

ORIGINAL

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

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**BRIEF OF AMICUS CURIAE**  
**NATIONAL CONFERENCE OF STATE LEGISLATURES**

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## INTRODUCTION

As Plaintiffs concede, Ohio's General Assembly "has plenary legislative power to enact any law that is not prohibited by the Ohio or United States Constitutions." (Pl. Br. at 1). This plenary power necessarily includes the power to alter or repeal prior enactments. Otherwise, a statute enacted in one set of facts and circumstances would remain forever inviolate, and the General Assembly would be powerless to react to changed facts and circumstances – and the changing needs of the citizens of Ohio.

Recognizing that state legislatures must have the flexibility to enact all necessary legislation, but also that some important matters should be placed beyond majoritarian control, our system of government allows prospective limitation of legislative power by – but *only* by – the federal or state constitution. Constitutional provisions and amendments are thus the means by which the people can bind future legislatures. A legislature cannot do so by statute. That is the essence of our constitutional democracy.

Here, with the state in desperate need of economic relief and stimulus, the General Assembly exercised its plenary power to reallocate funds from a state agency, the Tobacco Use Prevention and Control Foundation, to a more immediate public concern – the creation of new jobs. As this Court has long recognized, "[n]othing but a constitutional inhibition could prevent such action." *State ex rel. Public Inst. Bldg. Auth. v. Griffith* (1939), 135 Ohio St. 604, 619. Ohio's experience echoes that of several other states that initially created separate funds for tobacco use prevention but subsequently saw fit to reallocate those proceeds. In those other jurisdictions, such action did not even

precipitate a lawsuit. In the one state where reallocation of special state funds (unrelated to the tobacco settlement) did result in litigation, the state supreme court squarely rejected the plaintiffs' effort to limit legislative prerogative. Because Ohio (unlike several other states) has not amended its constitution to restrict the use of its tobacco settlement funds, the General Assembly's action was fully within its power. Plaintiffs' invitation to this Court to adopt a contrary rule would isolate Ohio as the only jurisdiction embracing a doctrine that permits legislatures to commit funds to irrevocable public charitable trusts. The judgment of the Tenth District Court of Appeals should therefore be affirmed.

#### **STATEMENT OF INTEREST OF AMICUS CURIAE**

*Amicus curiae* National Conference of State Legislatures ("NCSL") submits this brief in support of Defendants-Appellees State of Ohio, Ohio Attorney General Richard Cordray, Ohio Treasurer Kevin L. Boyce, Ohio Department of Health, and Director Alvin D. Jackson. NCSL is a bipartisan organization of the legislatures of all 50 states, the District of Columbia, the territories of the United States, and the Commonwealth of Puerto Rico. It is dedicated to enhancement of the quality and effectiveness of state legislatures nationwide.

NCSL's interest in this case is in preserving state legislatures' plenary power to enact necessary legislation – including legislation that reallocates public funds – in response to states' ever-changing needs and priorities. As this Court has observed, no one knows "what demands for public revenues and public funds may be more pressing" in the future. *Griffith*, 135 Ohio St. at 619. Accordingly, it is essential that state

legislatures retain the flexibility to react to new facts and circumstances, subject only to constitutional limitations. NCSL urges the Court to adhere to the bedrock principle that “[a] future general assembly may revoke [a] grant [of public funds] and divert these funds to other purposes.” *Id.* Through this brief, NCSL also seeks to provide this Court with a national perspective on the experience of various states with their respective tobacco settlement funds.

### **STATEMENT OF THE CASE AND FACTS**

NCSL has no independent knowledge of the facts and thus refers the Court to the Statement of the Case and Facts set forth in the Brief of Defendants.

### **ARGUMENT**

#### **Proposition of Law:**

**The General Assembly’s Power to Allocate and Reallocate Public Funds Is Plenary in the Absence of a Constitutional Amendment Limiting that Power.**

**A. One general assembly cannot limit the legislative power of future general assemblies.**

Ohio’s constitution vests the state’s legislative power in the General Assembly. *See* Ohio Const. art. II, § 1. It has long been settled that 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. Ct. of Common Pleas* (1967), 9 Ohio St. 2d 159, 162; *see, e.g., McNab v. Bd. of Park Comm’rs* (1923), 108 Ohio St. 497, 502-03 (“Of necessity the police power must be as expansive as the public needs. . . . The state’s general police power . . . is therefore clear and conclusive unless some express provision

of federal or state Constitution . . . denies such power.”); *State Bd. of Health v. City of Greenville* (1912), 86 Ohio St. 1, 23 (“In this state the authority of the general assembly to exercise the police power of the state is no longer an open question. . . . [S]uch power may be exercised by the general assembly of the state according to their judgment and discretion in any manner not inconsistent with or repugnant to provisions of the state or federal constitutions.”); *State ex rel. Poe v. Jones* (1894), 51 Ohio St. 492, 504 (“The 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.”).

The exclusivity of *constitutional* limits on the General Assembly’s legislative power means that its power cannot be constrained *legislatively*. As this Court explained over 70 years ago, “[n]o general assembly can guarantee the continuity of its legislation or tie the hands of its successors.” *Griffith*, 135 Ohio St. at 619.

[N]o general assembly has power to render its enactment irrevocable and unrepeatable by a future general assembly. No general assembly can guarantee the span of life of its legislation beyond the period of its biennium. The power and responsibility of legislation are always upon the existing general assembly. One general assembly may not lay its mandate upon a future one. Only the Constitution can do that.

*Id.* at 620 (internal quotation marks omitted). Absent a constitutional prohibition, legislation is always subject to revision or repeal by future legislatures, each of which has plenary power to take such actions as are necessary to the state’s general welfare. *See, e.g., id.* (“The power of a subsequent general assembly . . . to repeal is always existent.”) (internal quotation marks omitted).

**B. No general assembly can commit public funds to an irrevocable trust.**

Because the general assembly's legislative power cannot be limited legislatively, no general assembly can insulate public funds from reallocation by future general assemblies. Public funds are "at all times subject to legislative control." *Griffith*, 135 Ohio St. at 619. Although a general assembly may allocate them to a particular purpose, "[a] future general assembly may revoke this grant and divert the[] funds to other purposes." *Id.*; *see id.* at 620 (public revenues "are within the legislative power, and are necessarily subject to the control of the *existing* general assembly") (emphasis added; internal quotation marks omitted).

1. Plaintiffs Offer No Support for the Novel Recognition of an Irrevocable Public Charitable Trust

Of particular relevance here, no general assembly can commit public funds to an irrevocable charitable trust. For one thing, public charitable trusts – irrevocable or otherwise – have not been recognized under Ohio law. Plaintiffs have not cited (and NCSL has not found) any Ohio authority for the proposition that state funds may be held in a charitable trust for the benefit of the general public.

But even if the general assembly could create a public charitable trust, it cannot render such a trust irrevocable. *See Griffith*, 135 Ohio St. at 620 ("no general assembly has power to render its enactment irrevocable"); *Barber v. Ritter* (Colo. 2008), 196 P.3d 238, 253-54 (declining to interpret trust fund enabling legislation "as creating *irrevocable* trusts that would unconstitutionally restrain the legislature's plenary power over appropriations"). Indeed, the concept of an irrevocable trust – a concept that Plaintiffs

attempt to import from the law of private trusts – is entirely inapplicable in this context. As the Supreme Court of Colorado explained, “[t]o hold that the General Assembly could limit [its] plenary power . . . 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.* Legislative creation of a fund as a public trust “does not, and constitutionally cannot, have any limiting effect on the legislature’s plenary power to amend or repeal” the fund’s enabling statute, as Ohio’s General Assembly did here. *Id.*<sup>1</sup>

Plaintiffs insist that “*Barber* has no application here” because the Colorado funds were created “in the state treasury.” (Pl. Br. at 28). But the Colorado Supreme Court’s decision did not rely on that statutory language. *See Barber*, 196 P.3d at 253-54. And in any event, although Ohio’s tobacco endowment fund is “not . . . a part of the state treasury,” it indisputably comprises state public funds. Former R.C. 183.08. The funds were placed – and still remain – “in the custody of the treasurer of state.” *Id.* They were subject to disbursement by the Tobacco Use Prevention and Control Foundation, a state agency, but were not disbursed. *See id.* In short, the funds are in the state’s possession and control. The statutory phrase “shall not be a part of the state treasury” prevents the funds from reverting to the general fund at the end of the biennium, *id.*, but there are no magic words by which a legislature can limit future legislatures’ plenary legislative

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<sup>1</sup> *Griffith* and *Barber* make it clear that default rules of general trust law, such as the rule that a trust is irrevocable unless the settlor expressly reserves the right to revoke, do not override the constitutional bar to legislative restriction of legislative power.

power. Having retained these funds in the state's custody, the General Assembly lacked the power to immunize them from future reallocation.

The cases cited by Plaintiffs are not to the contrary. *United States v. Mitchell*, for example, merely recognizes that the federal government may hold land in trust for Indian tribes – it does not hold that such a trust (let alone other non-land based public charitable trusts) is irrevocable. *See United States v. Mitchell* (1983), 463 U.S. 206, 224-25. *See also White Mountain Apache Tribe v. United States* (Fed. Cir. 2001), 249 F.3d 1364, 1373 (same). None of the Plaintiffs' cases establishes that a state legislature may protect public funds from future reallocation by creating an irrevocable trust.<sup>2</sup>

2. Ohio Followed in the Footsteps of Other States that Have Reallocated Their Tobacco-Related Funds

The constitutional power to reallocate funds from statutory “trusts” has been recognized around the nation as state legislatures, facing new economic pressures and legislative priorities, have reallocated tobacco settlement funds that were initially pledged to tobacco use prevention and cessation. Ohio's experience in this regard is neither unique nor remarkable. In Connecticut, for example, where the state legislature created a Tobacco and Health Trust Fund as a “separate nonlapsing fund” in 1999, subsequent legislatures have repeatedly enacted legislation transferring funds to the state general fund or other state agencies. Conn. Gen. Stat. § 4-28f (creating Tobacco and Health

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<sup>2</sup> In *S. Carolina Dep't of Mental Health v. McMaster* (S.C. 2007), 642 S.E.2d 552, 556, cited in Pl. Br. at 21 n.6, the court noted that “[p]roperty subject to a charitable trust may not be terminated or altered by the General Assembly.” That case involved real property, however, that had been transferred to a state agency for a purpose specified in restrictive deed language. It did not involve reallocation of funds that the state acquired without restriction.

Trust Fund); *see, e.g.*, Conn. Pub. Act No. 09-1, §§ 6, 31 & Conn. Pub. Act No. 09-2, § 12 (transferring total of \$17,572,000 from Tobacco and Health Trust Fund to General Fund and Department of Social Services for fiscal year 2009). From 2000 to 2009, \$137 million was allocated to the Tobacco and Health Trust Fund, but only \$9.2 million was actually used for anti-smoking activities, while nearly \$120 million was legislatively transferred to the state general fund or other programs. *See* Fiscal Year 2010 Report of the Tobacco and Health Trust Fund Board of Trustees (Dec. 2009), at 10 (available at [www.ct.gov/opm](http://www.ct.gov/opm)). Yet there has been no litigation challenging the legislature's transfers of funds.

In Iowa, the state legislature created a Tobacco Settlement Trust Fund “separate and apart from all other public moneys or funds of the state, under the control of” a newly created state agency. Iowa Code § 12E.12. Part of this trust fund is the Endowment for Iowa's Health Account, the purposes of which include tobacco use prevention and control. *See id.* §§ 12E.3A, 12E.12. But in 2009, the legislature amended prior legislation to provide that all moneys deposited annually in the Endowment for Iowa's Health Account be transferred to another fund (the Rebuild Iowa Infrastructure Fund). *See id.* § 12E.12. No litigation resulted from this action.

To take just one more example, Pennsylvania's legislature created a “special” Tobacco Settlement Fund in 2001 and directed that 12 percent of the tobacco settlement payments received into the fund annually be used for tobacco use prevention and cessation programs. Penn. Stat. §§ 5701.303, 5701.306(b)(1)(iii). For fiscal year 2009-2010, however, the legislature redirected 25 percent of the money appropriated for

tobacco use prevention and cessation to other health-related purposes, and for fiscal years 2009-2010 and 2010-2011 it transferred 37.5 percent of the money appropriated for tobacco use prevention and cessation to the state general fund. *See id.* § 1715-K(a), (b)(1)(i)-(ii).<sup>3</sup> Again, no litigation was brought challenging the legislature’s action.

These states’ experiences – none of which even prompted a lawsuit – illustrate the widespread acceptance of the principle that a state legislature cannot insulate public funds from reallocation by future legislatures. The General Assembly could not, and did not, create the tobacco endowment fund as an *irrevocable* trust.<sup>4</sup>

**C. Permanent commitment of public funds can be done only by constitutional amendment.**

The settled rule that legislative power can be limited only by the federal or state constitution, and not by statute, is further reflected in the decisions of several states to adopt constitutional amendments that permanently commit tobacco settlement funds to tobacco use prevention efforts or other specified purposes. The people of Florida, for example, amended their constitution to require that an amount equal to 15 percent of the tobacco settlement funds received in 2005, adjusted for inflation, be dedicated annually to

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<sup>3</sup> The legislature also transferred a total of \$400 million from the Tobacco Endowment Account for Long-Term Hope, an account within the Tobacco Settlement Fund, to the general fund for fiscal years 2009-2010 and 2010-2011. *See* Penn. Stat. § 1715-K(b)(iv)-(v).

<sup>4</sup> Nor did any “trust rights and interests” vest upon the General Assembly’s creation of the tobacco endowment fund. (Pl. Br. at 23). Because plenary legislative power always resides in the existing legislature, no person can have a vested interest in a previous legislature’s enactments. *See State ex rel. Horvath v. State Teachers Retirement Bd.* (1998), 83 Ohio St. 3d 67, 72 (citing “the long-standing principle that no person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit”) (internal quotation marks omitted).

a state-wide tobacco education and prevention program. Fla. Const. art. X, § 27. Similar constitutional amendments were adopted in Idaho, Louisiana, Montana, and Oklahoma. *See* Idaho Const. art. VII, § 18; La. Const. art. VII, §§ 10.8, 10.9; Mont. Const. art. XII, § 4; Okla. Const. art. X, § 40.

Utah created a Permanent State Trust Fund by constitutional amendment. *See* Utah Const. art. XXII, § 4. A portion of Utah's tobacco settlement funds is held in this fund in perpetuity, with only the income available for appropriation by the legislature. *See id.* While the structure of these constitutional amendments may differ somewhat from Ohio's experience, the common point is a simple one: if a state desires to place funds out of the reach of future legislatures, forever committed to a particular purpose, it must amend its constitution.

Plaintiffs argue that these constitutional amendments restrict spending of future tobacco settlement proceeds only, while the funds at issue here have already been received and disbursed. (Pl. Br. at 27). That fails to acknowledge Utah's amendment described in the prior paragraph. In any event, as explained above, the funds have *not* been disbursed outside of state custody; they remain public funds. As such, they are functionally indistinguishable from the unspent future proceeds that are governed by the cited constitutional amendments. Plaintiffs' argument assumes that a legislature can "spend" public funds by placing them in an irrevocable trust – an assumption that is contrary to law. *See Griffith*, 135 Ohio St. at 619-20; *Barber*, 196 P.3d at 253-54.

The constitutional amendments in Florida, Idaho, Louisiana, Montana, Oklahoma, and Utah illustrate that states wishing to place tobacco settlement funds beyond the reach

of future legislatures did so by amending their constitutions. States surely would not have chosen the onerous process of constitutional amendment if the expedient of creating a fund “outside the state treasury” sufficed. (Pl. Br. at 27 (emphasis omitted)).

The lesson of these other states’ actions – that constitutional amendments are the only means by which states can permanently restrict the use of public funds – comports with the vesting of plenary legislative power in the existing legislature. Ours is a democratic system of government in which permanent prohibitions are enshrined in constitutions while legislative pronouncements are subject to revision and repeal. If Ohio wishes to commit its tobacco settlement funds to a particular purpose irrevocably, it may do so by constitutional amendment. In the absence of such an amendment, the General Assembly is free to allocate those funds in whatever manner it finds necessary and proper.

The states that did not pursue a constitutional amendment have all recognized (either by subsequent legislative conduct or judicial decision) that a legislature cannot commit funds in perpetuity to an irrevocable public charitable trust. There is no basis in Ohio’s constitution or laws that would bestow its general assembly with such remarkable powers. Ohio should not be the first (and only) jurisdiction to recognize such a notion of legislative power.

The perils of adopting Plaintiffs’ novel rule are manifold. But a simple example adequately illustrates the point. If Ohio’s general assembly were controlled by one political party, and (as happens from time to time) the prevailing winds of public opinion swayed and resulted in the minority party prevailing at an election and becoming the new

majority, the lame duck majority could seek to accomplish its legislative agenda through the mechanism of irrevocable public charitable trusts. This would flout the vote of the electorate and improperly constrain the conduct of the succeeding general assembly. More important, it is not difficult to see how such irrevocable public charitable trusts would evolve into political theater. Each party would make promises as to which parts of its agenda would become “irrevocable.” The Court would then be forced to referee these battles, as one side or the other would constantly litigate to enjoin the creation of certain trusts, claim that the trustees were not adequately performing their duties, or assert that the purpose of the trust had failed.

The Tenth District’s rejection of Plaintiffs’ proposed rule is not only sensible, it also demonstrates fidelity to this Court’s prior precedent as well as an appreciation for the experience in other states.

CONCLUSION

Because the General Assembly's reallocation of public funds was properly within its plenary legislative power, the judgment of the Tenth District Court of Appeals should be affirmed.

Respectfully submitted,



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