellants' "irrevocable trust" theory is baseless, as are the Retroactivity and Contract Clause claims that hinge on it.

The 123rd General Assembly had explicitly acknowledged that its distribution decisions lacked permanence. The endowment fund's enabling legislation called for regular budget reviews to "determine if this chapter's distribution and uses of revenue received under the tobacco master settlement agreement adequately reflect the state's priorities." Former R.C. 183.32. Moreover, while the General Assembly "earnestly request[ed]" that future General Assemblies "give due regard" to the initial allocations, it still recognized "the right of each General Assembly to evaluate independently the budgetary priorities of the state" given that "the economic conditions, educational needs, and tax burdens of the people of the state will inevitably change." Am. Sub. S.B. 192, § 17. Even the tobacco agency's executive director advised the Board, in the wake of the budget-cut announcement, that the legislature could repeal R.C. 183, disband the tobacco agency, and its resources would revert to the State. There is simply no basis for concluding that the General Assembly established the endowment fund as an irrevocable charitable trust.

Nor *could* the legislature permanently restrict the use of these public funds, since this would violate the well-established constitutional tenet that the General Assembly has plenary power to enact and repeal laws, and therefore, one General Assembly may not bind the hands of a future one by insulating public funds from reallocation.

Appellants nevertheless claim that the endowment fund was somehow not a public fund and was untouchable by virtue of its status 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 multiple levels. First, the endowment fund was a public fund consisting of public, State money, and was created to support a State agency. In their official accounting reports, both the Office of Budget and Management and the tobacco agency itself always classified the endowment fund as a public governmental fund, not a fiduciary trust. And year after year, the State Auditor—including Appellants' amicus, Betty Montgomery—certified that this classification was correct. Second, Appellants are wrong in characterizing "custodial accounts" as permanent, irrevocable funds. These accounts are simply shielded from automatic reversion to the General Revenue Fund at the end of each fiscal year or biennium; but they are not 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. Third, while Appellants repeat their tired analogy to the State employee retirement funds, the pension funds are simply not public funds.

They are collected and held for the sole benefit of *specific individuals* and they are subject to a high degree of protection predominantly because of federal law. By contrast, the endowment fund is a public fund through and through: it was created to support a State agency that served the general public, and it is subject to none of the pension-specific restrictions that shelter State employee retirement funds.

Appellants' second claim—that ALF has a contractual right to $190 million of the endowment fund—also fails. Both courts below easily found that the contract between the tobacco agency and ALF was invalid under the Open Meetings Act because the agency had decided to transfer the money to ALF during an improper, closed-door session. There is no factual basis for ALF's claim that the Attorney General's office "set up" the Board to violate the Open Meetings Act, nor are there legal grounds for legitimizing the actions taken in the improper, closed-door meeting even if ALF's fanciful tale were true. Moreover, the purported contract between the tobacco agency and ALF was invalid on at least three other grounds independent of the Open Meetings Act violations: (1) the Board unlawfully delegated its statutory duties to a private, unaccountable non-profit; (2) the transfer contract was never approved by the Board—to the contrary, the Board rescinded the transfer resolution 11 days after it was made; and (3) the contract failed to meet State contracting requirements under R.C. 9.231.

For all of these reasons, this Court should affirm the Tenth District's holding that the General Assembly did not establish the endowment fund as an irrevocable trust and that the purported contract agreeing to transfer $190 million of public funds to ALF is invalid under the Open Meetings Act.

STATEMENT OF CASE AND FACTS

A. The tobacco settlement payments came to Ohio came with no strings attached.

In 1998, Ohio and 45 other states and territories entered into a Master Settlement Agreement ("MSA") with four tobacco companies to enjoin various tobacco marketing practices and to recoup expenses (paid primarily through State Medicaid funds) for tobacco-related illnesses. The MSA promised $10.1 billion in compensation to Ohio through 2025, and additional payments in perpetuity.

There have never been any strings attached to the settlement money flowing to Ohio or any other state. Having been forced, for years, to divert money away from other priorities in order to cover tobacco-related healthcare costs, the parties to the MSA agreed that only a "no strings" policy could make the states whole by putting them back in a position to use the funds as their spending prerogatives dictated.

The MSA has never required any state to spend its settlement funds on anti-tobacco programming; and most states, like Ohio, have always directed the greater part of their settlement money to other priorities.

B. The General Assembly created a distribution scheme for the settlement funds and a new State agency for anti-tobacco programming.

In 2000, the 123rd General Assembly passed Am. Sub. S.B. 192, which distributed the MSA settlement funds to various projects—most of them unrelated to tobacco cessation—including school construction, law enforcement, biomedical research, and education technology. Former R.C. 183.02.[1] (S. 13-16).[2] The General Assembly also created a new State agency (the "tobacco use prevention and control foundation") for anti-tobacco programs, and a public fund

[1] Most of Am. Sub. S.B. 192 was codified as R.C. Chapter 183. The sections that were later repealed are referred to here as "Former R.C. 183.XX." The entire bill is included in Appellees' Supplement at Ex. 1.
[2] References to Appellees' Supplement are indicated in the brief as "S. __."

(the "tobacco use prevention and control endowment fund") to support it. Former 183.04 and 183.08; Am.Sub.S.B. No. 192 § 6 (S. 17, 20, 31). 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 (S. 20.) The legislature then apportioned approximately $235 million to the fund. Am. Sub .S.B. 192 at § 6 (S. 31).

The tobacco agency's mission was to "prepare a plan to reduce tobacco use by Ohioans, with emphasis on reducing the use of tobacco by youth, minority and regional populations, pregnant women, and others who may be disproportionately affected by the use of tobacco." Former R.C. 183.07. (S. 19). The agency was run by an executive director and his staff, all of whom were State employees, and it was overseen by a board of 23 members, all of whom were public officials. Former R.C. 183.04 and 183.06. (S. 17-19). As with other State agencies, the Board members were required to submit annual financial disclosures to the Ohio Ethics Commission, and the agency's rulemaking was governed by Chapter 119 of the Revised Code. Former R.C. 102.02(A) and former R.C. 183.07. (S. 1, 20).

C. The General Assembly disbanded the tobacco agency and reallocated its funds to economic stimulus programs.

In subsequent years, Ohio's economy declined and the State was in dire need of economic relief. On April 2, 2008, the Governor and General Assembly announced a $1.57 billion jobs bill. *Bd. of Trustees of the Tobacco Use Prevention and Control Foundation v. Boyce* (10th Dist.), 185 Ohio App.3d 707, 2009-Ohio-6993, ¶ 6 (hereafter "App. Op."). The bill was to be funded in part by reallocating approximately $230 million from the tobacco agency's endowment fund, which then contained approximately $270 million. *Id.*

In response to the announcement, the tobacco agency mounted a series of rapid and resistant reactions. On April 4, 2008, in an attempt to secrete the funds from the General

Assembly's reach before the stimulus legislation became effective, the tobacco agency resolved in a closed-door executive session to authorize the transfer of $190 million from the endowment fund to one or more of three private organizations, including the American Legacy Foundation ("ALF"), a Washington, D.C. non-profit corporation that focuses on tobacco cessation. *Id.* at ¶ 7.

On April 8, 2008, Michael Renner, the agency's executive director, determined that ALF should get the full $190 million, and he purported to execute a contract with ALF granting it the money. *Id.* Although former R.C. 183.08 authorized disbursements from the endowment fund "only upon instruments duly authorized by the board of trustees" of the agency, Renner individually submitted a written request to the State Treasurer to withdraw $190 million from the endowment fund and transfer it to ALF.

That same day, the General Assembly passed legislation, directing then-Treasurer Cordray to transfer approximately $230 million from the endowment fund to the newly created jobs program. *Id.* at ¶ 8. The bill directed the remainder of the fund, approximately $40 million, to be transferred to the Department of Health to continue anti-tobacco programs and to cover the tobacco agency's outstanding obligations. *Id.*

The tobacco agency then sued the State Treasurer alleging, among other claims, that the legislation unlawfully reallocated the tobacco agency's funds. *Id.* at ¶ 9. The State and the Attorney General intervened to defend the law. *Id.* On April 10, 2008, the trial court denied the tobacco agency's motion for a temporary restraining order to freeze the money, although without any other procedural underpinning sua sponte froze the funds. *Id.* ALF then intervened in the case, asserting a contractual right to $190 million from the endowment fund. *Id.* at ¶ 11.

On April 15, 2008, the tobacco agency's Board met again and voted to rescind its earlier resolution authorizing the transfer of $190 million from the endowment fund to ALF. *Id.* at ¶ 10. Mr. Renner informed the State Treasurer the next day that the agency was withdrawing its April 8 request to transfer $190 million to ALF. *Id.*

On May 6, 2008, the General Assembly passed H.B. 544, which became effective immediately and redressed any possible drafting issues related to the legislation of April 8. *Id.* at ¶ 13. Like the earlier legislation, H.B. 544 directed that approximately $230 million be transferred from the endowment fund to economic stimulus programs and that $40 million go to the Department of Health for anti-tobacco efforts. *Id.* H.B. 544 further abolished the tobacco agency, transferred its programming authority and other obligations to the Department of Health, liquidated the endowment fund, and repealed all provisions in Revised Code Chapter 183 that specifically referenced the tobacco agency and its funds—namely, Former R.C. 102.02, 183.021, 183.03, 183.04, 183.05, 183.06, 183.061, 183.07, 183.08, 183.09, 183.10, 183.30, 183.33, 2151.87, and § 3 of 2008 Am. S.B. 192. *Id.*

The case as it is now structured then assumed its final form. In light of the tobacco agency's dissolution, ALF amended its complaint to add the Ohio Department of Health and its Director as defendants. *Id.* at ¶ 14. Then, on May 27, 2008, two ex-smokers—Robert Miller and David Weinmann—sued the State, the Attorney General, and the Treasurer, challenging the constitutionality of H.B. 544 on grounds that (1) the endowment fund was an irrevocable charitable trust, (2) they were its beneficiaries, and (3) the transfer of the agency's funds to other government programs impaired their rights. *Id.* at ¶ 15. The trial court then consolidated that action with ALF's action. *Id.* at ¶ 16.

D. The trial court denied ALF's contract claim but ruled in favor of Miller and Weinmann on their claim that the endowment fund was an irrevocable charitable trust.

A three-day preliminary injunction hearing was held in June 2008. In October, the court ordered the parties to brief whether the endowment fund was an irrevocable charitable trust. Three months later, the court denied a preliminary injunction to ALF, finding that it had no contractual right to the $190 million. But the court granted a preliminary injunction to Miller and Weinmann, finding that they were likely to prevail on their claim that the endowment fund was an irrevocable charitable trust. PI Order of 2/10/2009.

The trial court held that the purported contract with ALF was invalid under the Open Meetings Act. PI Order, at ¶¶ 134-161. The court found that on April 4, 2008, the Board convened a closed-door executive session for over two hours to discuss various issues—among other things, whether the Board should transfer the endowment fund to an outside entity, how much and to whom the transfer should be made, and whether the agency's executive director, Michael Renner, should be authorized to execute a transfer contract. *Id.* at ¶¶ 52, 141. The Board then returned from executive session, and, without further discussion, passed a resolution authorizing Renner to transfer $190 million from the endowment fund to one of three non-profit organizations. *Id.* at ¶ 75. The court found multiple violations of the Open Meetings Act. First, it found that the decision to convene in executive session was improper, both because the Board was not conferencing with its attorney during this session and because the resolution to convene in executive session was defective because it failed to reference any matter for which an executive session was statutorily authorized. *Id.* at ¶¶ 134-141. Second, the trial court held that the discussions in the executive session exceeded legal bounds insofar as the Board discussed basic policy decisions, such as whether to transfer the endowment fund monies to another entity, to whom, and in what amount. *Id.* at ¶¶ 142-155. The trial court also rejected ALF's argument that equitable estoppel applies to prevent the Attorney General from asserting the Board's Open Meetings Act violations. *Id.* at ¶¶ 156-161. The court concluded that "Plaintiffs cannot point to a factual misrepresentation that was made by the Attorney General's office, nor reasonable reliance upon that misrepresentation." *Id.* at ¶ 157.

The trial court also found that the purported contract between the tobacco agency and ALF was invalid on three other grounds: (1) the Board unlawfully delegated its statutory duties to a private, unaccountable non-profit organization; (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. *Id.* at ¶¶ 162-179.

The "irrevocable trust" portion of the case then proceeded to trial, and after a one-day hearing consisting primarily of testimony about whether the General Assembly could have funded the economic stimulus program by other means, the trial court in August 2009 entered final judgment against ALF on its contract claim, and in favor of Miller and Weinmann on their irrevocable trust claim. Final Judgment Entry of 8/11/2009. The trial court appointed itself permanent executor of the fund and took upon itself the mission of the defunct agency. The trial court announced that it would, in perpetuity, accept and review proposals and applications for anti-tobacco programming: "[A]ny party, pending appeal of this judgment or thereafter, may apply to the Court for use or disbursement of monies in the Endowment Fund solely for the purpose of reducing tobacco use by Ohioans by carrying out, or providing funding for private or public agencies to carry out[] research and programs related to tobacco use prevention and cessation." Final Judgment, at 15. The court also barred the Treasurer from removing the money as H.B. 544 directed. *Id.* at 15-16.

E. The Tenth District unanimously ruled for the State defendants on appeal, reversing the trial court's finding that the endowment fund was an irrevocable charitable trust and upholding the trial court's ruling that the transfer contract with ALF was invalid.

The State appealed the trial court's judgment, and in a unanimous opinion, the Tenth District 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.

As to the plaintiffs' irrevocable trust theory, the court ruled that "[t]he Ohio Constitution prohibits one General Assembly from binding a subsequent one as to any fiscal or other matter," and that therefore, the endowment fund was not—and could not have been—an irrevocable charitable trust. App. Op. at ¶ 38. Further, the court found that although Miller and Weinmann bear the burden of proof in this case, "they offer no authority supporting the proposition that custodial funds, once created, cannot be abolished, amended, or transferred by the General Assembly." *Id.* at ¶ 34. The court concluded that "[b]ecause the General Assembly has plenary legislative power to revoke or transfer public funds, it acted constitutionally through H.B. 544 in transferring the monies from the endowment fund to other economic priorities." *Id.* at ¶ 41.

In addition, the Tenth District, after "thoroughly reviewing the record," *id.* at ¶ 77, affirmed the trial court's conclusions that the tobacco agency's Board violated the Open Meetings Act. *Id.* at ¶¶ 50-78. The court found that the transfer resolution was invalid because it "resulted from those nonpublic deliberations" and that therefore, "Renner lacked authority to enter into the contract with Legacy," rendering the contract "invalid and unenforceable." *Id.* at ¶ 77.

The Tenth District continued the trial court's injunction prohibiting the State from transferring the funds pending resolution of an appeal to this Court.

F. In 2009, the General Assembly reallocated the endowment fund proceeds to health and child welfare services.

There is an epilogue here. As the economic crisis intensified—and after the stimulus appropriations expired unused while the funds have remained frozen during this litigation—the General Assembly, through the most recent budget bill, reallocated the now approximately $260 million in remaining endowment funds to even more urgent needs, including Medicaid programs and other vital health and child welfare services. See H.B. 1 (128th General Assembly). Specifically, H.B. 1 has designated the funds for the following programs: $129.2 million for adult Medicaid services, including oxygen, wheelchairs, nursing services, and vision and dental care; $2.1 million for the Children's Buy-In Program, a public health insurance program available to children in Ohio who are not eligible for Medicaid but who are unable to obtain health insurance coverage (because, among other reasons, they have a pre-existing condition, or because they lost the only available coverage due to an exhaustion of a lifetime benefit); $30.1 million to expand Medicaid eligibility to children living at 300% of the federal poverty level; $5 million for Ohio's Breast and Cervical Cancer Project, which provides cancer screenings, diagnostic testing, and case management services at no cost to low income women in Ohio; and $92 million for Ohio's state-funded, county-administered child welfare and protection system.

ARGUMENT

<u>Defendants-Appellees' Proposition of Law No. I:</u>

The General Assembly did not, and constitutionally could not, establish the tobacco agency's endowment fund as an irrevocable trust.

Appellants' constitutional claims, and thus their first two propositions of law, hinge entirely on their theory that the endowment fund was an irrevocable charitable trust permanently dedicated to anti-tobacco programs. This Court has long held that "all legislative enactments enjoy a presumption of constitutionality," *State ex rel. Taft v. Franklin Cty. Court of Common Pleas,* 81 Ohio St. 3d 480, 481, 1998-Ohio-333, and that a party challenging the constitutionality of a statute bears the burden of proving that it is unconstitutional beyond a reasonable doubt, *State v. Ferguson,* 120 Ohio St. 3d 7, 2008-Ohio-4824, ¶ 12. Appellants cannot satisfy their heavy burden here because the General Assembly did not, and constitutionally could not, establish the tobacco agency's endowment fund as an irrevocable trust.

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. This plenary power—rooted in Section 1, Article II of the Ohio Constitution—means that "[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. Thus, public funds are "at all times subject to legislative control" and "[a] future general assembly may revoke" a grant of public funds "and divert these funds to other purposes." *Griffith,* 135 Ohio St. at 619. "Nothing but a constitutional inhibition could prevent such action." *Id.* 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 the endowment fund money as it sees fit.

Appellants say that the fund's status as a "custodial account" somehow changes this equation. It does not. Custodial accounts are not permanent, irrevocable funds. Indeed, the General Assembly passes legislation dissolving or reappropriating custodial account funds all the time. Appellants' analogy to the public employee retirement funds is also baseless and was easily rejected by both courts below. To be sure, the pension funds are subject to robust protection, but not because they are housed in "custodial accounts." Rather, the pension funds are protected because *they are not public funds*, and thus not subject to the General Assembly's plenary legislative power. Moreover, federal law, particularly ERISA, restricts how the pension funds can be used by the State. The endowment fund, by contrast, was at all times a public fund and thus subject to reallocation by the General Assembly.

Finally, even if Miller and Weinmann's irrevocable trust theory carried water—and it does not—they are entitled to no relief because they plainly lack standing to enforce any alleged trust.

A. The General Assembly did not establish the endowment fund as an irrevocable trust or limit legislative power to reallocate the money in the future.

When interpreting statutory text, this Court begins with first principles: "The polestar of statutory interpretation is legislative intent, which a court best gleans from the words the General Assembly used." *State v. Elam* (1994), 68 Ohio St. 3d 585, 587. The endowment fund was created through former R.C. 183.08. (S. 20). But nothing in that provision or anywhere else shows the creation of an irrevocable trust. The MSA settlement money that went into the endowment fund was received by the State as general state revenue. See, e.g., former R.C. 183.02 ("[a]ll payment received by the state pursuant to the tobacco master settlement agreement shall be deposited into the state treasury."). (S. 13). It was then subject to allocation by the General Assembly for any purpose. Former R.C. 183.08(A) placed some of this money in a fund in the custody of the State Treasurer but outside of the State treasury, for use by the tobacco agency; it directed the tobacco agency to use the endowment fund "to carry out its duties"; and it gave the agency's Board authority to decide how to spend the funds. (S. 20). The sum total of these provisions did nothing more procreative or prosaic than create a State fund to support a State agency.

Although Appellants refer to the fund throughout their brief as the "Endowment Trust," that term is their own invention. The General Assembly never called it a trust, but rather "the tobacco use prevention and control endowment *fund*." Former R.C. 183.08(A) (emphasis added). Meanwhile, the same legislation created several funds that the General Assembly did in fact call "trusts." See, e.g., R.C. 183.10 (creating the "law enforcement improvements trust fund"); R.C. 183.11 (creating the "Ohio agricultural and community development trust fund"); R.C. 183.19 (creating the "biomedical research and technology transfer trust fund"); R.C. 183.26 (creating the "education facilities trust fund"). (S. 21, 25, 27). Having used the term "trust" for other funds within the same statute, but *not* for the endowment fund, there is no basis in concluding that the General Assembly intended the endowment fund to be a trust. *Metro. Sec. Co. v. Warrant State Bank* (1927), 117 Ohio St. 69, 76 (The General Assembly "[h]aving used certain language in the one instance and wholly different language in the other, it will rather be presumed that different results were intended."); *Lake Shore Elec. Ry. Co. v. P.U.C.O.* (1926), 115 Ohio St. 311, 319 (had the General Assembly intended a term to have a particular meaning, "it would not have been difficult to find language which would express that purpose," having used that language in other connections).

Appellants also argue that because the General Assembly did not reserve the right to dissolve the fund, it must have meant to make the fund irrevocable. As Appellants admit, this approach seeks to graft the law of private charitable trusts onto the legislative budgeting process. It is an exotic proposition for which Appellants offer no support and that would radically encumber (indeed, embalm) hundreds of millions of dollars in public money. More important, this Court does not divine legislative intent from the *absence* of certain magic words. Thus, where nothing in former R.C. Chapter 183 states that the endowment fund was permanent or that the agency's funding would never be diminished, there is no basis for this Court to construe the legislation otherwise. See *Perrysburg Twp. v. City of Rossford*, 103 Ohio St. 3d 79, 2004-Ohio-

4362, at ¶ 7. ("In interpreting statutes, it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used.") (citations omitted).

Moreover, Appellants' theory ignores the plain language of the MSA settlement distribution bill, where the 123rd General Assembly explicitly acknowledged that its distribution decisions lacked permanence. For instance, R.C. 183.32 established a committee to review periodically the allocations in R.C. Chapter 183 to "determine if this chapter's distribution and uses of revenue received under the tobacco master settlement agreement adequately reflect the state's priorities." (S. 28-29). Similarly, while "earnestly request[ing]" that future General Assemblies "give due regard" to the distribution schemes in former R.C. Chapter 183 and recommended by the Ohio Tobacco Task Force, the 123rd General Assembly explicitly recognized that this request could only be aspirational, not compulsory, in light of "the right of each General Assembly to evaluate independently the budgetary priorities of the state." Am. Sub. S.B. No. 192, § 17 (emphasis added). (S. 36). The right to reassess budgetary priorities is necessary, the legislature recognized, because "the economic conditions, educational needs, and tax burdens of the people of the state will inevitably change." *Id.* In light of these acknowledgements—which address *all* of the distributions in R.C. Chapter 183—there is absolutely no basis for Appellants' claim that the 123rd General Assembly thought it was permanently insulating the endowment fund from reallocation.

Try as Appellants and their amici do to cloud over the distinction, the monies here were allocated to a specific *agency,* not an inchoate *cause*. As former R.C. 183.08(A) stated: "The endowment fund shall be used by the foundation to carry out its duties." (S. 20). Nowhere did the enabling legislation imbue the fund with a self-executing or autonomous anti-tobacco mission. It was simply allotted to an agency that had that mission. But as a creature of statute, the agency could be dissolved at any time and its funding reallocated. And the tobacco agency itself knew this. On April 2, 2008, following the announcement that the State's economic stimulus program would be funded in part with endowment fund monies, the tobacco agency's executive director emailed the Board and observed: "[T]he Legislature could always repeal RC 183, disband the [agency], and its resources would revert to the State." State's PI Ex. K. (S. Ex. 5, at 144). That is exactly what H.B. 544 subsequently did.

In short, nothing in former R.C. Chapter 183 established the endowment fund as a trust, let alone an irrevocable one, or limited the legislature's power to reallocate the funds in the future. The fund was simply created to support a State agency, which has now been abolished, and the General Assembly never indicated that the fund was meant to survive it. Simply put, the money was never imbued with a special life of its own—let alone an afterlife.

B. The General Assembly could not have established the endowment fund as an irrevocable trust because one General Assembly cannot limit the plenary legislative power of future General Assemblies over public funds.

As shown above, the General Assembly did not establish the endowment fund as an irrevocable trust. Moreover, the legislature *could not have* done so. The Ohio Constitution prohibits one General Assembly from limiting the legislative power of future General Assemblies, and therefore one General Assembly may not bind the hands of a future one by permanently insulating public funds from reallocation.

As this Court has long held, Section I, Article II of the Ohio Constitution vests the General Assembly with 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. This means that "[n]o general assembly can guarantee the continuity of its legislation or tie the hands of its successors." *Griffith,* 135 Ohio St. at 619; see also *State ex rel. Foreman v. Brown* (1967), 10 Ohio St. 2d 139, 158-59 ("one General Assembly cannot make a binding promise that the next General Assembly will not change the law."). This constitutional tenet extends to public funds, and thus public funds are "at all times subject to legislative control." *Griffith*, 135 Ohio St. at 619. While one legislature might commit funds to a particular matter, "[a] future general assembly may revoke this grant and divert these funds to other purposes." *Id.*

The 123rd General Assembly explicitly recognized this bedrock principle in the endowment fund's enabling legislation. Although that General Assembly "earnestly request[ed]" that future General Assemblies "give due regard" to the priorities recommended by the Ohio Tobacco Task Force and adopted by the legislature, that same General Assembly still recognized "the right of each General Assembly to evaluate independently the budgetary priorities of the state" given that "the economic conditions, educational needs, and tax burdens of the people of the state will inevitably change." Am. Sub. S.B. No. 192, § 17. (S. 36).

"Nothing but a constitutional inhibition could prevent such action." *Griffith*, 135 Ohio St. at 619. That is, "[t]he legislative power of the state is vested in the general assembly, and whatever limitation is placed upon the exercise of that plenary grant of power must be found in a clear prohibition by the constitution." *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—the endowment fund money as it sees fit, and thus the reallocation through H.B. 544 was permissible. This is why states that have wanted to restrict permanently the use of their tobacco settlement money have done so through constitutional amendments. See, e.g., Fla. Const., Art. V, § 27; Idaho Const. Art. VII, § 18; Mont. Const. Art. XII, § 4; Okla. Const. art. X, § 40. This also explains why Ohio itself uses constitutional amendments to restrict permanently certain revenue to a particular purpose—for instance, the exclusive dedication of net lottery proceeds to education, Ohio Const. Art. XV, § 6, and the exclusive dedication of motor fuel tax revenues for public highway purposes, Ohio Const. Art. XII, § 5a.

Appellants strain to distinguish those constitutional provisions by claiming that they only restrict the future use of the funds, whereas they contend that the money here was "spent" just by being allocated to the endowment fund. (Apt. Br. at 27). That is wrong. The fund's enabling legislation stated that "the endowment fund *shall be used*" by the foundation to carry out its duties." Former R.C. 183.08(A) (emphasis added). (S. 20). The future-tense makes clear that the endowment fund money was not already "spent." Like any other agency funding, it would only be "spent" when it was *used* by the agency—and there is no question that this money has not yet been used.

The Colorado Supreme Court recently considered the identical issue and reached the same conclusion. During an economic downturn between 2001-2004, the Colorado General Assembly transferred more than $442 million from 31 special funds into the state's general revenue fund in order to balance the state budget. A number of these transfers were made from special funds designated as "trusts," including Colorado's Tobacco Litigation Settlement Trust Fund. See C.R.S. 24-75-201.5 (2002) (directing the transfer of funds from, among other funds, the Tobacco Litigation Settlement Trust Fund, to the state's general fund). The plaintiffs in that case claimed—just as Appellants do here—that the funds could not be transferred because they resided in "trusts" and because none of the statutes creating the trusts reserved the legislature's right to revoke or amend them. *Barber v. Ritter* (Colo. 2008), 196 P.3d 238.

The Colorado Supreme Court recoiled at the notion that the law of private charitable trusts applied to public funds or that a legislature could even create an irrevocable trust with state money. Noting that the General Assembly's power to legislate was "absolute" and "plenary," particularly with respect to public funds, the court held that "[t]o hold that the General Assembly could limit this plenary power to appropriate by creating an irrevocable public trust would be to effectively hold that the General Assembly could abrogate its constitutional powers by statute. This is not the law." *Id.* at 253-54.

In other words, it would have been unconstitutional—that is, a violation of the General Assembly's plenary legislative power—to construe the "trust" funds as irrevocable. Thus, the court concluded that "[t]he status of the three cash funds as public trusts does not, and constitutionally cannot, have any limiting effect on the legislature's plenary power to amend or repeal those funds' enabling statutes." *Id.* at 254. Because that is exactly the situation here, this Court should heed the sound reasoning of the Colorado court, which directly echoes the mandates of the Ohio Constitution and this Court with respect to the General Assembly's legislative power.

Appellants contend that *Barber* does not apply here because the Colorado funds were "in the state treasury." (Apt. Br. at 28). But that was not relevant to the Colorado Supreme Court's decision. *Barber*, 196 P.3d at 253-54. The decisive factor was that the funds at issue were State funds—which the endowment fund here is. See above at Section A and below at Section C.1.

Appellants cite no authorities suggesting that a legislature can insulate public funds from reallocation by consigning them to an irrevocable trust. The scant few cases they do lean on are inapposite. Most of them concern private charitable trusts involving private funds, an analogy already established as untenable by virtue of the legislature's plenary power over public funds. (Apt. Br. at 22-25, 32). The case of *Dadisman v. Moore* (W. Va. 1989), 384 S.E.2d 816, concerns state employee retirement funds, which are easily distinguished because they do not consist of *public* money, as discussed below. (Apt. Br. at 21 n. 6). Two other cases recognize that the federal government may hold land in trust for Indian tribes—but they neither concern public funds nor hold that such trusts are irrevocable. See *United States v. Mitchell* (1983), 463 U.S. 206, 224-225; *White Mountain Apache Tribe v. United States* (Fed Cir. 2001), 249 F.3d 1364, 1373. In *South Carolina Dep't of Mental Health v. McMaster* (S.C. 2007), 642 S.E.2d 552, the real property at issue had been transferred to a state agency for a purpose specified in a restrictive deed. Similarly, *Kapiolani Park Preservation Soc'y v. City of Honolulu* (Haw. 1988), 751 P.2d 1022 is a conservation-easement case involving land donated to the State through deeds specifying that the land "be used permanently as a free public park." *Id.* at 1025. These cases do not concern public funds at all—let alone funds acquired without restrictions, as is true of the MSA settlement funds here. In short, none of Appellants' cases demonstrates that a state legislature can insulate public funds from reallocation by establishing an irrevocable trust.

In addition to their lack of supporting legal authorities, Appellants also fail to offer any rationale for their position. Nor is there any. Rather, permitting one General Assembly to restrict permanently another's use of public funds is antithetical to responsible governance. If recognized, such authority would leave future General Assemblies powerless to react to changing economic circumstances and priorities. Rightly so, this Court has already rejected that proposition: "No general assembly can guarantee the continuity of its legislation or tie the hands of its successors. Who knows what demands for public revenues and public funds may be more pressing within the next quarter-century? Who knows the necessities of future general assemblies." *Griffith*, 135 Ohio St. at 619. Thus, it is well settled that "[t]he power of a subsequent general assembly either to acquiesce or to repeal" an allocation of public funds "is always existent." *Id.* at 620.

In short, the 123rd General Assembly was constitutionally prohibited from establishing the endowment fund as an irrevocable trust, and the 127th General Assembly therefore retained power to repeal the fund and transfer its proceeds to other priorities, as it permissibly did through H.B. 544.

C. The endowment fund consisted of public, State money, and the fund's status as a "custodial account" did not make it irrevocable or shield it from reallocation.

In an effort to get around the clear constitutional prohibition against insulating public funds in an irrevocable trust, Appellants insist that the endowment fund was somehow not a public, State fund and was untouchable by virtue of its status 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. The endowment fund was a public fund consisting of public, State money, and Appellants are thoroughly misguided in characterizing "custodial accounts" as permanent, irrevocable funds.

1. The monies in the endowment fund are public, State funds.

As a fund that supported a State agency, the endowment fund was a public fund through and through. The MSA settlement money that was directed to the endowment fund was received by the State as general state revenue. See, e.g., former R.C. 183.02 ("[a]ll payment received by the state pursuant to the tobacco master settlement agreement shall be deposited into the state treasury."). (S. 13). It came to the State with no strings attached and was thus subject to allocation by the General Assembly for any purpose. Part of this settlement money was then allocated to the tobacco agency by being placed in a fund that was to be used by the agency "to carry out its duties." Former R.C. 183.08(A). (S. 20).

The money was not received from a source that connected it to the rights of any particular people; the public character of the money was never altered; and the State never gave up title to the money. The money was simply placed in a fund to support a State agency.[3] A small number of private donations (approximately $260,000 over a seven-year period) were made to the fund—as is true of numerous State agencies that receive private donations—but this does not change the public character of the fund. Those donations simply became State money once given to the State.

Indeed, the State's official accounting practices—including those of the tobacco agency—thoroughly disprove Appellants' claim that the fund was not a State fund. The State and the tobacco agency always treated the endowment fund as a public State fund, and never as a trust, let alone an irrevocable one.

Like most states, Ohio uses the guidelines of the Governmental Accounting Standards Board ("GASB") to classify State funds for accounting purposes. Using these guidelines, Ohio's financial statements group State funds into three broad but distinct categories: (1) proprietary funds, (2) fiduciary funds, and (3) governmental funds.

Proprietary funds pertain to revenues generated by the activities themselves, such as with a public utility. Fiduciary funds are those held in a trustee or agency capacity for others. GASB Basic Financial Statements, Statement No. 34, ¶ 69. A fund is designated a fiduciary fund when

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[3] In their amicus brief, former Tobacco Task Force members Betty Montgomery, Richard Finan, and K. Nick Baird go so far as to claim that the tobacco agency was a "charitable foundation" and somehow not a State agency. (Amicus Br. at 8). That is meritless and turns a blind eye to the plain language of former R.C. Chapter 183. The General Assembly could not have made clearer that the "tobacco use prevention and control foundation" was a State agency, not a "charitable foundation" or any other type of entity. Among other things: (1) its executive director and staff were all State employees; (2) it was overseen by a board consisting of 23 members, all of whom were public officials and subject to the annual reporting requirements of the Ohio Ethics Commission; and (3) it had rulemaking powers governed by Chapter 119 of the Revised Code. See former R.C. 183.04, 183.06, 102.02(A), and 183.07. In addition, former R.C. 183.07 provided that the agency "shall endeavor to coordinate its research and programs with *other agencies* of this state"—the use of the term "other" confirming that the General Assembly regarded the tobacco entity itself as a State agency.

the State "is acting in a fiduciary capacity for individuals, private organizations, or other governments." *Id.* Additionally, "fiduciary funds are distinguished from agency funds generally by the existence of a trust agreement that affects the degree of management involvement and the length of time that the resources are held." *Id.* Governmental funds—the largest category—account for virtually everything else. These are the bread-and-butter funds for State agencies and their operations. A subset of governmental funds are "special revenue funds," which simply denote public funds dedicated for "specified purposes," or whose revenue stream is derived from a unique source (as with federal grants or settlement funds). GASB, Codification of Governmental Accounting and Financial Reporting Standards, §§ 1300.103 & .105.

If the endowment fund were a "trust corpus," "with mandatory fiduciary duties," for the benefit of "trust beneficiaries"—as Appellants insist—it would have been classified as a fiduciary fund. (Apt. Br. at 21). But it was not. The Director of Budget and Management issues the State's official Comprehensive Annual Financial Report. R.C. 126.21(A)(9). From the outset, the State classified all the funds containing tobacco settlement money—including the endowment fund—as "special revenue funds," which, as discussed above, are a subset of ordinary, public governmental funds. (S. Ex. 2, at 42, 44, 48-49, 53, 56, 59, 63, 65, 69, 71, 74, 76, 80, 82, 86, 88) (Office of Budget and Management, Comprehensive Annual Financial Reports 2000-2007). The endowment fund met the definition of a special revenue fund to a tee: It consisted of State money, dedicated to a specific purpose, and was derived from a unique revenue stream (here, the MSA settlement funds). GASB, Codification of Governmental Accounting and Financial Reporting Standards, §§ 1300.103 & .105. Thus, the State Auditor repeatedly endorsed OBM's classification of the endowment fund as a "special revenue fund" in the State's Comprehensive Annual Financial Reports. (S. Ex. 3, at 90-95, 98-104). (Office of the Auditor, Independent Accountants' Reports 2000-2007).

Indeed, although former Auditor and Attorney General Betty Montgomery claims in her amicus brief that the Ohio Tobacco Task Force intended for the endowment fund to be a "sequestered trust fund" that would be "unlike the other funds" that received MSA settlement money, Amicus Br. at 7, as State Auditor she repeatedly certified that the endowment fund's designation as a special revenue fund—that is, a public governmental fund—was correct. (S. Ex. 3, at 94-95, 98-101) (reports of 2002, 2004, and 2005). As Auditor, she always endorsed the fund's classification as an ordinary public fund and *never* classified it as the fiduciary trust she now claims it was.

Just as tellingly, the tobacco agency's annual reports always classified the funds as special revenue funds, not as fiduciary trusts. For the 2001-2007 fiscal years, the tobacco agency repeatedly reported that the agency is "part of the primary government" and "uses a special revenue fund to report its financial position and results of operation" and that "[t]wo separate accounts exist within the special revenue fund; these are the Tobacco Use Prevention and Control endowment fund and the Tobacco Use Prevention and Control Operating Expenses Fund." (S. Ex. 4, at 109, 113-114, 117-118, 122-123, 127-128, 132-133, 137-138). And each year, the State Auditor (including Auditor Montgomery), endorsed the agency's classification of its funds as governmental funds, not fiduciary trusts. (S. Ex. 4, at 107, 111-112, 116, 120-121, 125-126, 130-131, 135-136, 140-141).[4]

[4] Exhibits 2, 3, and 4 to Appellees' Supplement are official government agency reports, and therefore this Court may take judicial notice of them, as the Tenth District did. *Disciplinary Counsel v. Sargeant*, 118 Ohio St.3d 322, 2008-Ohio-2330, ¶ 24 (taking judicial notice of case management report); *State ex rel. Myers v. Blake* (1929), 121 Ohio St. 511, 516 (taking judicial notice of official roster compiled by Secretary of State); *State ex rel. Meck v. Bd. of Deputy State*

There are multiple reasons why the endowment fund simply could not have been a fiduciary trust. First, fiduciary trusts "cannot be used to support the government's own programs." GASB Basic Financial Statements, Statement No. 34, ¶ 69. But former R.C. Chapter 183 made clear that the tobacco agency, which the endowment fund supported, was authorized to administer its own programming. See Former 183.07 (referring to the agency's research and programs). (S. 19). Second, fiduciary trusts are held and administered by the State "when it is acting in a fiduciary capacity for individuals, private organizations, or other governments." GASB Basic Financial Statements, Statement No. 34, ¶ 69. But the tobacco agency did not act as the fiduciary for any individual, private organization, or other government. Rather, the agency served a generalized public purpose—to "prepare a plan to reduce tobacco use by Ohioans." Former R.C. 183.07. (S. 19). Third, fiduciary trusts are indicated "by the existence of a trust agreement that affects the degree of management involvement and the length of time that the resources are held." GASB Basic Financial Statements, Statement No. 34, ¶ 69. It is undisputed that the General Assembly never created an agreement between the State and any other entity, and certainly no agreement detailing the fund's management or the length of time the money would be held.

In sum, during the eight-year life of the tobacco agency, no one ever treated the endowment fund as a trust—let alone an irrevocable one. Not OBM. Not any State Auditor. Not even the tobacco agency itself. There is no basis for the Court to adopt this far-flung and revisionist theory now.

Supervisors (1924), 111 Ohio St. 203, 210 (taking judicial notice of official report of the Secretary of State).

2. "Custodial accounts" containing State money are not permanent, irrevocable funds or shielded from the General Assembly's plenary legislative power of reallocation.

Although Appellants insist that the endowment fund's status as a custodial account somehow shields the funds from reallocation, conspicuously missing from their brief is *any* explanation of how that is so. Appellants simply declare, *ipse dixit*, that the endowment fund is not in the State treasury and is therefore not subject to reappropriation. But that is not a reasoned argument. It is an empty assertion, and it is wrong.

The legal character of custodial accounts is best understood in the context of the State funding process more broadly. Most State programs are funded through biennial appropriations from the State treasury. At the beginning of each biennium, the General Assembly appropriates a specific amount of money from the State treasury for a specific purpose. This is the process contemplated by Section 22, Article II of the Ohio Constitution. First, "money shall be drawn from the treasury" only upon "a specific appropriation, made by law." *Id.* Second, "no appropriation shall be made for a longer period than two years." *Id.* At the "close of the [appropriation] period"—either the end of each fiscal year or each biennium, depending upon how the appropriation was made—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 uses 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. This mechanism has several advantages. It makes long-range planning easier by preventing the automatic reversion of funds at the end of a fiscal year or biennium. And it is especially well-suited for directing a lump sum to an agency—particularly a sum that the legislature knows will exceed what is needed in a single biennium, as was the case with the tobacco agency.

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 forever shielded from the General Assembly's power to reallocate those funds as it sees fit. In this respect, Appellants and their amici fundamentally misapprehend the legal character of custodial accounts. These funds are not forever protected from reallocation. Indeed, the General Assembly orders the dissolution or liquidation of funds from custodial accounts (including custodial accounts called "trust" funds) *all the time*. To name only a few and recent examples:

- The Penalty Enforcement Fund—used by the Department of Commerce to enforce prevailing wage law violations—was initially established in R.C. 4115.10(A) as a custodial account, to reside "in the custody of the treasurer of state but [which] shall not be part of the state treasury." Through H.B. 94, however, the 124th General Assembly dissolved the custodial account, which caused any unspent funds to revert to the State treasury, and it created a new Penalty Enforcement Fund in the State treasury.

- Through H.B. 119, the 127th General Assembly directed the Director of Budget and Management, in collaboration with the State Treasurer, to "take any action necessary" to facilitate the "transfer of cash" from three custodial funds—the Attorney General Education Fund, the Secretary of State's Alternative Payment Program Fund, and Ohio's Best Rx Program Fund—"to the state treasury." The Attorney General Education Fund was eventually abolished as a custodial account altogether and was reestablished in the State treasury.

It made no difference that the funds listed above were in custodial accounts—they unquestionably consisted of public, State money. And like the endowment fund, the Penalty Enforcement Fund, the Attorney General Education Fund, and the Secretary of State's Alternative Payment Program Fund were all used by the respective State agencies to carry out their duties. Thus the General Assembly retained its power to either dissolve those accounts or reallocate the funds as it deemed best.

Appellants are thus wrong when they declare, without authority, that money is only public money if it resides in the State treasury. While this *used to be* the case, it no longer is. Before 1985, the General Assembly defined the State treasury as "the *sole place* for the deposit and safekeeping of the moneys. . . and assets of the state." Former R.C. 113.04 (emphasis added). But in 1985, the General Assembly both repealed that exclusivity language and amended the statute to recognize custodial funds. See Sub. H.B. No. 201 (1985) (now codified at R.C. 113.05(B)). "When confronted with amendment to a statute, an interpreting court must presume that the amendments were made to change the effect and operation of the law." *Lynch v. Gallia Cty. Bd. of Comm'rs* (1997), 79 Ohio St. 3d 251, 254. Through the 1985 amendment, the General Assembly rescinded the status of the State treasury as the "sole place" for the safekeeping of public funds and recognized that custodial accounts could also house public money. Accord *State ex rel. Ohio Funds Mgmt. Bd. v. Walker* (1990), 55 Ohio St. 3d 1, 8 (tax revenues are State money and fact that money was "[s]egregat[ed] into a special account"—a custodial fund—"will not change this fact."). Indeed, almost immediately, the General Assembly began creating custodial accounts and depositing public funds in them as an alternative to the biennial appropriations process.

There is yet another way the General Assembly has signaled its intent to retain control over public funds in custodial accounts. In order to fill budget gaps or meet other budgetary needs, the General Assembly has repeatedly given the Office of Budget and Management broad authority "to transfer cash from non-General Revenue Fund funds that are not constitutionally restricted to the General Revenue Fund." See, e.g., H.B. 194, §144 (124th General Assembly); H.B. 119, § 512.03 (127th General Assembly). Public money in custodial funds, as "non-General Revenue Fund funds," are subject to these provisions. Thus, far from being especially buffered from changing budgetary needs, as Appellants claim, the General Assembly has repeatedly indicated that non-GRF funds, such as the State money housed in custodial accounts, are among the least sheltered of public accounts and that the only funds that could be insulated from this directive are those that are "constitutionally restricted"—just as *Griffith* and this Court's other well-worn precedents say. *Griffith*, 135 Ohio St. at 619.

In sum, public money in a custodial account remains in the State's custody and control. The General Assembly's direction that these funds "shall not be part of the state treasury" simply prevents the funds from reverting to the General Revenue Fund at the end of each fiscal year or biennium. But nothing shields these funds from the General Assembly's plenary legislative power. See *Griffith,* 135 Ohio St. at 619-20 and *Barber*, 196 P.3d at 253-54.

D. The endowment fund is wholly unlike the State employee retirement funds.

In their final attempt to trump up an ordinary public account as something extraordinary, Appellants analogize the endowment fund to the State employee retirement funds. But as the Tenth District easily recognized, the comparison is entirely off base.

As a preliminary matter, Appellants contend that the endowment fund "is entitled to the same constitutional protections" as the retirement funds, yet they never identify *any* such constitutional protections. (Apt. Br. at 29). To be sure, the retirement funds enjoy robust protection, but not because they are housed in custodial accounts. The chart on page 30 of Appellants' brief is pointless. It simply lists the generic attributes of custodial accounts (with Appellants' "trust" veneer clipped onto it). But these attributes are not what afford the pension funds their unique protection, and thus the chart tells us nothing.

First and foremost, State employee retirement funds are distinctly protected because *they are not public funds*. Rather, the funds are collected and held for the sole benefit of specific individuals—public employees—who have "a vested interest" in the funds as contributors. *State* *ex rel. Preston v. Ferguson* (1960), 170 Ohio St. 450, 464. As Ohio courts have long recognized, State employee retirement accounts are "not to be considered state funds in the general sense." *In re Appeal of Ford* (1982), 3 Ohio App. 3d 416, 420; see also 1974 Ohio Atty. Gen. Op. No. 74-102 (State funds do not include moneys collected or voluntarily contributed for the sole benefit of the contributors). Other states are in accord. See, e.g., *Knutson v. Bronner* (Ala. 1998), 721 So. 2d 678 (public retirement system assets are not state funds); *Denver v. Cent. Bank & Trust Co.* (Colo. 1956), 133 Colo. 141 (city and county public employee retirement funds are not public funds). Indeed, the Director of Budget and Management does not even include the pension funds in the State's Comprehensive Annual Financial Report. This is because they are not public funds.

The tobacco agency's endowment fund shares none of those attributes. The endowment fund's monies were not received from a source that connected them to any specific individuals. The money from the MSA was received by the State as general State moneys, subject to expenditure by the General Assembly for any purpose. Moreover, the endowment fund was always reported as a public government fund in the State's annual financial reports and in the tobacco agency's own annual reports.

Second, the endowment fund was public through and through and its purpose was to support a typical, public State agency. The retirement systems are completely different. For instance, the Board that governs PERS is dominated by members elected by the members of the retirement system. R.C. 145.04. Moreover, the employees of the retirement system are not state employees. *Appeal of Ford*, 3 Ohio App.3d at 420. By contrast, the tobacco agency was unquestionably a State agency. Its rulemaking was governed by R.C. Chapter 119; all of its employees were public employees; and its board consisted of 23 members, all of whom were public officials subject to Ohio Ethics Commission disclosure and reporting requirements.

Third, the fiduciary duties of the tobacco agency and the retirement systems differ markedly. The retirement funds provide a pension for specific public employees, and the board overseeing the funds owes a fiduciary duty "solely" to those specific "participants and beneficiaries." See R.C. 145.11. Thus, the State employee retirement systems do not exercise their statutory functions *on behalf of the State*, but rather on behalf of particular, identifiable individuals. This is wholly unlike the tobacco agency, which served a generalized public purpose and whose "trustees" had no fiduciary obligations to *any* specific, identifiable individuals. Rather, the tobacco agency had the generalized public purpose of "prepar[ing] a plan to reduce tobacco use by Ohioans." Former R.C. 183.07. (S. 19).

Fourth, the retirement funds are subject to a high degree of protection largely because of federal law, including ERISA, which restricts how the funds can be used by the State. See 29 U.S.C. § 1001(b); *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon* (2004), 541 U.S. 1. The Ohio plans are "qualified plans," and therefore federal law prohibits the General Assembly from using the retirement system funds for purposes other than providing retirement benefits. See 26 U.S.C. § 401(a)(2) ("it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be . . . used for, or diverted to, purposes other than for the exclusive benefit of [its] employees or their beneficiaries."). The endowment fund was subject to no such federal restrictions.

Finally, Appellants claim that the General Assembly authorized the endowment fund money to be invested in corporate stock and therefore signaled that its money was not public, State money. (Apt. Br. at 17). That is wrong; the General Assembly did not such thing. The endowment fund's enabling legislation stated that "the eligible list of investments [for the endowment fund] shall be the same as for the public employees retirement system *under section 145.11 of the Revised Code*." Former R.C. 183.08 (emphasis added). (S. 20). But R.C. 145.11 does not mention or authorize any specific investments, let alone corporate stock. It simply obligates PERS board members to invest "with care, skill, prudence, and diligence" in investments that "offer quality, return, and safety comparable to other investments." R.C. 145.11. Therefore, the only thing the General Assembly could have intended through its reference to R.C. 145.11 in former R.C. 183.08 was for the tobacco agency's Board to invest the endowment fund money prudently—a reasonable obligation given the large sum involved. Appellants' point is further misplaced because the question of whether monies can be invested in corporate stock does not even turn on R.C. 145.11 at all, but rather on the Ohio Constitution, which restricts the financial involvement of government entities with private enterprises, including the purchase of corporate stock. See Ohio Const. Art. VIII, § 4. These constitutional restrictions apply only to *public money*, and therefore they have been interpreted as not applying to the State pension funds, which have long invested in corporate stock. As a public fund, however, the tobacco agency's endowment fund was subject to these constitutional restrictions and so the Board was not authorized to invest the money in corporate stock. That the Board apparently did invest in corporate stocks does nothing to magically transform the funds into private funds, but simply demonstrates that the Board wrongfully invested the agency's money (unfortunately, one of the errant Board's several missteps). The point is that there is nothing on the face of former R.C. 183.08 or R.C. 145.11 that authorized the tobacco agency's board to invest the endowment fund in corporate stock and thus no indication that the fund had the same non-public character or protection as the pension funds.

In sum, Appellants' pension fund analogy is wrong. The pension funds are protected, but that is because they are not public funds and because federal law, including ERISA, strictly limits how the funds can be used by the State. By contrast, the tobacco agency's endowment fund, as a public fund, was "at all times subject to legislative control," and thus subject to being "revoke[ed] . . . and divert[ed] . . . to other purposes" pursuant to the General Assembly's plenary legislative power. *Griffith*, 135 Ohio St. at 619.

E. Even if the endowment fund were an irrevocable trust, Appellants lack standing to enforce it.

Even if the endowment fund were an irrevocable trust, Appellants would still have to 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. But Appellants Miller and Weinmann, as ex-smokers, have no vested interest in the fund, and therefore no standing to enforce it.

Miller and Weinmann are not specifically identified in the statutes creating the fund; they are not part of a 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 general public with respect to anti-tobacco programs. As the name of the tobacco agency made clear (the "tobacco use prevention and control foundation"), its purpose was to promote tobacco prevention among non-smokers and cessation for current smokers. That covers *every single person in Ohio.* Miller and Weinmann have no basis for claiming that their own property rights are in jeopardy or that they will sustain any injury different in character from that suffered by the general public.

Accordingly, should the Court find that the endowment fund is an irrevocable trust, it should deny Appellants' claim because they plainly lack standing. Alternatively, the Court should remand the case to the Tenth District for consideration of these issues, which the State defendants raised in their appeal to that court. See App. Op. at ¶ 47 (declining to address standing issues after holding that lack of an irrevocable trust was dispositive of the case).

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.

In Appellants' third proposition of law, ALF claims that it is contractually entitled to $190 million of the endowment fund by virtue of the Board's transfer resolution of April 4, 2008, and the purported contract executed four days later with the agency's executive director, Michael Renner. For three reasons, that argument is meritless. First, the Board's decision to convene a closed-door executive session violated the Open Meetings Act, and the Act therefore invalidates both the Board's resolution agreeing to the $190 million transfer and the purported contract derived from that resolution. Second, there is no factual basis for ALF's claim that the Attorney General's office "set up" the Board to violate the Open Meetings Act, nor are there grounds for legitimizing the improper fruits of the Board's violations even if ALF's fanciful tale were true. And finally, the purported contract between the tobacco agency and ALF was invalid on at least three other grounds independent of the Open Meetings Act: the Board unlawfully delegated its statutory duties to a private, unaccountable non-profit; the transfer contract was never approved by the Board; and the contract failed to meet State contracting requirements under R.C. 9.231.

A. The tobacco agency's Board violated the Open Meetings Act during its April 4, 2008 meeting.

Although ALF offers no arguments contesting the unanimous rulings below that the Board violated the Open Meetings Act, it continues to insinuate that these were mere "purported . . .

infractions." (Apt Br. at 37.) Thus, it warrants briefly rehearsing that both courts below correctly held that the tobacco agency's Board blatantly violated the Act during its April 4, 2008 meeting.

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). And the Act provides that "[a] resolution, rule, or formal action of any kind" adopted in a closed-door meeting, or adopted in an open meeting "that results from deliberations in a meeting not open to the public," is invalid, unless the deliberations were for one of the narrow purposes specifically allowed in the Act. R.C. 121.22(H). The Board violated the Open Meetings Act in at least two respects, each of which independently invalidates its resolution to transfer $190 million from the endowment fund to a private entity.

First, the decision to convene in executive session was improper. The Open Meetings 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). As both courts below properly found, this exception does not apply here. The Board did not conference with its attorney during this session because the Board's attorney—an assistant attorney general—was not present. Moreover, the Board's resolution to convene in executive session was defective. The Act requires the "motion and vote to hold that executive session" to "state which one or more of the approved matters listed" in the Act will be considered in the executive session. R.C. 121.22(G). The Board's resolution did not reference any statutorily-authorized matters. *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 the agency's executive director should be authorized to carry out the transfer. After two hours of closed-door discussion, the Board returned to open session and, in a matter of a few minutes and without any deliberation, agreed to the transfer. There is no question that the transfer resolution, while adopted in an open meeting, "result[ed] from deliberations in a meeting not open to the public," in clear violation of the Open Meetings Act. R.C. 121.22(A).

In light of these violations, the agreement to transfer $190 million of public funds to ALF is invalid. R.C. 121.22(H).

B. The Attorney General's office did not "set up" the Board for an Open Meetings Act violation; and even if it had, the fruits of the Board's secret meeting are still invalid.

ALF argues that a former Attorney General somehow "set up" the Board to violate the Open Meetings Act, and that therefore, the current Attorney General should be equitably estopped from arguing that the Open Meetings Act violations invalidate the transfer resolution. That argument is baseless both factually and legally.

1. There was no "set up."

ALF asks this Court to do more than rule on a proposition of law. It asks the Court to revisit—and reverse—the trial court's factual findings regarding the absence of an assistant attorney general from the Board's April 4 meeting. Even the trial court—which was deeply sympathetic to the plaintiffs below—found no wrongdoing on the part of the Attorney General's office. PI Order, at ¶¶ 41-52, 157. Nor did the Tenth District find any wrongdoing, after specially noting that it had "thoroughly review[ed] the record." App. ¶ 77. Those findings are entitled to significant deference and are reversible only if they constitute an abuse of discretion. ALF points to none. Rather, ALF attempts to transform its claim into one about a disgraced former politician. That has never been what this issue is about and the Court should reject ALF's desperate new gloss.

The facts are as follows. Neither the tobacco agency's executive director nor any Board member ever requested the presence of an assistant attorney general or the appointment of special counsel for the April 4 meeting. App. Op. at ¶ 55. The tobacco agency's executive director, Michael Renner, knew that the Board's assigned counsel (Susan Walker) could not attend the meeting due to a work conflict, and as all the courts below found, "he had not expressly requested that another assistant attorney general attend in her place." *Id.* While Renner had placed a call to Walker while she was out of town on April 2, to ask a legal question and request special counsel for the agency, *id.* at ¶ 52, Renner did not communicate any urgency in his message, did not specify whether the request for special counsel pertained to the April 4 meeting, and did not ask for a response in any specific time frame. (Walker Depo, at 42, 45). Nonetheless, Walker directed another assistant attorney general to get in touch with Renner while Walker was out of town. App. Op. at ¶ 53. This attorney left Renner two voicemails on April 3, including one in which she asked him to explain his questions and special-counsel request in writing and to transmit the letter to the Attorney General's office. *Id.* She also asked Renner to call her back. But Renner only returned the call after the close of business (and could not recall whether he left her a voicemail). *Id.*; Renner testimony, PI Hrg. Vol. II, at 254. What is more, Renner failed to transmit the letter to the Attorney General's office prior to the April 4 meeting, and thus failed to communicate his concerns in a time or manner that would have enabled the Attorney General's office to apprehend any urgency in his request. App. Op. at ¶ 54.

That was the meager sum total of Renner's communications with the Attorney General's office prior to the Board's April 4 meeting. He knew that Walker could not attend; he never requested another attorney to attend in her place; and he failed to reach out to anyone else in the

Attorney General's office, or to transmit a letter with information that the office specifically requested. And despite Appellants' umbrage-infused retelling, the Attorney General had no basis for anticipating the Board's need for counsel at the April 4 meeting. The Governor and General Assembly announce agency budget cuts regularly. But this does not give rise to a conflict-of-interest between the affected agency and the Governor or legislature, or give the agency legal recourse. That the Board ultimately decided to use the meeting to take rash and unlawful action with respect to the fund could hardly have been foreseen.

In fact, in Renner's email to Board members on April 2, advising them of the legislature's plan to use some of the endowment fund for economic stimulus efforts, Renner explained that he had met with the Board's chairman that day and they agreed "it would be best to address the other issues before us on Friday *without trying to overlay this development.*" Def.'s PI Ex. K (S. 144). (Emphasis added). He continued: "As we discuss what our future course should be *over the coming months*, it would be better to apply that decision to ongoing programs rather than shut down programming now while we adjust for the future." *Id.* (emphasis added). Given that Renner was advising the Board *not* to take on a discussion of the legislature's plan at the April 4 meeting, and that the issues could be addressed "over the coming months," there was no basis for concluding that on that same day he had somehow urgently requested legal counsel for the April 4 meeting in anticipation of some sort of immediate action.

ALF offers scattered bits of testimony from Board members about their apparent surprise that no counsel was present for the April 4 meeting. (Apt. Br. at 35-36). But this testimony is irrelevant. Not a single Board member testified to having personal knowledge of Renner's communications with the Attorney General's office or the reason that no representative was present. Accordingly, their testimony fails to inform, let alone confirm, ALF's retelling. That the mere emotions of Board members are the most ALF can offer for support confirms the hollowness of its "set up" story.

In short, as both courts below ruled, there is no basis for finding that the Attorney General's office misrepresented anything to the Board or purposefully failed to send a representative to the Board's meeting.

2. The Open Meetings Acts violations invalidate the transfer contract no matter what.

Even if ALF's "set up" claims were true—and they are not—the Board's Open Meetings Act violations still invalidate the transfer contract.

First and foremost, this Court has long recognized that "[a]n estoppel, to be binding, must be reciprocal; and parties and privies only are bound thereby." *Kitzmiller v. Van Rensselaer* (1859), 10 Ohio St. 63, 64. ALF's argument fails in that respect on two levels. First, ALF was neither a party to nor privy of the April 4 meeting and therefore has no basis for standing in the shoes of the tobacco agency and asserting estoppel against the Attorney General. Second, while ALF claims that a former Attorney General "set up" the Open Meetings Act violations, there has never been any allegation of wrongdoing by the other Appellees—the State, the Treasurer, or the Director of Health. Those Appellees have maintained throughout the case that the purported contract with ALF is invalid because of the Board's Open Meetings Act violations. Because these other Appellees were not parties to the alleged "set up," they are not subject to estoppel.

ALF's reliance on *Roberto v. Brown Cty. Gen. Hosp.* (12th Dist.), No. CA87-06-009 is entirely off base, as both courts below noted. App. Op. at ¶75; PI Order at ¶159. That case involved board members trying to invalidate their *own* board's actions. There was also an additional equitable component: the complaining individual had relied upon the allegedly invalid employment agreement for five years. The courts below properly found no such reliance existed here. *Id.*

Second, the Open Meetings Act already contains certain exceptions to the rule that invalidates closed-door decisions, and ALF's proposed carve-out is not one of them. R.C. 121.22(H) provides that a resolution or formal action resulting from a closed-door session will not be invalidated if the session was convened for one of the purposes authorized in R.C. 121.22(G) or (J). None of those exceptions comes close to validating an otherwise improper resolution where the Open Meetings Act was somehow "set up." Where the General Assembly has not seen fit to recognize a statutory exception, this Court is not authorized to do so instead. *Weaver v. Edwin Shaw Hosp.*, 104 Ohio St. 3d 390, 2004-Ohio-6549, ¶ 20 (recognizing that the Court may not create "an additional statutory exclusion not expressly incorporated into this statute by the legislature").

Third, in their zeal to use the Open Meetings Act as a sword against a disgraced former politician, Appellants lose sight of who the Act is meant to protect: the public. As the Tenth District properly recognized, App. Op. at ¶ 76, and as this Court has repeatedly emphasized, the Open Meetings Act vindicates the rights of the public above all. "One of the strengths of American government is the right of the public to know and understand the actions of their elected representatives. This includes not merely the right to know a governmental body's final decision on a matter, but the ways and means by which those decisions were reached." *White v. Clinton Cty. Bd. of Comm'rs* (1996), 76 Ohio St. 3d 416, 419.

The public only stands to be injured by a legal rule that turns a blind eye to blatant violations of the Open Meetings Act. This is why the Act only recognizes very narrow exceptions to the rule invalidating closed-door decisions. R.C. 121.22(H). Indeed, this Court has cautioned against any application of the Act that would frustrate the public's right to know and evaluate the workings of government: "The statute that exists to shed light on deliberations of public bodies cannot be interpreted in a manner which would result in the public being left in the dark." *State ex rel. Cincinnati Post v. City of Cincinnati* (1996), 76 Ohio St. 3d 540, 544. ALF's proposal offends in precisely that way; it would leave the public in the dark. Indeed, the Open Meetings Act was developed to shine light precisely on the type of scheming and impulsive actions at issue here. ALF's is an "equitable" theory only in the most self-serving way and this Court should reject it as a gross iniquity to the public.

Finally, ALF's proposition of law would open the door for all types of machinations by those who would seek to legitimize improper closed-door decisions. Shifting the determinative inquiry from the objective question of *whether* there was an Open Meetings Act to the murkier question of *who caused it* would quickly eviscerate the Act. The Court should not sanction such an endeavor.

C. The purported contract between ALF and the tobacco agency was invalid on three other grounds independent of the Open Meetings Act.

Even if this Court ruled for ALF on its Open Meetings Act claim, the purported contract is still invalid on three other independent grounds. As the trial court correctly found, the purported contract was invalid because (1) the Board unlawfully delegated its statutory duties to a private, unaccountable non-profit; (2) the transfer contract was never approved by the Board; to the contrary, the Board rescinded its transfer resolution on April 15, 2008; and (3) the contract failed to meet State contracting requirements under R.C. 9.231. PI Order at ¶¶ 162-179.

The Tenth District did not address these other grounds, having found the Open Meetings Act violations dispositive of the contract's invalidity. Accordingly, even if the Court adopted

ALF's estoppel theory, it must remand the case to the Tenth District for consideration of these other grounds for invalidating the contract.

CONCLUSION

For these reasons, this Court should affirm the judgment of the Tenth District in its entirety.

Respectfully submitted,

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