

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

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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DAVID W. WEINMANN, AND AMERICAN LEGACY FOUNDATION

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FILED
JUN 03 2010
CLERK OF COURT
SUPREME COURT OF OHIO

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CONSTITUTIONAL AND STATUTORY PROVISIONS

Retroactivity Clause of the Ohio Constitution, Article II, § 28*passim*

Am. Sub. S.B. 192, 123rd General Assembly*passim*

29 U.S.C. § 1003(b)(1)13

R.C. 109.9312

R.C. 111.1812

R.C. 145.0113

R.C. 145.2313

R.C. 145.4813

R.C. 145.5113

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I. **Introduction: The 123rd General Assembly “Plainly Intended” To Create A Trust Fund Permanently Beyond Reappropriation To Other Uses**

The State concedes: *“The polestar of statutory interpretation is legislative intent....”* [State’s Brief at 14, quoting *State v. Elam* (1994), 68 Ohio St. 3d 585, 587 (emphasis added)] Here, the overwhelming – indeed, unrebutted – facts support the trial court’s express finding that the 123rd General Assembly *“plainly intended”* to disburse \$235 million of Ohio’s initial tobacco settlement receipts into a trust that is beyond legislative control and *permanently* dedicated to lifesaving tobacco prevention programs -- the Tobacco Use Prevention and Control Endowment Fund (“Endowment Trust”). [8/11/09 Findings of Fact ¶ 226 (Apx. 50)]

No one who reads the 123rd General Assembly’s S.B. 192 and the history of the Endowment Trust can credibly reach a contrary conclusion.

In 2000, the bipartisan Ohio Tobacco Task Force carefully designed the Endowment Trust as a self-sustaining, “sequestered trust fund established outside the state treasury,” for the specific purpose of “assur[ing] that the assets dedicated to tobacco cessation and prevention could not be diverted to other uses by future legislative action.” [Amicus Brief of Former Attorney General Betty Montgomery, et al. at 1] The Task Force was open and direct about its directive to create a permanent trust fund outside the power of future General Assemblies to divert its monies to other uses. In fact, every one of the multiple Legislative Service Commission analyses provided to members of the 123rd General Assembly during its consideration of S.B. 192 emphasized that money disbursed into the Endowment Trust is *not* subject to future appropriation by the General Assembly:

The appropriated money [under proposed S.B. 192] ... is to be placed into the Tobacco Use Prevention and Control Endowment Fund.... (*Money in a custodial fund of the Treasurer of State is not subject to appropriation by the General Assembly.*) *The Foundation is the trustee of the endowment fund, and the Treasurer of State can pay*

disbursements from the fund only upon instruments duly authorized by the Foundation's board of trustees.

[LSC Analyses of S.B. 192 at 6 (emphasis added)]

Having been directly told that monies appropriated for disbursement to the Endowment Trust outside the state treasury would not be subject to future legislative control, the 123rd General Assembly proceeded to enact S.B. 192. Its express language is the ultimate manifestation of the 123rd General Assembly's intent to transfer the Endowment monies into a trust that is permanently beyond the General Assembly's reach:

(1) The 123rd General Assembly specifically established the Endowment Trust as a special fund *outside the state treasury*: "The endowment fund ... shall be in the custody of the treasurer of state but *shall not be a part of the state treasury.*" R.C. 183.08(A) (emphasis added). This was by careful design and was in stark contrast to the General Assembly's creation – in the very same legislation – of eight other funds "*in the state treasury*" that received the remaining tobacco settlement proceeds that were not disbursed to the Endowment Trust.

(2) The 123rd General Assembly imbued the Endowment with *all elements of a trust*: a "*trustee*" (the Foundation) controlled by a "*board of trustees*" with mandatory fiduciary duties; a self-sustaining *trust corpus* (the Endowment Fund); and designated *trust beneficiaries* (Ohio's tobacco users and youth). R.C. 183.07, 183.08. [2/10/09 Findings of Fact, at ¶ 21 (Apx. 70)]

(3) The 123rd General Assembly eliminated any doubt that it was transferring the Endowment monies outside legislative control by establishing a two-step process to insulate the monies from later legislative attempts to divert them. The General Assembly did so by not just "appropriating" \$235 million of the tobacco settlement receipts already in hand to the Department of Health (step one), but then directing the Director of Health to "*disburse*" those monies outside the state treasury and into the Endowment Fund (step two). [S.B. 192, § 6 (Apx.

142)] The General Assembly did not merely “allocate” funds among various State funds, as the State would have this Court believe. Rather, it took the extraordinary step of mandating the funds to be “disbursed” outside the state treasury with the express intent of insulating them from subsequent legislative reappropriation.

(4) The 123rd General Assembly’s very use of the words “*self-sustaining*” “*endowment*” fund manifests its intention of permanence. R.C. 183.08(A),(B). As the trial court determined: “Endowment is defined in Black’s Law Dictionary as “[t]he act of settling a fund, or *permanent* pecuniary provision, for the maintenance of a public institution, charity, college, etc.” [2/10/09 Order ¶ 192 (emphasis in original)]

Thus, the trial court got it exactly right when it found that it was the specific, carefully planned design of the 123rd General Assembly to transfer the Endowment monies permanently beyond the General Assembly’s control:

226. *The General Assembly and the State plainly intended to create the Endowment Fund ... as an irrevocable trust* by enacting R.C. 183.07 and 183.08 without reserving any right to revoke the Trust; by expressly establishing the Endowment Fund *outside the state treasury*; by expressly designating [a] ... “trustee” of the Endowment Fund; by providing the Foundation with fiduciary responsibilities and control over the Fund; by specifying by statute the intended beneficiaries of the Trust (Ohio’s youth and tobacco users); *and by making completed, unconditional transfers of monies into the Endowment Fund....*

[8/11/09 Final Judgment Entry, Findings of Fact ¶ 226 (emphasis added) (Apx. 50)]

The State can’t deal with these facts, so it chooses not to. Instead, the State exposes the weakness of its position by actually *misstating* the evidence as part of its retort to the 123rd General Assembly’s intent. The State asserts that, in R.C. 183.32 and S.B. 192, § 17, “the 123rd General Assembly explicitly acknowledged that its distribution decisions lacked permanence.” [State’s Brief at 16] But R.C. 183.32 and S.B. 192, § 17 have nothing to do with the 123rd

General Assembly's prior disbursement of \$235 million of tobacco settlement proceeds that were actually received *during its term in 2000 and 2001* – the monies at issue in this case! [Hearing Tr., Vol. II, at 115-16] Instead, S.B. 192, § 17 expressly related to consideration of how future tobacco settlement money received *“after fiscal year 2012”* should be spent and requested future legislators to “give due regard” to the Tobacco Task Force’s recommendations of how to allocate tobacco settlement payments *received from 2012 “through fiscal year 2025.”* The State’s statement about R.C. 183.32 is similarly inaccurate: that statute referred to formation of a committee “beginning in 2012” to reexamine the use of “Tobacco Master Settlement Agreement Funds,” which, under R.C. 183.02, could only include settlement payments received in that fund during 2012 and thereafter – not monies the 123rd General Assembly that had previously received and disbursed into the Endowment Trust in 2000 and 2001.

Other than these sleights of hand, the State presents rhetoric, rather than any real substance, to challenge the 123rd General Assembly’s clear intent. The State would have this Court believe that the 123rd General Assembly “did nothing more” than create a “State fund to support a State agency.”¹ [State’s Brief at 14] But the truth is that the 123rd General Assembly did much more than that – it used distinct trust language and took special steps which manifested an undeniable intent to transfer monies into the corpus of the Endowment Trust permanently beyond legislative control.

The only real question for this Court is whether the 123rd General Assembly accomplished its goal of protecting the Endowment Trust monies from future legislative raid. Its

¹ The State’s Proposition of Law No. 1 hinges on the State’s mischaracterization of the existing monies in the Endowment Trust as “State funds.” But the foundation of the State’s position is fundamentally wrong. The monies that were previously disbursed into the Endowment Trust are not “State funds” subject to legislative control precisely because the 123rd General Assembly manifested its intent that they are not.

success in doing so is highlighted by first examining what the State doesn't challenge in this case.

II. Key Points Conceded By The State

The State's Brief and those of the various *amici* in support of its position are most striking for what they *omit to challenge*, rather than what they actually say. The State simply does not (because it cannot) address many of the dispositive issues in this case:

(1) The State does not contest that the 123rd General Assembly had the power to establish the Endowment Fund as a trust. Nor could it – in view of this Court's holding, in *State ex rel. Preston v. Ferguson* (1960), 170 Ohio St. 450, 464, that the General Assembly has validly created “trust funds” outside the state treasury like the state retirement funds.

(2) The State also does not challenge the trial court's fundamental finding of fact that the 123rd General Assembly intended to *permanently* commit the monies disbursed into the Endowment Trust to fighting the tobacco epidemic in Ohio. [8/11/09 Final Judgment, Findings of Fact ¶ 226 (Apx. 50)] The State never mentions – indeed, ignores – this finding in the hope that this Court will too.

(3) Nor does the State dispute that the 123rd General Assembly had plenary power to outright transfer monies received *during its term* – including the tobacco settlement proceeds at issue here – so that those funds would thereafter be beyond legislative control. Instead, the State attempts to twice imply – but carefully avoids stating – that the monies at issue in the Endowment Trust were originally received by “successor” General Assemblies. But do not be misdirected: the trust monies at issue here were received, appropriated and disbursed during the term of the 123rd General Assembly. [Hearing Tr., Vol. II, at 115-16 (Renner)] That is why *its* plenary power, and not that of later General Assemblies, controls here.

(4) The State does not challenge that once a trust is created and funded, equitable and legal title to the trust *res* vests immediately and irrevocably, unless the instrument creating the trust states otherwise. *Brown v. Buyer's Corp.* (1973), 35 Ohio St. 2d 191, 196 (“[t]he charitable purpose of a charitable trust becomes *vested* in use or enjoyment at the time of the creation of the equitable duty of the person, by whom the property is held, to deal with such property for such charitable purpose”; enjoyment of the trust for charitable purposes becomes “fixed and *irrevocable*” when the trustee’s duty is created) (emphasis added); Restatement of the Law 2d, Trusts (1959), § 367 (“[i]f a charitable trust has once been validly created, the settlor cannot revoke or modify it unless he has by the terms of the trust reserved a power to do so”); *In re Guardianship of Lombardo* (1999), 86 Ohio St. 3d 600, 607 (“[i]t is a well-founded principle that where the settlor makes no reservation in the language to amend or revoke a trust, he or she may not unilaterally revoke the trust”).

Thus, the State’s unsupported assertion that it “never gave up title to the money” when it “disbursed” tobacco settlement receipts into the Endowment Trust under the control of a special “trustee” more than eight years ago is just plain wrong. [State’s Brief at 22-23]

(5) And, the State is conspicuously silent about the restrictions the Retroactivity Clause of the Ohio Constitution, Article II, § 28, places on the General Assembly’s power to eradicate the Endowment Trust – even though that Clause is the sole subject of Plaintiffs’ Proposition of Law No. 1 in this appeal. The State’s silence is telling. It does not (because it cannot) contest that where, as here, the General Assembly seeks to repeal an existing law (the 123rd General Assembly’s S.B. 192), *the Retroactivity Clause prohibits the General Assembly from doing so in a way that impairs substantive interests that vested under pre-existing law.* *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100, 106-07. Although the State’s

amici quote the portion of *State ex rel. Youngstown v. Jones* (1939), 136 Ohio St. 130, that notes “there is no such thing as an irrevocable statute,” [Amicus Brief of President of Ohio Senate, et al. at 9], the State fails to mention the exception identified in the very next sentence of *Jones* that is dispositive of this case: When repealing a prior law, the General Assembly “*could not interfere with vested rights ... in violation of Section 28, Article II of the state Constitution....*” *Id.* at 136 (emphasis added). Indeed, the State’s *amicus* brief later acknowledges: “The General Assembly does not dispute that legislative repeal does not unravel transactions that were lawfully executed under prior law.” [*Id.* at 24] The 123rd General Assembly’s prior “disbursement” of tobacco settlement receipts to the Endowment Trust is exactly the type of lawfully executed transaction that cannot be unraveled by future legislation.

Each of these points is uncontested. Together, they are dispositive of this case. The 123rd General Assembly intended to transfer the Endowment monies into a trust outside the state treasury that is permanently beyond the General Assembly’s control; it had plenary power to do so and to spend tobacco settlement monies received during its term as it saw fit; and since the Endowment funds were impressed with a vested equitable estate upon disbursement of the settlement receipts into the trust, it is a violation of the Retroactivity Clause for the General Assembly to now divest the Trust by raiding its corpus.

III. Responses To The State’s Arguments

In a brief that is most remarkable for its lack of citation to the factual record, the State presents a string of arguments that are both wrong and largely irrelevant.

A. There Can Be No Doubt The Endowment Is A Trust Fund

For the first time in this case, the State contends “there is no basis in concluding that the General Assembly intended the endowment fund to be a trust.” [State’s Brief at 15] The State

posits that the General Assembly never called the Endowment a “trust.” But this is disingenuous, because, as the trial court found, the 123rd General Assembly expressly vested control of the Endowment in a “trustee,” a word that has only one legal meaning: a “person holding property in trust.” Restatement of the Law 2d, Trusts (1959), § 3(3).

The State does not (and cannot) contest that, as the trial court found, the Endowment has all the elements of a trust: (i) a “trustee” (the Foundation) with mandatory fiduciary duties requiring its funds to be used solely for tobacco control purposes; (ii) a trust corpus (the Endowment Fund monies); and (iii) trust beneficiaries (Ohio smokers and youth). [2/10/09 Order, Findings ¶¶ 21, 197] As the United States Supreme Court held in *United States v. Mitchell* (1983), 463 U.S. 206, where, as here, a statute creates all trust elements, a trust is established, even if the statute makes no express mention of “a trust fund.” *Id.* at 225. That is exactly why this Court, in *Preston*, 170 Ohio St. at 464, held that funds created by statutes with language strikingly similar to R.C. 183.07 and 183.08 are trust funds: ***“There is no question that the [SERS] funds here involved are trust funds.”*** (Emphasis added).

The State’s other basis for challenging the Endowment’s status as a permanently dedicated trust is how the Director of the Office of Budget and Management and Auditor supposedly accounted for the Endowment Trust in financial reports (the “OBM Reports”).² But

² Notably, the OBM Reports now relied upon by the State (which it failed to present and make subject to cross examination at trial) don’t even mention the Endowment Fund. The OBM Report excerpts included in the State’s Supplement generally state that the “Tobacco Settlement Fund” accounts for various health, education, economic, and law enforcement-related programs funded with tobacco settlement monies, but there is no indication whether OBM was accounting for those proceeds *before or after* a portion of them were subsequently disbursed into the Endowment Trust outside the state treasury. In fact, pages 13 and 14 of the 2000 OBM Report – which the State omitted from its Supplement – suggests that OBM accounts for the tobacco settlement revenues before any of them are disbursed to the Endowment Fund, because those pages don’t mention the Endowment Fund. Instead, they list only the eight funds that the 123rd

accounting rules and practices are irrelevant to, and certainly do not control, the legal test established by this Court and the United States Supreme Court for determining whether a statute creates a trust.

In fact, the State is now speaking out of both sides of its mouth because its new argument that the Endowment is not a trust directly contradicts the State's own position below that the Endowment is either a charitable or statutory trust. The State's entire standing argument in the trial court was based on the State's position that Plaintiffs Robert Miller and David Weinmann lacked standing to enforce a "*charitable trust*." [State's 6/16/09 Proposed Findings of Fact and Conclusions of Law at 6, ¶ 2] *See also* State's 2/13/09 Emergency Motion for Stay, at 10 ("[f]or purposes of this appeal, *Appellants [the State defendants] do not dispute the conclusion that TUPCF was, in fact, a charitable trust*") (emphasis added). "It is axiomatic that '[i]ssues ... which are completely inconsistent with and contrary to the theory upon which [a party] proceeded below cannot be raised for the first time on review.'" *Miller v. Wikel Mfg. Co., Inc.* (1989), 46 Ohio St. 3d 76, 78. *Accord: Republic Steel Corp. v. Board of Revision* (1963), 175 Ohio St. 179, 184-185 (issues "which are diametrically opposed to the theory upon which the [party] proceeded below can not be raised for the first time on review").

B. The 123rd General Assembly Had Plenary Power To Transfer Revenues Received During Its Term Irrevocably Beyond Legislative Control

The sole basis for the State's argument that the 123rd General Assembly lacked power to irrevocably cede control of the monies previously disbursed into the Endowment Trust is the State's assertion that one General Assembly cannot bind a successor General Assembly concerning future public funds. But this argument – and the State's parallel policy argument that

General Assembly expressly created "*in the state treasury*" as the initial fund recipients of the tobacco settlement proceeds, *none* of which is the Endowment Fund outside the state treasury.

doing so is “antithetical to responsible governance” – are nothing more than sleights of hand, because that is not what the 123rd General Assembly did and it is not what this case is about.

This case does *not* involve a commitment by a prior General Assembly to pay money into the Endowment Trust *in the future*. It is *not* about a prior General Assembly trying to bind future General Assemblies to pay subsequently received tobacco settlement receipts into the Endowment. *Instead, this is a dispute over monies the 123rd General Assembly actually received and spent during its own term in 2000 and 2001 by having them disbursed into the Endowment Trust*, [Hearing Tr., Vol. II, at 115-16] – something that was plainly within the 123rd General Assembly’s plenary power. As the State itself concedes, “[t]he General Assembly has plenary power to ‘pass any law unless it is specifically prohibited by the state or federal Constitutions.’” [State’s Brief at 13, quoting *State ex rel. Jackman v. Cuyahoga County Court of Common Pleas* (1967), 9 Ohio St. 2d 159, 162] And, there is no constitutional provision that prohibited the 123rd General Assembly from spending the tobacco settlement proceeds *received during its term* as it saw fit.

The State’s repeated reliance on *State ex rel. Public Institutional Bldg. Auth. v. Griffith*, 135 Ohio St. 604 (1939), is thus wholly misplaced. *Griffith* is not even remotely applicable here because it involved a state agency’s attempt to commit public funds *to be received in the future* (for the next 25 years) for payment of bonds, *id.* at 619 – not current funds that were in the General Assembly’s plenary power to disburse.

The other case the State uses to challenge the 123rd General Assembly’s power is not only inapplicable, its subject matter is misstated by the State. The State asserts at page 19 of its Brief that one of the funds at issue in *Barber v. Ritter* (Col. 2008), 196 P.3d 238, was “Colorado’s Tobacco Litigation Settlement Trust Fund.” Yet, the Colorado court specifically

listed the funds at issue in that case, and the Tobacco Litigation Settlement Trust Fund was *not* one of them. *Id.* at 242 n.4. The three trust funds that *were* at issue in *Barber, id.* at 252-53, are inapposite because, unlike the Endowment Trust, *those three funds were created in the state treasury, always remained state funds, and were expressly made subject to further appropriation by Colorado’s legislature.* Colo. Rev. Stat. §§ 19-3.5-106, 38-13-116.5, and 39-29-109(2).

Here, because Ohio’s 123rd General Assembly had plenary power to disburse revenues received during its biennium to a third party like the American Cancer Society or Children’s Hospital, it necessarily follows that the General Assembly had the power to disburse those same proceeds into an irrevocable trust outside the state treasury. *Either way, the General Assembly had the power to part irrevocably with legislative control of the funds.* Once the money was disbursed to the trust outside the state treasury, it was spent, and neither the 123rd nor any subsequent General Assembly had any control over it. The current General Assembly has no more power over those previously spent funds that are now in the Endowment’s trust corpus than it does over a prior General Assembly’s appropriated disbursements to the Ohio Arts Council or into the state retirement trust funds, which the State acknowledges are irrevocably protected outside the state treasury – just like the Endowment Trust funds.

C. The State’s Reliance On Unrelated, Non-Trust Custodial Accounts Is Futile

The State and one of its supporting *amici* attempt to justify depletion of the Endowment Trust by contending that the General Assembly previously has dissolved and liquidated funds from other, non-trust “custodial accounts.” But by doing so, the State ignores that, unlike the custodial funds it cites, the Endowment Fund is impressed with a vested equitable trust estate – just like the state retirement funds that are also in “custodial accounts” outside the state treasury.

In fact, unlike the Endowment Trust, *none* of the custodial funds cited by the State was a *trust*. The General Assembly specifically created the Secretary of State’s Alternative Payment Program Fund as a two-day, pass-through fund to transfer monies into the state treasury. R.C. 111.18 (Am. Sub. H.B. 119, 127th General Assembly). The Penalty Enforcement Fund was never a trust; rather, it was used by the Director of Commerce for the general State purpose of enforcing prevailing wage laws. R.C. 4115.10. The legislation creating the Attorney General Education Fund did not create it as a trust and did not even state the fund was outside the state treasury. R.C. 109.93 (S.B. 351, 119th General Assembly). And, the Liquor Control Rotary Fund was never a trust. In fact, the legislation creating it expressly directed transfer of its excess funds to the “general revenue fund.” G.C. 6064-10, recodified as R.C. 4301.12.

The State actually proves Plaintiffs’ point by failing to identify a single prior precedent where the General Assembly has taken back monies disbursed by a prior General Assembly to a special purpose trust outside the state treasury, like the Endowment Trust. While the General Assembly might intend to keep control of some non-trust custodial funds, here we have just the opposite: the 123rd General Assembly “plainly intended” to insulate the monies it disbursed into the Endowment Trust from the vagaries of biennial budgets. [8/11/09 Findings of Fact ¶ 226]

D. The State Cannot Credibly Distinguish The Endowment Trust From The State Retirement Funds

The State readily acknowledges that the state retirement funds – which, like the Endowment Trust are held in permanently dedicated trust funds outside the state treasury – “are protected” from being seized by the General Assembly because they are not State funds. [State’s Brief, at 13-14, 34] Yet, the State has no plausible explanation why the Endowment Trust should not have the same constitutional protections (*i.e.*, under the Retroactivity Clause) as the pension funds enjoy.

The State first argues that most Endowment Trust monies originated from “general State moneys.” [State’s Brief, at 31] But this is no different from the *State’s contributions* into the state retirement funds. For example, the “employers’ accumulation fund,” a segregated fund within the Public Employees Retirement System (“PERS”), is funded from the General Assembly’s appropriations from the state treasury. R.C. 145.23(B); R.C. 145.51(A); R.C. 145.01(D); R.C. 145.48(A); R.C. 145.69 (“paid from state funds”); R.C. 145.70. And, contrary to the State’s suggestion, no “specific individual” has any vested right in this \$13.5 billion-plus PERS fund, R.C. 145.561, R.C. 145.23(B) – though its corpus as a whole is still protected because, like the Endowment Trust, it is impressed with a vested trust estate.

The State’s next argument – that the Tobacco Use Prevention and Control Foundation is a “State agency” – is a red herring. Again, even if true, this does *not* distinguish the Endowment Trust from the state retirement funds because state retirement boards are state agencies. *In re Appeal of Ford* (1982), 3 Ohio App. 3d 416, 418 (“the State Teachers Retirement Board is a state agency”). *Cf. Fair v. School Employees Retirement System* (1975), 44 Ohio App. 2d 115, 119 (School Employees Retirement Board is “an instrumentality of the state”). Regardless of what label is used to describe the Foundation and its Board of Trustees (the majority of whom were health professionals or recommended by health associations, R.C. 183.04), it cannot change the fact that, as “trustees” of the Endowment Trust, they have mandatory fiduciary duties under R.C. 183.07-.08 to use the trust monies for the specific purpose of tobacco prevention and cessation programs for the exclusive benefit of Ohio’s tobacco users (cessation) and youth (prevention), not “generally” for the State of Ohio as the State would have this Court believe. Restatement of the Law 2d, Trusts (1959), § 170, Comment 1 (“[t]he trustee violates his duty to the beneficiary ... where he uses the trust property for his own purposes”); Restatement of the Law 3d, Trusts

(Prudent Investor Rule Ed. 1992), § 379, Comment a (“[t]he trustee of a charitable trust, like the trustee of a private trust ... is subject to normal fiduciary duties: to administer [the trust] solely in the interest of effectuating the charitable purposes”).

And, the State’s last-ditch effort to distinguish the Endowment Trust – by asserting that federal ERISA law (rather than the Ohio Retroactivity Clause) prohibits the General Assembly from diverting monies from state pension funds – is baseless. Controlling law is clear that the State retirement systems are exempt from ERISA. 29 U.S.C. § 1003(b)(1) (“[t]he provisions of [ERISA] *shall not apply* to any employee benefit plan if— (1) such plan is a *government plan....*”) (emphasis added); *Erb v. Erb* (1996), 75 Ohio St.3d 18, 20 (“Congress expressly exempted government retirement systems, such as the [Police and Firemen’s Disability and Pension Fund], from ERISA’s scope”); *Cosby v. Cosby* (2002), 96 Ohio St.3d 228, 230 (State Teachers Retirement System, “as a government retirement system, ... is exempt from federal ERISA requirements”).

The State is left with no meaningful difference between and the Endowment Trust and the State-contributed funds within the state retirement system. Both are outside the state treasury and are pre-existing, vested trust estates, which the Retroactivity Clause prohibits the General Assembly from raiding whenever there is a budget shortfall.

Significantly, the State concedes that – like the state retirement funds – the Endowment Trust was always invested in corporate stocks. [State’s Brief at 33] Obviously, the State condoned this because the State Treasurer, as the Endowment’s custodian, contracted with the Fund’s investment managers. R.C. 183.08(A). Thus, the Fund’s investment in corporate stock is yet more compelling evidence that the State understands the Endowment Trust monies are not

State funds, because *Article VIII, § 4 of the Ohio Constitution prohibits investment of State funds in corporate stock*, and the State Treasurer would not have participated in an illegality.

E. Plaintiffs Have Standing

The State makes a half-hearted attempt, near the end of its brief, to challenge Plaintiffs' standing. But quite frankly, this is not a close issue. There can be no doubt that Plaintiffs have standing to challenge the constitutionality of the General Assembly's legislative effort to annihilate the Endowment Trust. The trial court identified *five separate grounds* for standing. [2/10/09 Order ¶¶ 102, 105-112] [8/11/09 Final Judgment ¶ 238] Let's look at just two of them.

First, Plaintiffs Miller and Weinmann have standing to challenge the constitutionality of a statute where, as here, they have a risk of injury that is different from that suffered by the public in general. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St. 3d 451, 469-471 (a private litigant has "standing to attack the constitutionality of a legislative enactment" if "he or she has suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general"). Here, the trial court specifically found that Plaintiffs Miller and Weinmann, as recovering smoking addicts, have "special rights and interests" in the Endowment Trust that are "separate and distinct from [those] of the general public." [2/10/09 Order ¶¶ 106, 112] The trial court also found that Plaintiffs are "specifically identifiable beneficiaries of the Trust" because they are actual participants in the Trust's tobacco cessation programs. [8/11/09 Final Findings ¶ 238]

Second, Plaintiffs have standing to prevent dissipation of the Endowment Trust because the Attorney General, who is supposed to do so, is conflicted as an *adverse party* and is acting adversely to the Trust. The trial court put it best when it reasoned:

109. Where "the attorney general, as *parens patriae*, has abandoned ... possible rights of the beneficiary of the trust," then

beneficiaries of a charitable trust can bring suit in defense of those rights, even if they are not specifically named in the trust document. *Kapiolani Park Preservation Society v. City and County of Honolulu*, 751 P.2d 1022, 1024 (Hawaii 1988). Furthermore, “where ... the attorney general as *parens patriae*, has actively joined in supporting the alleged breach of trust, the citizens of th[e] State would be left without protection, or a remedy, unless ... members of the public, as beneficiaries of the trust, have standing to bring the matter to the attention of the court.” *Id.* at 1025. Here, the Ohio Attorney General intervened in this case as a party adverse to the Trustees and the Foundation, and requested the Court to permit the dissipation of the Endowment Fund, the trust corpus.

110. Thus, as in *Kapiolani*, denying standing to the individual Plaintiffs in this action would permit the State, “with the concurrence of the attorney general ... to dispose ... of all, or parts of, the trust ... as it chose, without the citizens of the ... State having any recourse to the courts. Such a result is contrary to all principles of equity and shocking to the conscience of the court.” *Id.* Because the Attorney General has failed to seek to protect or otherwise enforce the Trust, is directly adverse to the individual Plaintiffs, and is representing parties with interests adverse to those of Ohio tobacco users and the other intended beneficiaries of the Endowment Trust, *the individual Plaintiffs* would lack adequate legal recourse and *would have no one to represent the interests of the Trust’s beneficiaries unless they are permitted to prosecute this action.*

[2/10/09 Order ¶¶ 109-110 (emphasis added)]

Accord: Fitzgerald v. Baxter State Park Auth. (Me. 1978), 385 A.2d 189, 195-96 (Maine residents who used state park held in charitable trust had standing to enforce the trust; Attorney General could not because he was a named defendant and represented another state defendant: “*The Attorney General could not properly take in litigation a position adverse to a state agency on which he sits and for which he acts as counsel.*”) (emphasis added).

Put simply, if Plaintiffs don’t have standing to bring this case, then *nobody* does.

IV. The State Cannot Take Advantage Of Its Own Wrongful Conduct To Set Up An Open Meetings Violation To Invalidate The Legacy Contract

Significantly, the State does not deny two key points concerning the open meetings issues involving the Foundation’s contract with American Legacy Foundation (“Legacy”) to continue

tobacco prevention and cessation programs in Ohio. First, it would be wrongful for Attorney General Marc Dann to have deliberately abandoned the Foundation's Board of Trustees at their regularly scheduled April 4, 2008 meeting. Second, each of the purported open meetings infractions was avoidable if only General Dann had legal counsel attend the meeting, because it was his job to ensure legal compliance deficiencies did not occur.

The State, however, tries to get around these controlling points by again distorting the facts. The State cites the court of appeals' decision, at ¶ 55, for the proposition that "[n]either the [Foundation's] executive director nor any Board member *ever* requested the presence of an assistant attorney general ... for the April 4 meeting." [State's Brief at 38] But this is untrue and is not what the court of appeals stated.³ The Foundation's Executive Director, Michael Renner, testified that on April 2 and 3, 2008, he fully apprised the Attorney General's of the elevated nature of the need for it to provide legal advice at the Board meeting on April 4, 2008. [Hearing Tr., Vol. II, at 34-35] In fact, the trial court specifically found that in response to Mr. Renner's urgent request for legal advice, an Assistant Attorney General informed Mr. Renner on April 3 that "Attorney General Marc Dann was having a 'high-level meeting' that same day to discuss the issues raised by Mr. Renner," and that "a lawyer in the Attorney General's office would get back to him before the Board of Trustees' meeting on April 4." [2/10/09 Findings ¶¶ 28, 31] But that never happened, and no lawyer from the Attorney General's office even went to the April 4 meeting. The trial court thus found that "Mr. Renner was surprised that no Assistant Attorney General attended the April 4 Board meeting ... as had occurred on 'multiple occasions in the past,'" and that "[i]t was routine for a lawyer from the Attorney General's office to attend

³ The court of appeals merely repeated the trial court's finding that *after* the April 4 Board meeting was convened and no one from the Attorney General's office showed up, no one called the Attorney General's office again at that time. [2/10/09 Order, ¶ 46]

the meetings of the Foundation’s Board of Trustees, particularly when there was a legal question to be discussed.” [2/10/09 Findings ¶ 43]

Thus, the trial court’s unchallenged findings of fact establish that General Dann – even though he knew the Board of Trustees required legal representation to discuss urgent legal matters at its April 4 meeting – (i) failed to provide advice in response to the Foundation’s legal inquiries, (ii) failed to have an assistant attorney attend the April 4 meeting, and (iii) failed to appoint special counsel to attend. And, as the State itself concedes, “[t]hose findings are entitled to significant deference” and cannot be challenged unless they “constitute an abuse of discretion.” [State Brief at 37]

It was this deliberate abandonment of the Trustees by General Dann that caused the very open meetings issues upon which the lower courts invalidated the Legacy contract.

The State tries to sidestep its misconduct by arguing that “the other Appellees – the State, the Treasurer, or the Director of Health” did not commit the wrongdoing. ***But, like the Attorney General, each of these parties is the State.*** This Court already has rejected the State’s effort to draw such distinctions between State actors. In *State v. Williams* (1996), 76 Ohio St. 3d 290, the Court rejected the State’s argument that the Bureau of Motor Vehicles was not the State. The Court held: “The state acts through its various agencies and entities, and the [BMV] is an agency of the state. We conclude that the state of Ohio is the real party in interest....” *Id.* at 295.

Thus, the State – whether in its own name or one of its agencies – cannot use the forbidden fruits of its own open meetings booby trap to invalidate its contract with an innocent third party like Legacy. Any other holding would eviscerate one of the most basic principles in the law that a party cannot take advantage of its own wrongdoing. *State v. Harrison* (1993), 88

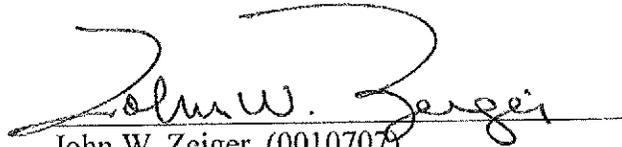
Ohio App. 3d 287, 290 (“neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong”).

V. **Conclusion**

The intent of the 123rd General Assembly is clear: it sought to – and did – disburse \$235 million (roughly 3%) of Ohio’s tobacco settlement funds *permanently* beyond legislative control into the “self-sustaining” “[E]ndowment” Trust, so that those monies would always be dedicated to lifesaving tobacco prevention programs. And, the 123rd General Assembly unquestionably had plenary power to so spend those funds during its own biennium. Under the Retroactivity Clause, the current General Assembly cannot raid the resulting trust corpus of the Endowment, which equitably vested for the benefit of its beneficiaries upon the trust’s funding nearly ten years ago.

The court of appeals’ decision must be reversed, and the trial court’s permanent injunction protecting the Endowment Trust monies for their intended purposes should be reinstated.

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