

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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**AMICUS BRIEF OF PRESIDENT OF THE OHIO SENATE BILL HARRIS
AND SPEAKER OF THE OHIO HOUSE OF REPRESENTATIVES
ARMOND BUDISH IN SUPPORT OF DEFENDANTS-APPELLEES**

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INTRODUCTION – STATEMENT OF INTEREST

Ohio Senate President Bill Harris and Speaker of the Ohio House of Representatives Armond Budish submit this bipartisan amicus brief in support of Appellees the State, the Ohio Attorney General, the State Treasurer, and the Ohio Department of Health and its Director. In their effort to protect their narrow policy interests, Appellants suggest that one general assembly can permanently insulate public funds from reallocation by locking them away in an irrevocable charitable trust. This is a radical theory that would broadly undermine each legislature’s ability to serve as a democratically representative body. It is vital that the general assembly retain its ability to respond to changing circumstances and priorities. As a result, this Court has long recognized that public funds are “at all times subject to legislative control” and may be revoked or diverted as the state’s changing needs dictate. *State ex rel. Public Inst. Bldg. Auth. v. Griffith* (1939), 135 Ohio St. 604, 609.

The judgment below should therefore be affirmed – and the stay on these funds should be lifted – because the 123rd General Assembly lacked authority to create an “irrevocable public trust.” What one legislature may enact through general legislation, a subsequent legislature may repeal or amend. This is necessarily true because, in our democratic form of government, present majorities govern themselves, through their elected representatives. Permitting one legislature to bind its successors disenfranchises the current majority by binding the people to laws which embody the policies of preceding electorates and their legislators. Thus, the mere fact that monies were deposited into a “custodial” account could not create an irrevocable trust, a contract, or any other vehicle vesting rights in any of the Appellants.

The notion that one legislature may attempt to bind its successors is known as “entrenchment.” The courts and legal commentators have extensively studied entrenchment and conclude with near unanimity that entrenchment is unconstitutional. To hold otherwise would

permit the former legislature, through ordinary legislation, to enact the equivalent of a constitutional amendment. The Ohio Constitution requires amendments to be put to the people. Entrenchment would usurp this power and is inconsistent with the democratic principles which underlie Ohio's representative form of government.

STATEMENT OF THE CASE AND FACTS

We adopt Appellees' statement of facts and of the case. We refer to Am. Sub. S.B 192 of the 123rd General Assembly as the "Act of 2000" and the 2008 Acts of the 127th General Assembly, Am. S.B. 192 and H.B. 544, as the "Acts of 2008."

ARGUMENT

Proposition of Law No. I:

The general assembly has plenary power to pass legislation on any subject unless such power is limited expressly by the Ohio or United States Constitutions.

- A. **The legislature may pass a law reallocating monies in a custodial account because nothing in the state or federal constitutions forbids such a law.**

The general assembly may reallocate public monies in a custodial account because all legislative power is vested in the general assembly under the Ohio Constitution, and nothing in the Ohio or United States Constitutions provides that the general assembly *cannot* reallocate such public monies. Ohio Const., Art. II, § 1; *State ex rel. Jackman v. Cuyahoga County Court of Common Pleas* (1967), 9 Ohio St. 2d 159, 162 (Legislature may "pass any law unless it is specifically prohibited by the state or federal Constitutions."); *State ex rel. Lynch v. Rhodes* (1965), 2 Ohio St. 2d 259, 265; *State ex rel. Youngstown v. Jones* (1939), 136 Ohio St. 130, 133 (The "General Assembly may pass any law not inhibited by the organic law of the state or nation."); *Fisher Bros. Co. v. Brown* (1924), 111 Ohio St. 602, 625; *State ex rel. Poe v. Jones* (1894), 51 Ohio St. 492, 504; *Cass v. Dillon* (1853), 2 Ohio St. 607, 607.

Appellants assert that the 123rd General Assembly had the plenary power to direct deposit of funds from the Tobacco Master Settlement Agreement (“MSA”) into a custodial account – the Tobacco Use Prevention and Control Endowment Fund [the “tobacco fund”]. This much is not controversial. They argue further, however, that the mere deposit of funds into a custodial account suffices to put public monies beyond the reach of succeeding legislatures. No authority exists to support this proposition. Because each general assembly has plenary power to legislate, and nothing in the Ohio Constitution forbids a legislature from reallocating public monies in custodial funds, the 123rd General Assembly did not have authority to “bind” future legislatures merely by depositing MSA monies into the tobacco fund.

If a custodial fund is inviolate, then any legislature could marshal as many state assets as possible and permanently dedicate them to that legislature’s priorities merely by placing them in custodial accounts. Having “tied up” state funds in this manner, that prior legislature would no longer be around to face the consequences when it becomes apparent that the monies are needed for more pressing matters. Accountability demands that each legislature have the ability to allocate funds to their highest and best purpose. The court of appeals thus concluded correctly that the legislature had the power “to reallocate the tobacco settlement money” from the tobacco fund to other priorities. *Bd. of Trustees of the Tobacco Use Prevention & Control Found. v. Boyce* (10th Dist.), 185 Ohio App.3d 707, 2009-Ohio-6993 (hereinafter “App. Op.”), at ¶35.

B. The Ohio Constitution vests the power to restrict the legislature’s ability to reallocate funds in the people, through constitutional amendment.

If Ohio citizens want to limit legislative spending power, they must do so through a constitutional amendment. This is true of any alteration of sovereign power. As described more than 150 years ago by the Ohio Supreme Court:

That political sovereignty, in its true sense, exists only with the people, and that government is founded on their sole authority, and subject to be altered, reformed, or abolished *only by them*, is a political axiom upon which all the American governments have been based ***. A part of this power has been delegated to the Federal, and a part of the State governments ***. That these powers *can neither be enlarged or diminished by these repositories of delegated authority*, would seem to result, inevitably, from the fundamental maxim referred to, and to be too plain to need argument or illustration.

Debolt v. Ohio Life Ins. & Trust Co. (1853), 1 Ohio St. 563, 578 (emphasis added).

Thus 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; La. Const. Art. VII, §§ 10.8; Mont. Const. Art. XII, § 4; Okla. Const. Art. X, § 40; see also *East Baton Rouge Parish School Bd. v. Foster* (La. 2003), 851 So. 2d 985, 988 (sustaining challenge to law appropriating tobacco monies to fund private schools when the constitution limited such use to public schools). In addition, Ohioans and citizens of other states have amended their state constitutions to restrict the use of other types of revenue. See, e.g., Ohio Const., art. XV, § 6(A) (restricting lottery revenue to educational purposes); Ohio Const., art. II, § 35 (creating state workers compensation fund); see also *In re Members of the House of Representatives* (Ala. 1995), 665 So. 2d 1357, 1359 (Alabama Constitution requires income from Alabama Trust Fund to be deposited in the General Fund, striking contrary statute); *Grossman v. Montana Dep't of Natural Res.* (Mont. 1984), 682 P.2d 1319, 1329 (Montana Constitution prohibits the appropriation of coal tax receipts except by vote of 3/4th of each house of the legislature); cf. *Mitchell v. State Child Abuse & Neglect Prevention Bd.* (Ala. 1987), 512 So. 2d 778, 780 (unused monies in “children’s trust fund” created by statute, but not limited by constitution, reverted to state general revenue fund despite deposit in “trust” and limits on use).

In *Barber v. Ritter*, the Colorado Supreme Court held that if the legislature could create, through an ordinary statute, an “irrevocable public trust,” then the legislature could “abrogate its

constitutional powers by statute,” which conflicts with the process for constitutional amendment in Colorado. (Colo. 2008), 196 P.3d 238, 254. This precise reasoning was adopted by the Ohio Supreme Court in *Debolt* in 1853 and remains true today. The legislature cannot create an irrevocable public trust via statute because, if it could, it would be limiting its own constitutional power to direct the spending of public monies. See *Debolt*, 1 Ohio St. at 578. A contrary holding would do injustice to the people of Ohio. This is not about aggrandizing the legislative prerogative. It is about preserving our democratic system of checks and balances and preserving for the people the powers reserved by them. Only the people can amend the state constitution. Holding that the legislature cannot create an irrevocable public trust through ordinary legislation prevents the legislature from usurping that power. It also ensures that the current legislature remains accountable to the people for how state money is being spent: an “irrevocable public trust” can be used neither as a limitation on the legislature’s right to spend public monies wisely nor as an excuse to avoid reallocating funds to meet pressing needs of current constituencies.

C. The courts cannot abridge the power of the legislature to control public spending based on policy considerations.

Appellants’ *amici* Citizens’ Commission to Protect the Truth and the Academy of Medicine of Cleveland & Northern Ohio *et al.* do not dispute that the legislature has the power to reallocate monies from custodial funds such as the tobacco fund. Rather, they argue that tobacco use prevention is important, effective and serves the public good. Most would agree that tobacco use prevention is a laudable enterprise. So, too, are health care for the poor and for children. In a time of economic crisis, it is both the right and the duty of the legislature to make difficult choices among competing uses of limited public funds. *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948, ¶71 (“[T]he General Assembly is charged with making the difficult policy decisions on such issues.”)

Amici do not attempt to show, nor can they, that the public benefits from tobacco use prevention outweigh the benefits from other state programs. Instead, they urge this Court to put the specific health needs of one group of people (those who have used, or may use, tobacco) before the general health and economic needs of Ohioans as a whole. This type of *policy* decision is neither defensible nor within the judicial purview. See *Hyle v. Porter*, 117 Ohio St. 3d 165, 2008-Ohio-542, at ¶33 (role of the judiciary is to interpret the law); *Weaver v. State* (1929), 120 Ohio St. 44, 46 (“[T]o declare what the law is, or has been, is a judicial power.”). Because legislative power is general and plenary, and no constitutional limit prevents the legislature from reallocating funds in custodial accounts, the legislature had the power to transfer funds from the tobacco fund to the General Revenue Fund (“GRF”).

Proposition of Law No. II:

The sovereign powers of the legislature derive from the people and are exercised for the benefit of the people; the legislature thus may not cede or enlarge such sovereign powers through “contract” or legislative entrenchment.

When the legislature enacts law through the passage of an ordinary bill, it can repeal or amend that law through the same means. Appellants’ “public trust” argument rests entirely on the assumption that one legislature can bind another by putting terms in ordinary legislation that restrict successive legislatures. This assumption fails for two reasons. First, all Ohio legislatures are vested with the same sovereign powers. One legislature thus cannot “entrench” legislation (on any subject matter) by providing that an act is not subject to repeal or amendment by a future legislature because: (1) doing so would necessarily diminish the sovereign powers of its successors; and (2) entrenched legislation is tantamount to a constitutional amendment. Second, the particular sovereign power at issue here – the power to direct spending of public monies – is an essential aspect of sovereignty. The 123rd General Assembly lacked the power to cede the

right of future legislatures to reallocate public monies in the tobacco fund under the circumstances presented here.

A. Legislative entrenchment is prohibited by the Ohio Constitution; one legislature may not bind its successors.

“No general assembly can guarantee the continuity of its legislation or tie the hands of its successors.” *Griffith*, 135 Ohio St. at 619. If it could, one legislature could leave its successors powerless to react to changed economic circumstances and other public emergencies. *Id.* 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.

The idea that one legislature may attempt to bind another is known as “entrenchment.” Nearly every legal commentary concludes that entrenchment is unconstitutional. E.g., McGinnis & Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory* (2003), 89 Va. L. Rev. 385, 390; Sterk, *Retrenchment on Entrenchment* (2003), 71 Geo. Wash. L. Rev. 231, 231-32; Roberts & Chemerinksy, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule* (2003), 91 Calif. L. Rev. 1773, 1776-77. Although most of the literature is directed at the United States Constitution, the arguments against entrenchment carry the same weight with respect to the Ohio Constitution.

Legal commentators argue that entrenchment is unconstitutional for many reasons. First, the United States Constitution vests “legislative power” in the Congress and the Ohio Constitution in the general assembly. U.S. Const. art. I, cl. 1; Ohio Const. art. II, § 1. In Anglo-American jurisprudence, not only was it the practice of legislatures *not* to entrench statutes, but it was understood that they lacked the power to do so. McGinnis & Rappaport, 89 Va. L. Rev. at 393; 1 William Blackstone, *Commentaries* *90 (“Acts of parliament derogatory from the power of subsequent parliaments bind not.”). The traditional understanding was that legislatures lacked

the power to entrench statutes because all legislatures were equally powerful. *Id.*

Second, the distinction between the process for amending the constitution and passing ordinary legislation demonstrates that entrenchment is unconstitutional. The United States and Ohio Constitutions mandate a strict constitutional amendment process. U.S. Const. art. V; Ohio Const. art. II, § 1a, art. XVI, § 1. By contrast, the United States and Ohio Constitutions provide for the enactment, amendment or repeal of ordinary legislation through a simple legislative majority process. U.S. Const. art. I, § 7; Ohio Const. art. II, § 15. “Legislative entrenchment *** would allow Congress to pass a statute that could not be repealed by subsequent Congresses and therefore would operate as a type of quasi-constitutional law. *** The distinction between constitutional and ordinary legislation is fundamental in our system, and entrenchment flouts that distinction.” McGinnis & Rappaport, 89 Va. L. Rev. at 395; see also *Roberts & Chemerinsky*, 91 Calif. L. Rev. at 1784 (“[A] statute that requires supermajority approval for legislative change alters the constitutionally mandated procedure for enacting laws.”).

Third, entrenchment runs afoul of our system of representative government in at least three ways. First, entrenchment invites the current legislature, elected by current constituents, to make decisions which bind future legislatures, representing future constituents. Sterk, 71 Geo. Wash. L. Rev. at 244-45; see also Klarman, *Majoritarian Judicial Review: The Entrenchment Problem* (1997), 85 Geo. L.J. 491, 509 (Entrenchment is “inconsistent with the democratic principle that present majorities rule themselves.”). Such legislatures might be tempted to entrench provisions which maximize current benefits at the expense of future costs. Sterk, 71 Geo. Wash. L. Rev. at 244-45. Second, entrenchment, in effect, extends the term of the legislature beyond what is prescribed by law. Roberts & Chemerinsky, 91 Calif. L. Rev. at 1789; Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 Am. B. Found. Res. J.

379, 404-05 (“Just as members of Congress lack the power to extend their terms beyond those set by the Constitution, they may not undermine the spirit of that document by immutably extending their influence beyond those terms.”). Third, entrenchment introduces inefficiencies stemming from inadequate foresight, tying the hands of current legislators who are better informed on current issues. Sterk, 71 Geo. Wash. L. Rev. at 244-45; Roberts & Chemerinsky, 91 Calif. L. Rev. at 1813 (“Good government requires that each legislature and each public majority reassess the need for new policies and the costs and benefits of each. No one can foresee the conditions that legislation, however wise or popular when enacted, will face in the future.”).

Given the wealth of reasons that entrenchment violates the democratic form of government established by our constitutions, it is unsurprising that the courts have long held that it is unconstitutional. *Newton v. Comm’rs* (1879), 100 U.S. 548, 563; *Ohio Life Ins. & Trust Co. v. Debolt* (1853), 57 U.S. 416, 431. As explained in *Newton*,

Every succeeding legislature possesses the same jurisdiction and power *** as its predecessors. The latter must have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require.

100 U.S. at 559; see also *Stone v. Mississippi* (1880), 101 U.S. 814, 818; *Rechelderfer v. Quinn* (1898), 287 U.S. 315, 318; *Youngstown*, 136 Ohio St. at 136 (“It is a well recognized principle that there is no such thing as an irrevocable statute, for a legislature has no power to bind successive legislatures.”); *State ex rel. Singer v. Cartledge* (1935), 129 Ohio St. 279, 283 (After their adoption, statutes “exist at the will of the legislature.”); 1973 Ohio Atty.Gen.Ops. No. 73-031, at 2-119 (“The authority to enact a law necessarily implies the power to amend or repeal it.”). Both *Debolt* and *Newton* specifically addressed the powers of the Ohio general assembly.

It is irrelevant that the General Assembly might have alternative ways to balance the budget. The people's elected representatives in the General Assembly have performed their constitutional duty to balance the budget. The people have laid this burden on the legislature through the Constitution, and the legislature is accountable to the people for its choices. The trial court's holding that the tobacco fund is an "irrevocable public trust" because the legislature could have found money elsewhere usurps this legislative function and does injustice to the system of checks and balances vested in state government by the people.

B. Absent a clear statement, statutes do not create contractual duties that bind future legislatures, and, even if intent to contract unmistakably appears in the statute, no vested rights are born of a bargain into which the legislature lacks authority to enter.

The Court of Appeals held properly that no Contracts Clause violation exists here. To find a Contracts Clause violation, a court must determine whether a statute operates "as a substantial impairment of a contractual relationship." *Allied Structural Steel Co. v. Spannaus* (1978), 438 U.S. 234, 244; *State ex rel. Horvath v. State Teachers Retirement Bd.* (1998), 83 Ohio St. 3d 67, 76. "This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Horvath*, 83 Ohio St. 3d at 76 (quoting *General Motors Corp. v. Romein* (1992), 503 U.S. 181, 186). The creation of the tobacco fund, codified at former R.C. 183.08, created no contractual relationship between the state and Appellants Miller and Weinmann. Whether a statute creates contractual rights is governed by twin principles: the doctrines of "reserved powers" and "unmistakability."

1. All contract rights are taken subject to the state's police powers.

The "reserved powers" doctrine holds that a legislature lacks authority to bargain away the sovereign power vested in that body by the people, and any contract that purports to do so is,

in itself, *ultra vires* and unenforceable as an illegal bargain. *Debolt*, 1 Ohio St. at 578 (“That [sovereign] powers can neither be enlarged or diminished by *** repositories of delegated authority, would seem *** too plain to need argument or illustration.”); *United States v. Winstar Corp.* (1996), 518 U.S. 839, 888 (“[T]he legislature cannot bargain away the police power of a State,” quoting *Stone*, 101 U.S. at 817).

Both the Ohio and United States Supreme Courts have long held that any legislative act which purports to contract away sovereign power is unconstitutional; the courts have, therefore, employed every effort to construe statutes to *not* create such contractual rights. *Atlantic Coast Line R. Co. v. Goldsboro* (1914), 232 U.S. 548, 558 (no contractual right under railroad charter to avoid municipal safety regulations; “all contract rights and property rights are held subject” to police powers); *Stone*, 101 U.S. at 817 (upholding statute banning lotteries despite state legislative charter granting right to conduct a lottery); *West River Bridge Co. v. Dix* (1848), 47 U.S. 507, 532-33 (legislative contract granting exclusive right to toll bridge did not bargain away state’s power of eminent domain); *Horvath*, 83 Ohio St. 3d at 76-77 (statute creating State Teachers Retirement System did not vest rights in interest on teacher deposits); *Debolt*, 1 Ohio St. at 578-82 (legislative charter did not grant permanent tax exemption and the general assembly was unauthorized to grant one).

The doctrine of reserved powers thus runs hand-in-hand with the canon of constitutional avoidance — because a contract to bargain away sovereign police power is unconstitutional and beyond the power of the legislature, the court must follow the “elementary rule [] that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). The Court can easily

do so here by construing the Act of 2000 (Am. Sub. S.B. 192) *not* to vest any contractual rights in former smokers such as Miller and Weinmann.

Appellants' claims fail the "reserved powers" test. As noted by the court of appeals, the Ohio Constitution grants the general assembly the power to legislate as to any matter except as limited by the Ohio and United States Constitutions. App. Op. ¶38; Ohio Const. art. II, § 1. If one legislature could "deal in, and barter away the sovereign right of the State [it would] thereby, in effect, [] change the constitution." *Debolt*, 1 Ohio St. at 581. The power to change the Constitution is reserved to the people. Ohio Const. art. II, § 1a, art. XVI, § 1. Thus, the legislature cannot, through an ordinary bill, create an "irrevocable public trust." Such a trust would prevent future legislatures from exercising their reserved powers to legislate (through repeal) and to spend public funds (through reallocation, or transfer). As the *Debolt* court explained: "if the attempt has here been made, it is a naked release of sovereign power, without any consideration ***. Under these circumstances, we feel no hesitation in saying the General Assembly was incompetent to such a task." 1 Ohio St. at 578.

2. Contract rights can never be inferred or presumed from a legislative act but must appear unmistakably therein.

The "unmistakability" doctrine holds that, even if the legislature has the right to contract on a subject, a statute will not be interpreted to create vested contractual rights, and thus to bind future legislatures, unless the intent to create such rights appears "unmistakably" on the face of the act. *Horvath*, 83 Ohio St. 3d at 76; *Debolt*, 1 Ohio St. at 574. In other words, a legislative contract is never presumed or inferred. As explained in *Debolt*,

[T]he object and end of all government is to promote the happiness and prosperity of the community by which it is established, and *it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created*. A State ought never to be presumed to surrender this power, because, *like*

the taxing power, “the whole community ha[s] an interest in preserving it undiminished.”

1 Ohio St. at 574 (quoting *Providence Bank v. Billings* (1830), 29 U.S. 514, 561)(emphasis in original). The court added that “the same rule of construction has been repeatedly adopted and applied by the courts of this State.” *Id.* (citing *Bank of Chillicothe v. Swayne* (1838), 8 Ohio 257, 286; *State v. Granville Alexandrian Soc.* (1841), 11 Ohio 1, 12).

The Act of 2000 does not “unmistakably” confer vested rights on Appellants, nor does it appear unmistakably that any of its provisions were irrevocable. “[A]ny ambiguity in the terms of the contract, must operate against [private interests], and in favor of the public; and the plaintiffs can claim nothing that is not clearly given them by the act.” *Debolt*, 1 Ohio St. at 574 (quoting *Charles River Bridge v. Warren Bridge* (1837), 36 U.S. 420, 544). Here, because the 123rd General Assembly did not expressly create an irrevocable trust (which it lacked the authority to create in any event), the court must presume that the “trust,” if such it was, was revocable, the terms of the act were subject to repeal, and the tobacco fund subject to liquidation by a future legislature. See *Horvath*, 83 Ohio St. 3d at 77 (“[T]here is nothing in any version of the Act evincing an intent on the part of the General Assembly to bind itself contractually ***.”) The arguments that an irrevocable trust should be inferred from legislative history (*Amicus of Montgomery et al.* pp. 11-12) or for policy reasons (*Amicus of Academy of Medicine et al.*), fail for the same reason. Vested contractual rights cannot be inferred or presumed from a statute.

3. The Act of 2000 created no contractual rights.

Miller and Weinmann argue that the statute creating the tobacco fund, codified at former R.C. 183.08, granted them vested rights as former smokers to benefit from whatever programs might be funded by the tobacco fund’s agency. In their merit brief, they point to no language in the Act of 2000, or any of its provisions as codified, to prove that they have a *contractual* interest

in the tobacco fund. Appellants' Merit Brief at 31-33. Instead, they rely exclusively on the notion that the tobacco fund is a public trust which the legislature could not dissolve. *Id.*

Appellants Miller and Weinmann do not cite a single case which shows that, even if the tobacco fund is a "public trust," such trust vests them, in particular, with any *contractual* rights. A trust is a "legal entity created by a grantor for the benefit of designated beneficiaries under the laws of the state and the valid trust instrument." Black's Law Dictionary (6th ed.) 1508. A trust does not have any of the hallmarks of a contract: "a bargain in which there is a manifestation of mutual assent to the exchange and a consideration." Restatement (2d) of Contracts, § 17. Assent requires a "meeting of the minds," and consideration must exist on both sides. *Id.*, comments c, d. The Act of 2000 reflects no bargain between the state and Messrs. Miller and Weinmann. No evidence exists that the 123rd General Assembly had the Appellants, or any other particular person, in mind when it created the tobacco fund. No evidence exists that the Appellants "bargained" for the benefits they anticipated or gave *even a peppercorn* of consideration in exchange for such benefits. In sum, even if the Act of 2000 did create a "public trust," no evidence exists that the Appellants here hold any vested contract-based rights thereunder.

Moreover, interpreting the Act of 2000 as a contract is absurd because that act was a general law. In *Debolt*, the court rejected a bank's argument that all the terms of the act which authorized its charter formed part of its contract and were, thus, unalterable by future legislatures. 1 Ohio St. at 573. After noting that the act itself addressed many interrelated issues, the court held that "[t]o assert that all these multiplied regulations, civil and criminal, of a great branch of business, belonged to the unalterable franchises of those banks, would be simply absurd." *Id.* The same is true here. The Act of 2000 addressed the myriad ways that the 123rd General Assembly sought to spend the MSA monies, which came to Ohio with no strings

attached. The provisions creating the tobacco fund form a small part of the Act. There is no reason to interpret those particular provisions as forming a “contract.” Nor is there any basis to segregate some of the Act’s terms as contractual and others not. The fact that the tobacco fund and its agency were created as part of a general law militates against any finding that the legislature intended the Act to form a contract with Miller, Weinmann, or anyone else. Instead, Miller and Weinmann were entitled to the benefits of the law for so long as the law was in effect. Where benefits arise “not by any contract of [plaintiff’s] own *** but by the mere operation of a law, *** [there is] no reason for saying that the legislature had not power to repeal this law, thereby depriving [plaintiff] of his right.” *McCormick v. Alexander* (1825), 2 Ohio 65, 76.

4. The common law of trusts does not shield the Act of 2000 from repeal.

Appellants cite general rules regarding *private* charitable trusts for the proposition that a *public* trust is irrevocable unless the legislature specifically reserves the right of revocation. Appellants’ Merits Brief at 24. The common law of trusts does not help them. The Restatement distinguishes between private charitable trusts and trusts created by statute. Compare Restatement (3d) of Trusts, § 4, comment g (“Some forms of trusts that are created by statute *** are administered as express trusts, the terms of which are either set forth in the statute or are supplied by the default rules of general trust law.”); Restatement (2d) of Trusts § 349 (methods of creating a charitable trust, which **do not** include creation by statute).

The Restatement also explains that when the settlor retains an interest in the trust, the trust is presumed to be *revocable*. *Id.* § 63, comment c (“If *** the settlor has failed expressly to provide whether the trust is revocable or amendable but has retained an interest in the trust *** , the presumption is that the trust is revocable and amendable by the settlor. *** [A] power of appointment retained by the settlor (including a power of withdrawal, even if subject to a

standard) is a retained interest ***.”) Here, the state, as “settlor,” reserved an interest in the “trust” in at least four ways: (1) the state reserved the power to appoint and remove members of the Board, former R.C. 183.04; (2) the State provided that the tobacco fund should be a custodial account, held in the state treasury (as opposed to giving the money, in the form of a grant, to a private institution), former R.C. 183.08; see *infra* p. 20 (discussing public nature of funds held in custodial accounts); (3) the state retained oversight over tobacco agency spending by requiring annual reports and audits, former R.C. 183.09, and (4) the State provided that the tobacco fund would be subject to periodic review by a legislative committee. Former R.C. 183.32. Thus, according to the “flexible approach” set forth in the Restatement, the Court must presume that the tobacco fund was revocable. *In re Will & Trust of Moor*, CA No. 2231-S, 2005 Del. Ch. LEXIS 88, *49 (Del. Chancery June 8, 2005); see also *Askanase v. LivingWell, Inc.* (C.A.5, 1995), 45 F.3d 103, 106 (settlor retains “interest” in trust not only through rights to property but also through reserved power or control over trust).

C. The only reasonable construction of the Act of 2000 is that it created an ordinary “custodial fund” subject to repeal and reappropriation.

Given that the 123rd General Assembly lacked authority to create an “irrevocable public trust,” the only reasonable interpretation of the Act of 2000 is that it created an ordinary “custodial” account, maintained by the treasurer of state but not part of the “state treasury.” Former R.C. 183.08; 1982 Ohio Atty.Gen.Ops. No. 82 at 1. As recognized by the appeals court, R.C. 113.05 authorizes the legislature to create custodial accounts. App. Op. ¶32. In a non-custodial account, unspent balances revert back to the state general fund at the end of the fiscal year. *Id.* ¶31; R.C. 131.33. Custodial accounts, however, are “removed from the biennial appropriation cycle such that unspent funds do not revert automatically to the general revenue fund at the end of the biennium but, rather, remain in the custodial account.” App. Op. ¶32.

Although monies in custodial accounts do not revert *automatically* to the general fund, “[t]his 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.* ¶33. R.C. 113.11 provides that payments can be made out of custodial funds as directed by an officer “authorized by law.” Because the legislature makes the law, the legislature decides who is “authorized” to direct payments from custodial funds; nothing precludes the legislature itself from authorizing the transfer of monies out of custodial accounts.

Appellants present no law supporting the argument that a custodial fund is exempt from transfer, repeal or reappropriation. *Id.* ¶34. The tobacco fund is a public fund. “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.*; 2008 Ohio Atty.Gen.Ops. No. 3 (“Funds of the [TUPAC] Foundation are public funds, held in trust for the benefit of the public.”); *State v. Hale* (1991), 60 Ohio St. 3d 62, 66 (a public office is a public trust, and public property and public money under the control of a public officer constitute a public fund); R.C. 117.10(C) (“public money” is “any money received, collected by, or due a public official under color of office, as well as any money collected by any individual on behalf of a public office or as a purported representative or agent of the public office.”); R.C. 135.01(K) (“Public moneys’ means all moneys in the treasury of the state or any subdivision of the state, or moneys coming lawfully into the possession or custody of the treasurer of state or of the treasurer of any subdivision.”); see also *Opinion of the Justices* (1943), 15 So. 2d 41 (monies in statutory “Special Educational Trust Fund” are public monies which cannot be invested by the state treasurer absent a specific appropriation by the legislature); *State ex rel. Griffith v. Thompson* (1924), 115 Kan. 457, 458 (Money in “custodial” account “was

public money when it came into [the treasurer's] hands, thereafter remained public money, and as such was under his control as state treasurer.”)

That funds in custodial accounts have long been considered “public funds” subject to reappropriation also is evident in the historic practice of the Ohio legislature. For example, over sixty years ago the legislature created a “custodial” account to fund the Department of Liquor Control (“DLC”). The General Code provided that monies collected by the DLC would be deposited into the “liquor control rotary fund which is in the custody of the treasurer and not in the state treasury.” *State ex rel. Hoffman Candy & Ice Cream Co. v. Defenbacher* (1951), 154 Ohio St. 429, 431; G.C. 6064-10. Despite the fact that the liquor control rotary fund was “not in the state treasury,” the legislature provided that the treasurer of state should sweep the fund periodically and transfer any funds that were not needed to pay for the continued operations of the DLC into the GRF. *Id.*

Moreover, the legislature later amended the code to abolish the custodial “liquor control rotary fund” and create the “liquor control fund” which is in the state treasury. See R.C. 4301.12 (modern version of 6064-10). If appropriation to a custodial account was enough to abolish the legislature’s appropriation power over the funds therein, then the legislature could not, by definition, abolish *any* custodial account and replace it with an ordinary account in the state treasury. Yet, the legislature has done so many times. Compare, e.g., *State ex rel. Nat’l Elec. Contractors Ass’n v. Ohio Bureau of Employment Servs.*, 83 Ohio St. 3d 179, 181 (noting that former R.C. 4115.10 created the “penalty enforcement fund” which was “in the custody of the treasurer of state but *** not part of the state treasury.”); with Am. Sub. H.B. 94, Section 32 (124th G.A., 2001) (directing the Director of Budget and Management to transfer the balance in the “Penalty Enforcement Fund that was in the custody of the state treasury to the Penalty

Enforcement Fund (Fund 5K7) that is created in the state treasury.”); and R.C. 4115.10 (modern penalty enforcement fund is in the state treasury); compare also *State ex rel. Ohio Funds Mgmt. Bd. v. Walker* (1990), 55 Ohio St. 2d 1, ¶9, syllabus (discussing the “note service fund” which was “in the custody of the Treasurer, but not part of the state treasury” under former R.C. 113.37(A)(3)); with R.C. 113.37 (repealed). Significantly, the court in *Ohio Funds* also held that deposit of tax revenues into the custodial “note service fund” did “not alter the character of these funds ***.” 55 Ohio. St. 3d at 7-8. Nor did the deposit of MSA funds into the tobacco fund change their character; they remained public monies subject to legislative control and reallocation.

Custodial accounts thus have not, historically, been protected from transfers to the GRF. In recent years, several general assemblies have authorized the Director of Management and Budget to transfer cash balances from non-GRF funds to the GRF:

- Am. Sub. H.B. 1¹ (2010-2011), 128th General Assembly, Section 512.60: permitting transfer of “cash from non-General Revenue Funds that are not constitutionally restricted to the General Revenue Fund” to balance the budget, with no cap, Section 512.10 (transfer of interest from “any state fund” to GRF);
- Am. Sub. H.B. 119² (2008-2009), 127th General Assembly, Section 512.03: permitting transfer of “cash from non-General Revenue Fund funds that are not constitutionally restricted to the General Revenue Fund” not to exceed \$70,000,000, Section 512.06 (transfer of interest from “any fund in the Central Accounting System” to GRF); and
- Am. Sub. H.B. 94³ (2002-2003), 124th General Assembly, Section 144: permitting transfer of “cash from non-federal, non-General Revenue funds that are not constitutionally restricted to the General Revenue Fund,” not to exceed \$31,794,657.

¹ http://www.legislature.state.oh.us/BillText128/128_HB_1_EN_N.pdf

² http://www.legislature.state.oh.us/BillText127/127_HB_119_EN_N.html

³ http://www.legislature.state.oh.us/BillText124/124_HB_94_ENR.html

Appellants' argument that custodial funds are inviolate finds no support in law or practice. Indeed, the fact that the general assembly has, on multiple occasions, delegated authority to the Director of Management and Budget to draw from such funds as that office sees fit suggests that custodial funds are, if anything, *less* protected than ordinary GRF accounts.

Appellants also suggest that the tobacco fund is inviolate by labeling it the "Endowment Trust." Appellants' Merits Brief at 1. As an initial matter, the 123rd General Assembly did not call the tobacco fund a "trust." Rather, it was an "endowment fund." In any event, denominating an account as a "trust" or "endowment" has not insulated funds from reallocation or transfer to the GRF. See, e.g., Am. Sub. H.B. 1 (2010-2011), Section 512.50 (transfer from Education Facilities Trust Fund to GRF); Am. Sub. H.B. 119 (2008-2009), Section 512.34 (transfer from Education Facilities Endowment Fund to GRF); see also R.C. 127.14 (controlling board may transfer "all or part of cash balances in excess of needs from any fund of the state to the general revenue fund ****" with certain enumerated exceptions).

Appellants and their *amici* assert that when the 123rd General Assembly allocated monies to the tobacco fund, such monies were placed into a permanent trust. In the late 90's and early 2000's, Ohio government enjoyed budget surpluses, thus providing members of these earlier legislatures the luxury of creating special funds and allowing certain funds, such as the tobacco fund, to retain unspent balances at the end of the fiscal period. See Am. Sub. H.B. 283,⁴ 123rd General Assembly, Section 124 (providing for transfers of **surplus** funds from the GRF to other special funds). Eventually, however, even these legislatures began to feel a budget pinch. Specifically, Am Sub. H.B. 94, the budget for the 2002-2003 biennium, provided for a transfer of roughly \$31 million from *any* fund to balance the budget, except to the extent that the fund was

⁴ http://www.legislature.state.oh.us/BillText123/123_HB_283_ENR.html

“federal” or “constitutionally restricted.” These examples show that past legislatures understood that custodial funds were not “irrevocable public trusts” unless “constitutionally restricted” and could be tapped to balance the budget in times of need.

Proposition of Law No. III:

Appellants had no vested rights in the tobacco fund when the 127th General Assembly passed the Acts of 2008.

The judgment of the court of appeals also should be affirmed because none of the Appellants had any vested rights in the monies remaining in the tobacco fund when such monies were reallocated by the 127th General Assembly.

A. Miller and Weinmann Have No Contract.

Appellants Miller and Weinmann admit they have no contract with the State. They rest their “Contracts Clause” and “Retroactivity” arguments exclusively on the notion that the 123rd General Assembly created an irrevocable public trust in the tobacco fund. Appellants’ Merits Brief at 19, 32. As explained, *supra*, however, the courts must presume that a statute does *not* create contractual rights. *Horvath*, 83 Ohio St. 3d at 76.

The Act of 2000 contains no hallmarks of a contractual commitment vis-à-vis Miller and Weinmann. It is nothing like the statutes which *have* been held to confer contractual rights such as those creating bank charters or franchises, e.g. *Piqua Branch Bank v. Knoop* (1853), 57 U.S. 369, or those authorizing the issuance of bonds which the state later seeks to repudiate. E.g., *United States Trust Co. v. New Jersey* (1977), 431 U.S. 1, 10; see also *Horvath*, 83 Ohio St. 3d at 76. In such cases, the plaintiffs have written instruments vesting them with particular rights and setting forth the consideration due to the state in exchange for such vested rights. See *id.* Miller and Weinmann have no written instrument and offered nothing to the state in exchange for the benefits they hoped to receive from the tobacco fund. The only benefits that they could have

received under the TUPAC statutes were gratuities, which would vest *only upon possession*. See *Semple v. United States* (1889), 24 Ct. Cl. 422, ¶1, syllabus; see also *Horvath*, 83 Ohio St. 3d at 654 (benefits from state programs are mere gratuities unless statute expressly provides that benefits “vest”). Thus, if they actually received benefits (such as cash or counseling), the repeal of the tobacco statutes would not have required them to repay such benefits, which had vested; but the repeal could certainly prevent them from receiving additional benefits in the future.

B. American Legacy Foundation had no contract with the state.

Appellant the American Legacy Foundation (“ALF”), likewise, has no contract. Although ALF, unlike Miller and Weinmann, can point to a written agreement purporting to confer on ALF certain rights, that agreement is unenforceable for all the reasons set forth in the merit brief of the State as well as those adopted by the trial court and the court of appeals. App. Op. at ¶¶50-77. The Board lacked authority to enter into the contract with ALF. *Id.*

Appellants’ argument that the courts should ignore the Open Meeting Act violation because they were “forced” by the State to violate the Act is absurd. First, the record itself demonstrates that the Board failed to make any good faith effort to secure the presence of an attorney. *Id.* at ¶¶51-55. In addition, as held by the court of appeals, the Board went well beyond the permissible purposes for an executive session in debating the ALF contract; this would have violated Ohio open meetings law even if an attorney had been present. *Id.* at ¶71. Moreover, the Open Meetings Act is intended to ensure the accountability of public officials *to the people of Ohio*. See *id.* ¶64; *State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio St. 3d 540, 544. The injury having been inflicted by one part of state government and suffered by the people, a violation of the Open Meetings Act cannot be “waived” by any other part of state

government. Any holding to the contrary would enable one hand of state government to exonerate the other's wrongdoing at the people's expense.

In addition, the alleged "contract" with ALF, to the extent authorized, should be voided as contrary to public policy. The "[l]iberty of contract is not an absolute and unlimited right, but upon the contrary is always subservient to the public welfare." *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Kinney* (1916), 95 Ohio St. 64, ¶1, syllabus. "The public welfare is safeguarded, not only by Constitutions, statutes, and judicial decisions, but by sound and substantial public policies underlying all of them." *Id.* ¶2, syllabus; see also *J.F. v. D.B.*, 116 Ohio St. 3d 363, 2007-Ohio-6750, at ¶5. "It is the legislature that defines public policy." *Bengala v. Doe*, 7th Dist. No. 02-CA-166, 2003-Ohio-7104, at ¶30 (citing *Williams v. Scudder* (1921), 102 Ohio St. 305, ¶¶3, 4, syllabus).

The record here reflects that the Board was well aware that the legislature and the governor intended to liquidate the tobacco fund pursuant to the stimulus proposal announced on April 2, 2008. App. Op. ¶51. The legislature passed Am. S.B. 192 on April 8, 2008. *Id.* ¶8. The Board signed the contract with ALF on the same day. *Id.* ¶61. The "contract" violates public policy in at least three ways. First, the April 8, 2008, announcement of the leaders of the 127th General Assembly and the governor constituted a clear statement of public policy setting forth the legislature's determination that the tobacco fund monies should be channeled to higher state priorities. The Board's "race to the podium" to sign a contract before the governor could sign the bill violates this clear statement of public policy and is void as an attempt to prevent the legislature from exercising its Constitutionally-endowed powers to enact laws and direct spending of public funds. Second, the Ohio Constitution vests all executive power in the governor, and only the governor has the power to veto duly enacted legislation. Ohio Const. art.

III, § 5, art. II, § 16. The tobacco agency's attempt to empty the tobacco fund before the governor could sign the pending bill amounted to an effort to veto the bill, whose passage was virtually certain. Even if this type of preemptive action by one part of the executive branch is not illegal as a veto in itself, it certainly violates the policy behind art. II, § 16. Third, the agency's attempt to "spend" all of its money before it could be put to other uses violates the public policy that the current legislature represents the current majority. The tobacco agency knew that it would soon face a significant reduction in funding. Instead of respecting that legislative decision, the tobacco agency raced to spend down its reserves. Upholding the ALF "contract" would, thus, be akin to endorsing a debtor's personal shopping spree on the eve of filing a bankruptcy petition – in this case, leaving Ohio's taxpayers holding the bill.

C. The legislature did not "spend" the money by directing its deposit into the tobacco fund.

Amici also assert that, even if the 127th General Assembly had the plenary power to repeal the Act of 2000, repeal cannot recapture money that has already been "spent." *Amicus* brief of Montgomery, Finan and Baird at 13. The General Assembly does not dispute that legislative repeal does not unravel transactions that were lawfully executed under the prior law. *Youngstown*, 136 Ohio St. at 136. The record here demonstrates, as shown above, however, that Appellants consummated no lawful transactions under the Act of 2000 giving rise to any vested rights which were impaired by its later, partial repeal. *Amici* nonetheless argue that the legislature "spent" the monies allocated to the tobacco fund merely by authorizing their deposit into a custodial account. The court of appeals held correctly that deposit of funds into a custodial account does not change the nature of such funds, which remain, in this case, public funds. App. Op. at ¶¶31-34; see also *Ohio Funds Mgmt.*, 55 Ohio. St. 3d at 7-8. This makes good common sense; if a person transfers his or her paycheck from one personal account to another, that person

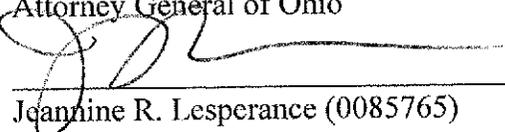
would not be deemed to have “spent” the money. Here, placement of the funds into a custodial account simply enabled the tobacco agency to spend the tobacco funds without specific, additional appropriations and prevented the funds from reverting automatically to the GRF at the end of the biennium. *Id.* ¶32; see also *Hoffman Candy*, 154 Ohio St. at 431 (treasurer was authorized to sweep excess funds from liquor control custodial fund to GRF); *Mitchell*, 512 So. 2d at 780-81 (Existence of “specific guidelines and restrictions” on spending from Alabama Children’s Trust Fund did not mean that monies were “encumbered upon receipt.”).

CONCLUSION

For these reasons, Senate President Bill Harris and House Speaker Armond Budish respectfully request that this Court affirm the decision of the Tenth District Court of Appeals in all respects, enter final judgment in favor of Defendant-Appellees, and lift the stay on the funds so that they can be put to use for the benefit of all Ohioans.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Amicus Brief Of President Of The Ohio Senate Bill Harris And Speaker Of The Ohio House Of Representatives Armond Budish In Support Of Defendants-Appellees* was served by U.S. mail this 24th day of May, 2010, upon the following counsel:

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