IN THE SUPREME COURT OF OHIO

ORIGINAL

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

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

MERIT BRIEF OF PLAINTIFFS-APPELLANTS ROBERT G. MILLER, JR., DAVID W. WEINMANN, AND AMERICAN LEGACY FOUNDATION

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TABLE OF CONTENTS

APPENDIX **APX. PAGE**

TABLE OF AUTHORITIES

CASES **PAGE**

UNREPORTED CASES **PAGE**

CONSTITUTIONAL AND STATUTORY PROVISIONS

OTHER AUTHORITIES

INTRODUCTION

This case is fundamentally about the General Assembly's constitutional powers and restrictions. Everyone agrees with the basic proposition that, pursuant to Article II, § 1 of the Ohio Constitution, the General Assembly has plenary legislative power to enact any law that is not prohibited by the Ohio or United States Constitutions. *State ex rel. Jackman v. Cuyahoga County Court of Common Pleas* (1967), 9 Ohio St. 2d 159, 162. But, at the State's urging, the court of appeals turned this constitutional standard on its head by failing to recognize the plenary power of the ***123rd*** General Assembly and the constitutionally protected trust interests it created in 2000, when the court was determining whether, eight years later, the ***127th*** General Assembly was constitutionally prohibited from divesting those pre-existing trust interests. This foundational error turned the remainder of the court of appeals' constitutional analysis topsy-turvy, causing the court to arrive at the exact opposite conclusion it should have reached.

In 2000, the 123rd General Assembly exercised its plenary power to spend $235 million of the initial receipts from Ohio's $10.5 billion landmark settlement with the tobacco industry, so that a small portion of the initial settlement proceeds would be ***permanently committed*** to fighting tobacco use and ameliorating its devastating toll of death and disease on tens of thousands of Ohioans. The General Assembly did so through precisely structured legislation – establishing a self-sustaining ***irrevocable trust*** called the Ohio Tobacco Use Prevention and Control Endowment Fund ("Endowment Trust") that was dedicated to reducing tobacco use in Ohio, and then expressly directing the State to disburse $235 million of Ohio's initial tobacco settlement proceeds ***outside the state treasury*** and into the Endowment Trust. That same legislation mandated that the Endowment monies could be spent only by a special "trustee" from a custodial fund that is ***"not . . . a part of the state treasury."*** R.C. 183.08(A).

In stark contrast to the portion of the tobacco settlement proceeds that the 123rd General Assembly directed to be "disbursed" out of the State's control and into the Endowment Trust outside the state treasury, the very same legislation appropriated the remaining tobacco settlement proceeds to other worthwhile purposes but expressly mandated that they remain "in the state treasury" subject to the General Assembly's control. This distinction in treatment of the tobacco settlement proceeds unequivocally reflects the General Assembly's intent to disburse the Endowment Trust monies outside the reach of future General Assemblies' power to divert the trust funds from their intended purposes. And, that is precisely what the Franklin County Common Pleas Court found in this case.

The facts upon which this appeal is to be determined are not subject to dispute. The trial court found that the 123rd General Assembly intended to disburse $235 million of tobacco settlement proceeds into a ***trust that is beyond legislative control*** so that the funds would be ***permanently dedicated*** to lifesaving tobacco prevention programs. Specifically, the facts as determined by the trial court are that the Endowment has all elements of a trust: "a 'trustee' (the Foundation), and a trust corpus (the Endowment Fund), and ... beneficiaries of the trust (Ohio's youth and tobacco users)." [2/10/09 Findings of Fact, at ¶ 21 (Apx. 70)] And, as the trial court found, the General Assembly intended for the Endowment to be irrevocably outside its reach:

> 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)]

Yet, in 2008, the 127th General Assembly attempted to expropriate the same trust monies the 123rd General Assembly had spent more than eight years before. Through the passage of House Bill 544 in May 2008 and the current biennial budget, the 127th and current General Assemblies seek to reach outside the state treasury, raid the pre-existing monies in the Endowment Trust, and divert those monies to the state treasury for non-trust purposes.

Although the current General Assembly has plenary power over the State's current revenues, it is constitutionally prohibited from expropriating funds the State spent more than eight years ago. As the trial court correctly held, the General Assembly's attempt to divert the monies in the Endowment Trust violates both the Retroactivity Clause of the Ohio Constitution, Art. II, § 28, and the Contracts Clauses of the United States Constitution, Article I, § 10, and the Ohio Constitution, Article II, § 28, by divesting the Endowment's trust estate.

Significantly, the court of appeals did not disagree with the trial court's fundamental finding that the 123rd General Assembly intended to permanently commit the monies disbursed into the Endowment Trust to fighting the tobacco epidemic in Ohio. That finding of fact, [8/11/09 Final Judgment, Findings of Fact ¶ 226 (Apx. 50)], remains unrebutted. Rather, the court of appeals ruled that the 123rd General Assembly did not have the ***power*** to create an irrevocable trust and to disburse monies outside the control of future General Assemblies. [12/31/09 Decision ¶ 39 (Apx. 30)] But this is categorically wrong as a matter of law.

As the court of appeals itself recognized, "the Ohio Constitution provides that the General Assembly's legislative power is plenary – it can pass any law [including disbursement of funds into an irrevocable trust] so long as the legislation is not constitutionally prohibited." [Decision ¶ 34] ***But there is no constitutional provision that prohibited the 123rd General Assembly from spending the tobacco settlement proceeds <u>received</u> <u>during</u> <u>its</u> <u>term</u> as it saw fit.***

State ex rel. Dickman v. Defenbacher (1948), 85 Ohio App. 398, 401 ("[t]here is no constitutional limitation on the power of the General Assembly to make current appropriations from current revenue funds"). Neither the court of appeals nor the State has asserted that any such limitation exists. Thus, the 123rd General Assembly exercised its constitutional plenary power by choosing to spend some of Ohio's initial tobacco settlement receipts through disbursement to the Endowment Trust outside the state treasury and beyond legislative control.

Because the 123rd General Assembly had plenary power to direct disbursement of even the State's general revenue funds to a third party like the American Cancer Society or Ohio's hospitals, it certainly had the power to disburse tobacco settlement proceeds into an irrevocable trust outside the state treasury. Either way, that General Assembly had the power to part irrevocably with legislative control of what were previously State funds during its term.

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 the General Assembly's appropriated disbursements in 2000 to the Ohio Arts Council or into the state retirement trust funds, which are irrevocably protected outside the state treasury – just like the Endowment Trust funds. Put simply, the State can't take back what it already has transferred away.

The court of appeals got it backwards. It was the ***123rd*** General Assembly that acted well within its plenary powers and the ***127th*** General Assembly that violated the Constitution by seeking to eradicate the pre-existing substantive trust interests created by the 123rd General Assembly and State's unconditional disbursements in 2000. The court of appeals' decision must therefore be reversed, and the trial court's permanent injunction protecting the Endowment Trust's existing funds for their dedicated trust purposes must be reinstated.

STATEMENT OF FACTS

A. The History Of The Ohio Tobacco Use Prevention And Control Endowment Fund

In 1998, Ohio and 45 other states entered into a landmark settlement with tobacco manufacturers to provide compensation for the states' medical expenses resulting from the devastating toll of tobacco-related diseases. [Hearing Tr., Vol. II, at 173 (Healton)] The terms of the settlement were incorporated into the 1998 Master Settlement Agreement ("MSA"). [Hearing Tr., Vol. II, at 10-11 (Renner)]

In 1999, Governor Taft and the General Assembly created the Tobacco Task Force, a bipartisan group of Ohio legislators and other public officials, to recommend appropriate uses of the settlement proceeds. The Task Force determined that $235 million of the first year's proceeds should be permanently set aside and dedicated to funding tobacco control programs in Ohio. To accomplish this, the Task Force recommended a sequestered trust fund established outside the state treasury to assure that these dedicated monies were beyond the control of future General Assemblies and could not be diverted to other purposes in the future.

In 2000, the General Assembly adopted the Task Force's recommendations by enacting Am. Sub. S.B. 192 ("S.B. 192" and codified at R.C. Chapter 183), which set forth how Ohio would spend its tobacco settlement. Pursuant to S.B. 192, when Ohio received its first tobacco settlement payments, the funds were initially deposited into a Tobacco Master Settlement Agreement Fund and were then appropriated to eight new funds created "in the state treasury" for various uses, including the construction of school facilities. R.C. 183.02(A)-(H). [S.B. 192, at 10777-10781 (Apx. 132-34)] But in contrast to these eight funds, S.B. 192 adopted the Task Force's recommendations by establishing a special custodial trust fund, which, unlike the other funds, was ***outside the state treasury*** and was permanently dedicated to tobacco control

programs in Ohio. Specifically, S.B. 192 created "the tobacco use prevention and control endowment fund, which 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).

It was clear to all involved that this special trust fund was purposely placed beyond the General Assembly's power to reacquire it. Every one of the bill analyses presented to the General Assembly during its consideration of S.B. 192 plainly stated that the money placed in the Endowment is "***not subject to appropriation by the General Assembly***." [LSC Analyses of S.B. 192 at 6, http://lsc.state.oh.us/analyses/fnlal23.nsf/All%20Bills%20and%20Resolutions (emphasis added)]

S.B. 192 established a new foundation, the Tobacco Use Prevention and Control Foundation (the "Foundation"), R.C. 183.04, as the appointed "trustee of the endowment fund." R.C. 183.08. Control of the Foundation was vested in a "board of trustees" (the "Trustees" or "Board of Trustees"); the twenty Trustees, the majority of whom were health professionals or persons recommended by prominent health associations, were appointed pursuant to R.C. 183.04. [S.B. 192, at 10782-83 (Apx. 134-35)] S.B. 192 vested the Trustees with exclusive control of the Endowment Fund: ***"Disbursements from the [endowment] fund shall be paid by the treasurer of state only upon instruments duly authorized by the board of trustees of the foundation."*** R.C. 183.08(A) (emphasis added). The Trustees understood that they owed fiduciary duties as trustees to protect the Endowment Fund for its intended purposes. [Hearing Tr., Vol. III, at 32-33, 41, 44 (Richards)] [Hearing Tr., Vol. II, at 50-52 (Renner)] [Hearing Tr., Vol. I, at 175-76 (Francis)] [Hearing Tr., Vol. I, at 93 (Crane)] [Pl. Ex. 16, Jagers Dep. at 23-24]

R.C. 183.07 establishes the sole purpose of the Endowment Trust: to fund and carry out research and treatment programs for "tobacco use prevention and cessation." The Foundation's

mandatory duty as trustee is to "reduce tobacco use by Ohioans, with emphasis on reducing the use of tobacco by youth, minority and regional populations, pregnant women, and others who may be disproportionately affected by the use of tobacco." R.C. 183.07-.08.

To fund these anti-tobacco efforts, the uncodified portion of S.B. 192 appropriated $234,861,033 of Ohio's initial tobacco settlement proceeds to the Department of Health. The General Assembly then directed that the Director of Health "shall disburse" those monies outside the state treasury into the Endowment Trust:

> The Director of Health ***shall disburse*** moneys appropriated in this appropriation item to the Tobacco Use Prevention and Control Endowment Fund created by section 183.08 of the Revised Code to be used by the Tobacco Use Prevention and Control Foundation to carry out its duties.
>
> [S.B. 192, § 6, at 10798 (Apx. 142) (emphasis added)]

The Director of Health did so, disbursing the monies into the Endowment Trust outside the state treasury and putting them under the exclusive control of its trustee. [*Id.*] [Hearing Tr., Vol. II, at 115-16 (Renner)] Those funds were then commingled with grants and private donations received by the Foundation and deposited into the corpus of the Endowment Trust. [Pl. Ex. 17, Renner Dep. at 43-44] [Hearing Tr., Vol. II, at 14 (Renner)]

By March 2008, the Endowment's assets had grown to approximately $264 million, even after millions of dollars had been used for tobacco control programs. [Hearing Tr. at 13-14 (Renner)] The Endowment's successes during its first eight years were remarkable: there were 85,800 fewer teenage smokers and over 350,000 fewer adult smokers in Ohio. [Hearing Tr., Vol. II, at 194-99 (Healton)] As a result, tens of thousands of Ohio smokers were saved from premature tobacco-related deaths – including Plaintiff David Weinmann who had developed tongue cancer from smoking since he was a teenager. [Hearing Tr., Vol. I, at 141-48

(Weinmann)] The trial court specifically found that the Endowment's programs are vitally important for Ohio tobacco users because "[t]obacco use is ... the single most preventable cause of premature morbidity [illness] and mortality [death]." [2/10/09 Findings ¶ 93 (Apx. 87)] Tobacco use causes life-threatening diseases, such as cancer, heart attacks, strokes, emphysema, chronic bronchitis, sudden infant death syndrome, and premature births. [Id.] Approximately 390,000 Ohioans currently suffer from tobacco-related disease, and tobacco use causes between 18,000 to 20,000 premature deaths in Ohio each year. [Hearing Tr., Vol. II, at 203 (Healton)] [Hearing Tr., Vol. I, at 71-72 (Crane)]

B. The State's 2008 Plan To Divert The Endowment Trust Corpus To Purposes Unrelated To Tobacco Prevention

Despite the success of the Endowment's anti-tobacco programs, Governor Strickland, on April 2, 2008, announced a plan to fund a part of a $1.57 billion economic stimulus ("Stimulus Proposal") by raiding $230 million from the Endowment Trust. [Hearing Tr., Vol. I, at 77-78 (Crane)] [Hearing Tr., Vol. II, at 15 (Renner)] This threat to the mission of the Endowment Trust gave rise to serious legal concerns by the Trustees of the Foundation, who understood they had a fiduciary responsibility to assure the trust monies were used to help addicted Ohioans quit smoking. [Hearing Tr., Vol. II, at 15 (Renner)] [Hearing Tr., Vol. III. at 33-35 (Richards)] [Pl. Ex. 17, Renner Dep. at 45, 60] [Pl. Ex. 15, Crane Dep. at 24]

In an effort to ensure that the Endowment Trust monies would continue to be used for their committed purpose, the Foundation entered into a $190 million contract on April 8, 2008 with one of the nation's preeminent tobacco control organizations, Plaintiff-Appellant American Legacy Foundation ("Legacy"), to provide continuing tobacco cessation programs in Ohio. [Pl. Ex. 3] [Hearing Tr., Vol. II, at 68-69 (Renner)] [Hearing Tr., Vol. I, at 99-101 (Crane)]

Legacy is a nonprofit organization that focuses on tobacco prevention, control and cessation. It was founded in 1999 pursuant to the 1998 Master Settlement Agreement with the tobacco industry. Legacy was incorporated by the National Association of Attorneys General. Its eleven-member Board of Directors consists of two state governors, two state attorneys general, two state legislators, and five medical and public health experts. [Hearing Tr., Vol. II, at 173-76 (Healton)] Legacy's mission is to build a world where young people reject tobacco and anyone can quit. [*Id.* at 174] It is a national leader in funding and carrying out research and programs for tobacco control, prevention, and cessation. [Pl. Ex. 17, Renner Dep. at 195-96] [Hearing Tr., Vol. I, at 96-98 (Crane)] [Hearing Tr., Vol. II, at 106-07 (Renner)] Legacy's programs place a special emphasis on youth and other people disproportionately affected by the tobacco epidemic, especially minorities and lower income individuals. Its tobacco prevention programs have a strong track record of success. For example, Legacy's youth prevention campaign resulted in 300,000 fewer youth smokers nationwide in 2002-2004. [Hearing Tr., Vol. II, at 182-90 (Healton)]

In response to the Foundation's contract with Legacy, the General Assembly swiftly passed emergency legislation on the afternoon of April 8, 2008, purporting to reach outside the state treasury and divert all but $40 million of the Endowment Trust monies to a new "Jobs Fund" created in the state treasury for the Stimulus Proposal.[1] [Pl. Ex. 8, State's Admission Nos. 3 - 6] [Hearing Tr., Vol. II, at 71-73, 105 (Renner)]

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[1] The April 8, 2008 bill was Amended Senate Bill No. 192. The relevant portions of this bill were repealed by House Bill 544 on May 6, 2008. [Pl. Ex. 9] The State stipulated below that the repealed portions of the 2008 S.B. 192 have no legal effect and have no impact on the monies in the Endowment Trust. [Hearing Tr., Vol. III, at 151-52]

C. The Court Proceedings Below

On April 9, 2008, the Foundation's Trustees brought this action in the Franklin County Common Pleas Court, challenging the constitutionality of the legislation that threatened to liquidate the Endowment Trust. The next day, the State of Ohio and then Attorney General Marc Dann intervened as defendants adverse to the Trustees and in support of the depletion of the Endowment Trust. [Pl. Ex. 23] [4/10/08 TRO Hearing Tr. at 17-23] The trial court entered a freeze order on April 10, 2008 to maintain the *status quo* and protect the Endowment Trust until further order of the court.[2]

In late April 2008, Legacy intervened as a plaintiff against the State, alleging that the legislation that sought to deplete the Endowment Trust violated the Contracts Clause by impairing Legacy's contract to use those monies for tobacco prevention programs in Ohio. The 127th General Assembly responded by passing House Bill 544 ("H.B. 544") on May 6, 2008, which purported to abolish the Foundation, liquidate the Endowment Trust, and divert nearly all of its monies to a newly created "Jobs Fund" in the state treasury for the Stimulus Proposal. [Pl. Ex. 9, at pg. 14 (Apx. 160)]

In late May 2008, the Trustees' and Legacy's lawsuit against the State was consolidated with an action brought by Plaintiffs-Appellants Robert G. Miller, Jr. and David Weinmann, who, like Legacy, seek to preserve the Endowment Trust. Miller and Weinmann are special beneficiaries of the Endowment Trust. They are Ohioans who both became addicted to tobacco as teenagers and then tried for years to quit smoking. For Weinmann, quitting was a matter of survival – at age 29, he developed tongue and neck cancer from smoking. Weinmann and Miller

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[2] The freeze order was extended several times ***with agreement of the State*** before the trial granted Plaintiffs' motion for preliminary injunction on February 10, 2009. [4/24/08 Agreed Entry; 5/9/08 Order; 6/25/08 Order] Not once before the preliminary injunction did the State seek to lift the freeze order or request a more expedited ruling from the trial court.

were able to quit by joining the Endowment's programs, but they continue to struggle with their addiction and rely on its tobacco cessation programs to stay tobacco free. [Hearing Tr., Vol. I, at 141-48 (Weinmann)] [Hearing Tr., Vol. II, at 160-70 (Miller)]

Legacy, Miller and Weinmann (collectively, "Plaintiffs") asserted below that those portions of H.B. 544 purporting to deplete the Endowment Trust are unconstitutional, and sought to enjoin the State from dissipating the Trust fund.[3] Miller and Weinmann assert that H.B. 544's depletion of the Endowment Trust impairs a vested trust in violation of the Retroactivity Clause of the Ohio Constitution and the Contracts Clauses of the Ohio and Federal Constitutions.

The trial court held a three-day preliminary injunction hearing in June 2008. On February 10, 2009, the trial court granted Plaintiffs' motion for preliminary injunction to preserve the *status quo* pending the final trial. [Apx. 65]

The case was tried in early June 2009.[4] At trial, the State sought to justify its efforts to eradicate the Endowment Trust by presenting evidence about diverting those funds to new State biomedical and bioproducts programs, but the State's own witness admitted that alternative funding sources for these programs – like federal stimulus dollars – were available for these programs without wiping out the Endowment Trust. [8/11/09 Final Findings of Fact ¶¶ 229-233 (Apx. 51-54)] [6/1/09 Hearing Tr. at 31-71] The State offered not a shred of evidence regarding any other purpose for which it sought to use monies taken from the Endowment Trust. Yet, shortly after the trial was completed (and without apprising the trial court), the State abandoned its plan to fund the new biomedical and bioproducts programs and instead attempted to re-divert

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[3] All Defendants in these consolidated actions are collectively referred to as the "State."

[4] The trial record also consists of the evidence submitted during a three-day preliminary injunction hearing in June 2008.

the Endowment Trust funds to optional Medicaid and social services programs in the new State budget.

On August 11, 2009, the trial court entered its final judgment, holding that H.B. 544 violates the Retroactivity and Contracts Clauses by retrospectively impairing pre-existing substantive trust rights and disabling the Endowment Trust's tobacco control programs. [8/11/09 Final Judgment Entry (Apx. 48)] The court explained that the General Assembly plainly created the Endowment Trust as an irrevocable trust by expressly establishing it as a trust outside the state treasury, not reserving a right to revoke the trust, expressly designating the Foundation as "trustee," providing the Foundation's Trustees with fiduciary responsibilities and exclusive control over the trust funds, identifying the intended trust beneficiaries (Ohio smokers), and making prior, unconditional transfers into the Endowment Trust. [*Id.* at ¶¶ 226, 241]

The court also found, based on uncontroverted evidence, that without injunctive relief, Plaintiffs Miller and Weinmann and the other Ohio trust beneficiaries participating in the Endowment's tobacco cessation programs would suffer irreparable harm: "Depletion of the Endowment Fund, and discontinuance or reduction of the tobacco prevention and cessation programs funded by the Endowment Fund, would result in a ***substantial increase in tobacco-related premature death and disease in Ohio....*** " [*Id.* at ¶ 237 (emphasis added) (Apx. 55)] Thus, the court permanently enjoined the State from extracting the pre-existing corpus of the Endowment Trust. The court further ordered that the Endowment monies were to remain outside the state treasury and not subject to control or appropriation by the General Assembly. The trial court, however, granted judgment against Legacy, finding that its contract with the Foundation was not enforceable because the Board of Trustees did not comply with the Open Meetings Act when it authorized the Legacy contract.

On December 31, 2009, the court of appeals reversed the trial court's judgment in favor of Plaintiffs Miller and Weinmann, and affirmed the trial court's judgment against Legacy.

ARGUMENT

Proposition of Law No. I:

The Retroactivity Clause of the Ohio Constitution, Article II, § 28, prohibits the General Assembly from divesting the equitable trust estate of, and depleting the previously disbursed monies held in, the Endowment Trust, which the General Assembly specifically established and funded in 2000 as a permanent trust outside the state treasury for lifesaving tobacco prevention and cessation programs.

A. The Endowment Trust Monies Are Not The State's Funds

The court of appeals, in reversing the trial court's decision that the Ohio and Federal Constitutions prohibit the General Assembly from eradicating the Endowment Trust, erroneously assumed away the core constitutional issue in this case. The court leaped to the conclusion that the money in the Endowment Trust is "state money," which the court loosely termed "public funds" throughout the remainder of its decision. [Decision, at ¶¶ 33, 37, 41, 45 (Apx. 27-33)] Once this conclusion was made, the court brushed aside Plaintiffs' constitutional claims in a single sentence, holding: "Because the General Assembly has plenary legislative power to revoke or transfer ***public funds*** [i.e., State funds], it acted constitutionally through H.B. 544 in transferring the monies in the endowment fund to other economic priorities." [*Id.* at ¶ 41]

But the underlying premise for the court of appeals' decision – that the Endowment Trust monies are State funds – is just plain wrong. The monies in the Endowment Trust are ***not*** the State's funds. Rather, as the trial court found, they are special trust funds that are expressly ***outside the state treasury*** and are for the exclusive benefit of the Endowment's beneficiaries. [8/11/09 Final Judgment Entry, Findings of Fact ¶ 226 (Apx. 50)]

The most fundamental reason why the monies in the Endowment Trust are ***not*** the State's funds is because ***that is what the statute that created the Endowment Trust expressly states***. In 2000, the 123rd General Assembly established the Endowment Trust as a special custodial 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).

When the State received the initial tobacco settlement payments under the MSA, the State Director of Health disbursed $235 million of the proceeds out of the State's coffers and into the Endowment Trust that was permanently dedicated to fighting the tobacco epidemic in Ohio. In contrast to the monies disbursed to the Endowment Trust ***outside the state treasury***, the General Assembly appropriated the remaining tobacco settlement proceeds to eight ***other*** funds that remained ***"in the state treasury"*** subject to the General Assembly's control. R.C. 183.02(A)-(H), 183.03, 183.10, 183.11, 183.18, 183.19, 183.26, 183.27, and 183.28.

The stark distinction between the General Assembly's creation of the Endowment Trust as a special custodial account that is ***"not … part of the state treasury"*** and its creation of eight other funds ***"in the state treasury"*** unequivocally manifests the General Assembly's intent that monies disbursed into the Endowment Trust are permanently beyond its control. *Lemieux v. Kountz* (1923), 107 Ohio St. 84, 89 ("[b]y using two expressions in the same section, the Legislature must be held to have intended that a different meaning would be given to each"). The General Assembly did so to assure that at least a small portion of the tobacco settlement proceeds paid to Ohio as a result of medical expenses it incurred in treating debilitating tobacco diseases would be ***permanently committed*** to mitigating tobacco-related disease and death into the indefinite future.

All prior Ohio authorities on point properly recognize that if funds are ***"not ... part of the state treasury,"*** this means exactly what it says: they are ***not*** State funds. In *In re Ford* (1982), 3 Ohio App. 3d 416, 420, the court concluded that State Teachers Retirement System funds that are outside the state treasury are "not state funds." Indeed, in claiming that the Endowment Trust monies are State funds even though they are expressly "not ... part of the state treasury," the Attorney General reverses field and takes a position directly contrary to the historical position of his office. Attorney General Opinion No. 2004-14 correctly recognizes that "state funds, in general, are funds held ***in the state treasury*** and appropriated by the General Assembly." *Id.* at 16 (emphasis added). The Attorney General thus concluded that "moneys that are held by the Treasurer of State ... in custodial funds" that "are not part of the state treasury" – just like the Endowment Trust – "are ***not considered to be state funds.***" *Id.* at 7, 18 (emphasis added). *Accord*: 1931 Ohio Atty. Gen. Op. No. 31-3486 (funds in the custody of the Treasurer outside the state treasury are not "state funds").

It was clear to all involved that the Endowment Trust was purposely placed outside the state treasury so that it would be beyond the General Assembly's control. Every one of the bill analyses presented to the General Assembly during its consideration of S.B. 192 plainly stated that monies disbursed into the Endowment Trust would ***not*** be subject to 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, which the act creates as a "custodial fund of the Treasurer of State" to carry out the duties of the Foundation. (***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.***

> [Legislative Service Comm'n Analyses of S.B. 192 at 6 (emphasis added), http://lsc.state.oh.us/analyses/fnlal23.nsf/All%20Bills%20and%20Resolutions/13E93A4E78443CA3852568A200543503]

To eliminate any doubt that it was placing the Endowment Trust monies beyond its control, the General Assembly made clear that the State ***spent*** the monies that had been appropriated for tobacco prevention by actually mandating that they be ***disbursed*** outside the state treasury. The General Assembly did so by establishing a two-step process to insulate the trust fund monies from later legislative attempts to divert them. In the first step, the General Assembly appropriated money ($234,861,033 for fiscal year 2001) to the State Tobacco Prevention Fund – an account of the Ohio Department of Health ("ODH"). [S.B. 192, § 6, at 10798 (Apx. 142)] In the second step, the General Assembly mandated that ODH actually ***disburse*** those same monies into the Endowment Trust outside the state treasury, reflecting the intention of the General Assembly to put them beyond its power. [8/11/09 Final Findings ¶ 225, citing S.B. 192, § 6 and 6/3/08 Hearing Tr., at 115-16 (Renner)] As the trial court found, the State made ***"completed, unconditional transfers of monies into the Endowment Fund (subsequent to, and as distinguished from, the General Assembly's prior appropriations to ODH for tobacco cessation purposes)."*** [*Id.* at ¶ 226 (emphasis added) (Apx. 50)]

In other words, the Endowment Trust contains money the State ***spent*** more than eight years ago (in addition to private donations). And, even the State acknowledges, as it must, that once the State spends funds, they are forever beyond the General Assembly's control:

> "***[S]pending those funds*** at the time [of the original] appropriation ... ***would have forever ended any legislative ability to reappropriate them***...."
>
> [State's 8/11/09 Emergency Motion for Stay in Court of Appeals, at 7-8 (emphasis added)]

Yet another way the General Assembly established that the Endowment Trust monies are not State funds was its authorization of how the trust funds could be invested. Article VIII, § 4 of the Ohio Constitution prohibits investment of State funds in corporate stock: "[N]or shall the state ever hereafter become a ... stockholder, in any company or association in this state, or elsewhere, formed for any purpose whatever." Yet, the General Assembly expressly classified the monies in the Endowment Trust as non-state funds by authorizing them to be invested in corporate stocks. R.C. 183.08(A) provides that "[t]he eligible list of investments [for the Endowment Trust] shall be the same as for [the Public Employees Retirement System ("PERS")] under section 145.11 of the Revised Code." It has been settled since at least 1974 that R.C. 145.11 permits PERS funds to be invested in corporate stock. *See* 1974 Ohio Atty. Gen. Op. No. 74-102, at 2-419 ("R.C. 145.11 ... authorizes investment [in] common and preferred stock" – the constitutional prohibition against the State investing in corporate stock does not apply to funds that are not part of the state treasury). Indeed, the evidence is undisputed that, since the Endowment Trust's inception, its monies always have been invested in tens of millions of dollars of corporate stocks. [State's Exs. N, O, P, Q, R, and S, at pg. 10]

In sum, not only did the 123rd General Assembly expressly state that monies disbursed to the Endowment Trust are not State funds, those trust monies have ***none*** of the attributes of State funds:

- State funds are in the state treasury, but the Endowment Trust never was.
- State funds are unspent appropriations by the General Assembly, but the Endowment Trust consists of monies spent by the State ("disbursed" by the Director of Health) more than eight years ago, which are now commingled with private donations in the trust corpus.

- State funds are subject to reappropriation by the General Assembly every two years, but the Endowment Trust isn't (as the court of appeals recognized in paragraph 33 of its Decision).
- State funds are constitutionally prohibited from being invested in corporate stocks, but the Endowment Trust always was.

There is absolutely no basis for the court of appeals' conclusion that the monies in the Endowment Trust are State funds.

B. The Retroactivity Clause Prohibits The General Assembly From Raiding The Pre-Existing Monies In The Endowment Trust That Is Outside The State Treasury

There is no authority or precedent permitting the General Assembly to expropriate monies that are not the State's funds. Although the court of appeals emphasized the General Assembly's "plenary powers," ***it has no power to enact laws that are unconstitutional.*** And, as the trial court held, the General Assembly cannot raid the Endowment Trust and divert its monies for non-tobacco prevention purposes precisely because doing so violates the Retroactivity Clause of the Ohio Constitution.

The Retroactivity Clause states: "The general assembly shall have no power to pass retroactive laws...." Ohio Const., Article II, § 28 (Apx. 125). A statute is unconstitutional under the Retroactivity Clause if it impairs pre-existing substantive, as opposed to remedial, rights. *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100, 106-07.[5] *Accord: Smith v. Smith* (2006), 109 Ohio St. 3d 285, ¶ 6 ("[a] statute that applies retroactively and that is substantive violates Section 28, Article II of the Ohio Constitution"). An unconstitutional substantive law is "[e]very statute which takes away or impairs vested rights acquired under

[5] "Remedial laws are those affecting only the remedy provided," such as "laws which merely substitute a new or more appropriate remedy for the enforcement of an existing right." *Van Fossen*, 36 Ohio St. 3d at 107.

existing laws, or ... attaches a new disability, in respect to transactions or considerations already past...." *Van Fossen* (1988), 36 Ohio St. 3d at 106, quoting *Cincinnati v. Seasongood* (1889), 46 Ohio St. 296, 303.

In other words, although the General Assembly generally may repeal an existing law, the Retroactivity Clause prohibits the General Assembly from doing so in a way that impairs pre-existing substantive rights and interests that vested under prior law. Thus, the Retroactivity Clause forbids the General Assembly from liquidating the Endowment Trust, disabling its tobacco cessation programs, and diverting its monies for non-tobacco prevention purposes, because the Endowment is a pre-existing trust with substantive rights.

It is undisputed that H.B. 544 has retrospective application. Section 4 of H.B. 544 expressly states that, "[n]otwithstanding any provision of law to the contrary, on the effective date of this section," the Treasurer is directed to liquidate and divert the monies previously disbursed into the Endowment Trust – thus disabling its pre-existing tobacco control programs. *See Van Fossen* (1988), 36 Ohio St. 3d at 106 (new statute was clearly retrospective because it applied to cases existing on its effective date "notwithstanding any provision of any prior statute or rule of law").

H.B. 544 is also substantive, not remedial. By liquidating the Endowment Trust, diverting its existing monies for non-tobacco prevention purposes, and disabling its programs, H.B. 544 divests a pre-existing equitable trust estate and attaches new disabilities to past trust-funding transactions. This is because, as the trial court rightly found, the Endowment Fund is a trust. [2/10/09 Order, Findings ¶ 21 (Apx. 70)] And, as discussed below, it is well settled that legal and equitable rights and interests of a trust vest when the trust is funded.

1. The Endowment Fund Is A Trust

The trial court correctly found that the Endowment Fund is a trust. In fact, the State conceded below that the Endowment is a trust – a "statutory trust" or a "charitable trust." [State's Court of Appeals Brief, filed August 31, 2009, at 4, 12, 14-15]

In *State ex rel. Preston v. Ferguson* (1960), 170 Ohio St. 450, this Court held that funds created by statutes with language strikingly similar to R.C. 183.07 and 183.08 are trust funds. The Court held that the funds established by R.C. Chapter 3309 for the School Employees Retirement System ("SERS") are impressed with a trust: ***"There is no question that the [SERS] funds here involved are trust funds***." *Id.* at 464 (emphasis added). The statutory language that the Court held created "trust funds" in *Preston* is substantively the same as the statutory language establishing the Endowment Fund:

SERS Fund	Endowment Fund
"A school employees retirement system is hereby established for [public school] employees..., which shall include the several funds created and placed under the management of the school employees retirement board for the payment of retirement allowances and other benefits...." R.C. 3309.03.	"There is hereby created the tobacco use prevention and control endowment fund, which ... shall be used by the foundation to carry out its duties." R.C. 183.08(A). The Foundation "shall prepare a plan to reduce tobacco use by Ohioans ... [and] carry out or provide funding for..., research and programs related to tobacco use prevention and cessation." R.C. 183.07.
"The members of the school employees retirement board shall be the ***trustees*** of the [SERS] funds." R.C. 3309.15.	"The foundation is the ***trustee*** of the endowment fund." R.C. 183.08(A).
"[A]ll disbursements [from SERS funds] shall be paid by [the treasurer] only upon vouchers [now, 'instruments'] duly authorized by the school employees retirement board...." R.C. 3309.12.	Disbursements from the [endowment] fund shall be paid by the treasurer of state only upon instruments duly authorized by the board of trustees of the foundation." R.C. 183.08(A).

The striking similarity between these two statutes can lead to only one conclusion: Like the SERS fund, which this Court holds is a trust fund, the Endowment Fund is a trust.

This conclusion is reinforced by the trial court's finding that 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); and (iii) trust beneficiaries (Ohio smokers). 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 relationship is established. *Id.* at 225. This is true even if the statute makes no express mention of "a trust fund, or a trust or fiduciary connection." *Id.* In *Mitchell*, the Court concluded that the General Allotment Act of 1887 and related statutes, which "give the Federal Government full responsibility to manage ... land for the benefit of the Indians," created a trust. *Id.* at 224-25. The Court explained: "All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds)." *Id.* at 225.[6]

And, in addition to establishing all trust elements, the General Assembly manifested its intent to create the Endowment Fund as a trust in two other ways. First, the General Assembly, in R.C. 183.08(A), expressly designated the Foundation as the Endowment's "trustee." The word "trustee" has a distinct legal meaning: a "person holding property in trust." Restatement of the Law 2d, Trusts (1959), § 3(3). R.C. 1.42 mandates that "[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall

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[6] Other examples of trusts created by statutes abound. *Dadisman v. Moore* (W. Va. 1989), 384 S.E.2d 816, 821-22 (state Public Employees Retirement System is "classic example of a 'statutory' trust" – having all trust elements: public retirees are trust beneficiaries; the PERS fund is the trust corpus; and the PERS Board of Trustees is "trustee"); *White Mountain Apache Tribe v. United States* (Fed. Cir. 2001), 249 F.3d 1364, 1373 (statute declaring buildings to be held by United States for benefit of Apache Tribe created a trust; "it is well-established that a common law trust arises when three elements are present, namely, a trustee, a beneficiary, and a trust corpus"), *aff'd* 537 U.S. 465 (2003); *South Carolina Dep't of Mental Health v. McMaster* (S.Car. 2007) 642 S.E.2d 552, 555-56 (state statute and deeds vesting public trustee with title to land for a hospital "clearly evidence[d] the creation of a charitable trust," which "may not be terminated or altered by the General Assembly"); Restatement of the Law 3d, Trusts (2003), § 4, Comment g (examples of "[t]rusts created by statute").

be construed accordingly." *Rockfield v. First Nat'l Bank of Springfield* (1907), 77 Ohio St. 311, 326 (courts are required to give words in statutes their distinct legal meaning).

Second, the General Assembly imposed mandatory fiduciary duties on the Foundation as trustee. In *Ohio Society for Crippled Children and Adults, Inc. v. McElroy* (1963), 175 Ohio St. 49, this Court held that in determining whether a trust has been created, "the question is whether the settlor not only expressed a *desire* that the recipient of the property use it in a certain way but whether he expressed an intention to impose a *duty* upon the recipient to so use it." *Id.* at Syllabus ¶ 1. Here, the settlor (the State) manifested its intent to impose mandatory duties and restrictions upon the Foundation's use of the Endowment:

- "The endowment fund ***shall*** be used by the foundation to carry out its ***duties***." R.C. 183.08(A) (emphasis added).
- "[T]he foundation ***shall*** carry out, or provide funding for private or public agencies to carry out, research and programs related to tobacco use prevention and cessation." R.C. 183.07 (emphasis added).

As in *McElroy*, the State's imposition of mandatory fiduciary duties upon the trustee of the Endowment Trust for the benefit of others evinces an unequivocal intent to create a trust.

Thus, the trial court got it exactly right when it found that the Endowment is a trust:

> 21. Through the enactment of R.C. Chapter 183, and specifically R.C. 183.07 and 183.08, and by transferring monies into the Endowment Fund outside the state treasury, ***the General Assembly plainly evinced an intent to create a trust*** (the "Trust")....
>
> 197. ***R.C. Chapter 183 created the Endowment Fund as a trust***: the settlor (the State of Ohio) conveyed property (transferred monies into the Endowment Fund) to a trustee (R.C. 183.08 designates the Foundation as "trustee") with a manifest intent to impose a fiduciary duty on the trustee (R.C. 183.07-.08 expressly impose fiduciary "duties" on the Foundation) requiring that the property be used for the specific benefit of others (the Fund must be used for tobacco cessation and prevention for the specific benefit of Ohio tobacco users and its youth, R.C. 183.07).

198. ***The statutory scheme creating the Endowment Fund has all the elements of a trust***: a trustee (the Foundation), trust corpus (the Endowment Fund), and trust beneficiaries (Ohio's youth and tobacco users).

[2/10/09 Findings of Fact and Conclusions of Law, at ¶¶ 21, 197, 198 (emphasis added) (Apx. 70, 112)]

2. The Endowment Fund Is A Vested Trust Estate

Once, as here, a trust is created and funded, substantive equitable and legal trust rights and interests vest immediately. This is true not only for private trusts, but also for public charitable trusts.

In *Brown v. Buyer's Corp.* (1973), 35 Ohio St. 2d 191, this Court held that "[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, whether actual enjoyment by the beneficiaries of the charitable trust is present or [in the] future." *Id.* at 196 (emphasis added). In other words, as the Court explained, the right of use and enjoyment of the trust for charitable purposes becomes "fixed and ***irrevocable***" when the trustee's duty is created. *Id.* (emphasis added).

The trial court properly followed these well-established trust principles in holding that the equitable rights of the Endowment Trust vested when it was unconditionally funded by the State:

> The Endowment Fund's beneficiaries have constitutionally protected vested rights in the trust *res*. Once the General Assembly transferred monies to the Endowment Fund to be held by the Foundation in trust, those funds were impressed with a trust outside the state treasury, R.C. 183.08(A), and the equitable rights of the class of trust beneficiaries, including Ohio tobacco users, vested in the Fund.
>
> [2/10/09 Order, at ¶ 206 (Apx. 115)]

The trial court, in addition to citing this Court's decision in *Brown*, *supra*, [8/11/09 Final Judgment, at ¶ 249 (Apx. 58)], cited extensive law to support its conclusion – none of which was challenged below.[7]

And, under settled trust law for both private and public charitable trusts, a trust is ***irrevocable*** unless the settlor expressly asserts the right to revoke the trust. 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"). ***Here, the trial court found that the General Assembly, by intent and design, did not reserve a right to revoke the Endowment Trust because it plainly intended to create an "irrevocable trust."*** [8/11/09 Findings of Fact, at ¶ 226 (Apx. 50)]

Moreover, as a matter of law, the General Assembly understood and adopted the well-settled trust principles of vesting and irrevocability when it created and funded the Endowment Trust. This Court's precedents hold that these common law trust principles apply to the Endowment Trust and the statutes that created it because the General Assembly did not expressly

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[7] *First Nat'l Bank of Cincinnati v. Tenney* (1956), 165 Ohio St. 513, 518 (when a trust is created, "the settlor transfers and delivers property to a trustee ... and designated beneficiaries take immediate vested interests in such property"); *Braun v. Central Trust Co.* (1952), 92 Ohio App. 110, 116 (when a trust becomes effective, the legal and equitable titles "vest immediately": trust beneficiaries are "vested with the equitable title" and legal title is vested in the trustee); *Hermann v. Brighton German Bank Co.* (1914), 29 Ohio Dec. 626 at *4 ("in a trust, the equitable title vests in the cestui que trust [the beneficiaries]"); *Hatch v. Lallo*, 2002 WL 462862, *2 (Ohio App. 9th Dist. 2002) ("a settlor's transfer of the trust property's legal title to a trustee accomplishes [the] separation" of "equitable and legal" ownership interests between the trust beneficiary and the trustee).

state that trust law did not apply.[8] In *State ex rel. Morris v. Sullivan* (1909), 81 Ohio St. 79, at Syllabus ¶ 3, this Court held:

> ***Statutes are to be read and construed in the light of and with reference to the rules and principles of the common law in force at the time of their enactment***, and in giving construction to a statute the Legislature will not be presumed or held to have intended a repeal of the settled rules of the common law, unless the language employed by it clearly expresses or imports such intention.[9] (Emphasis added).

Thus, *Morris* held that because a statute authorizing the Governor to appoint railroad commissioners did not expressly abrogate a common law rule limiting certain of the Governor's appointment powers, the common law rule "continue[d] and remain[ed] in full force and effect, and must therefore control and govern" the application of the statute. *Id.* at 95-96.

Accordingly, pursuant to the trial court's well-supported factual findings and this Court's controlling precedents, the equitable trust estate of the Endowment Trust became ***irrevocably vested*** more than eight years ago when the State disbursed monies outside the state treasury and into the Trust, and designated its specific purpose by imposing fiduciary duties upon the trustee to carry out tobacco control programs for its intended beneficiaries (Ohio smokers and youth). The 123rd General Assembly's awareness of the basic common law of trusts when it created and funded the Endowment Trust outside the state treasury necessarily means that the General Assembly specifically intended to establish the Endowment Fund as a permanent trust whose funds are forever beyond legislative control. And, as the trial court put it:

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[8] The law of trusts applies equally to trusts created by statute. "[T]he terms of [statutory trusts] are either set forth in the statute or ***are supplied by the default rules of general trust law.***" Restatement (3d), Trusts (2003), § 4, Comment g (emphasis added). *Accord: Cobell v. Norton* (D.C. Cir. 2001) 240 F.3d 1081, 1099 (government's rights and responsibilities in connection with statutory trust, if not expressly outlined in statute, are "largely defined in traditional equitable terms").

[9] This Court continues to follow this rule of statutory construction. *See Danziger v. Luse* (2004) 103 Ohio St. 3d 337, at ¶ 11 (quoting *Morris*).

> The General Assembly and the State plainly intended to create the Endowment Fund (the "Trust") 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 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....
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> [8/11/09 Findings ¶ 226 (emphasis added) (Apx. 50)]

The 123rd General Assembly's careful construction of an irrevocable trust with vested rights in defined beneficiaries precludes the subsequent General Assemblies' attempts, in H.B. 544 and new H.B. 1, to terminate the Endowment Trust and forever divert its pre-existing corpus in violation of the Retroactivity Clause of the Ohio Constitution.

Yet, the court of appeals ignored the well-settled trust rules of vesting and irrevocability, and wrongly concluded that they do not apply to the Endowment Trust. [Decision ¶ 37 (Apx. 29)] The court did so for two reasons that have no basis here. First, the court stated that "one General Assembly cannot make a binding promise that the next General Assembly will not change the law." [Decision ¶ 38 (Apx. 30)] But the court's rationale completely misses the point. This case does ***not*** involve a prior General Assembly's ***promise*** 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, like the future receipts the 123rd General Assembly intended to be transferred to the Endowment. [S.B. 192, § 17 (Apx. 144)] (In fact, after the 123rd General Assembly's term, subsequent General Assemblies did not make the appropriations and disbursements into the Endowment Trust that S.B. 192 originally called for.) ***Instead, this is a dispute over monies the 123rd General Assembly actually appropriated and spent during its own term in 2000 by having them disbursed into the Endowment Trust*** – something that was plainly within the

123rd General Assembly's plenary power. 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. Future General Assemblies have no more power over those spent funds than they do over prior General Assemblies' disbursements of State monies out of the state treasury and into the public retirement trust funds. ***Under the Retroactivity Clause, the General Assembly cannot change or repeal a law in a way that retroactively divests pre-existing substantive rights.*** But that is exactly what H.B. 544 and H.B. 1 purport to do by attempting to expropriate funds the 123rd General Assembly previously spent.

The court of appeals used its same faulty rationale to conclude that the only way to make the Endowment Trust monies "unreachable" is through a constitutional amendment. [Decision ¶ 35 (Apx. 29)] The court relied on constitutional provisions in three other states concerning tobacco settlement revenues, but it erred in doing so. Those out-of-state provisions restrict state legislative spending of ***future*** proceeds – ***not monies, like those here, that were previously received and disbursed outside the state treasury pursuant to a prior General Assembly's plenary power.*** Fla. Const., Art. X, § 27; Idaho Const., Art. VII, § 18; and Mont. Const., Art. XII, § 4. This case is not about monies that are still in, or will be received in, the state treasury. It is about monies that the State unconditionally disbursed into the Endowment Trust outside the state treasury more than eight years ago. And, the Ohio Constitution – specifically, the Retroactivity Clause – already protects the pre-existing monies in Endowment Trust from divestiture without the need for another constitutional amendment.

The second reason why the court of appeals did not apply well-settled rules of trust vesting and irrevocability to the Endowment Trust was because it came to the remarkable and unprecedented conclusion that a state legislature cannot create an irrevocable trust. [Decision ¶

39 (Apx. 30)] But, again, this is spurious because it ignores the 123rd General Assembly's ***plenary power*** to spend the tobacco settlement proceeds ***received during its term*** as it saw fit – including its power to disburse a portion of those proceeds permanently outside the state treasury and the control of legislators and into the Endowment Trust. *State ex rel. Jackman, supra*, 9 Ohio St. 2d at 162; *State ex rel. Dickman, supra,* 85 Ohio App. 398, 401-02 ("[t]here is no constitutional limitation on the power of the General Assembly to make current appropriations from current revenue funds").

The court of appeals relied exclusively on the out-of-state decision in *Barber v. Ritter* (Col. 2008), 196 P.3d 238, 252-53, to support its conclusion that the General Assembly has no power to disburse funds into an irrevocable trust. But *Barber* has no application here. Unlike the Endowment Trust, the three funds at issue in *Barber* were expressly created ***in the state treasury*** and made subject to further appropriation by Colorado's legislature. Colo. Rev. Stat. § 19-3.5-106 ("[t]here is hereby created ***in the state treasury*** the Colorado children's trust fund...."); Colo. Rev. Stat. § 38-13-116.5 ("[t]here is hereby created ***in the state treasury*** the unclaimed property trust fund"); Colo. Rev. Stat. § 39-29-109(2) ("[a]ll moneys in the [severance tax] fund ***shall be subject to appropriation*** by the general assembly....").

Here, Plaintiffs do not contest that a prior General Assembly cannot irrevocably bind future General Assemblies about how to spend funds that are ***in the state treasury***. But where, as here, the State has unconditionally disbursed funds into a special use trust outside the state treasury, future General Assemblies have no continuing power over those funds. As discussed below, this is exactly why the monies previously disbursed by the State into the state retirement fund systems are irrevocably protected from expropriation by future General Assemblies.

C. The Endowment Trust Was Specifically Structured Just Like The State Retirement System Trust Funds And Is Entitled To The Same Constitutional Protections Those Trusts Enjoy

The very existence of the state retirement trust funds created by prior General Assemblies shatters the court of appeals' conclusion that "a state legislature cannot create" an irrevocable trust. [Decision ¶ 39 (Apx. 30)]

Like the Endowment Trust, the state retirement funds are trust funds that are outside the state treasury, controlled by trustees for a specific trust purpose, and held by the Treasurer in special custodial accounts.[10] *Preston, supra*, 170 Ohio St. at 464 (SERS funds are "trust funds"); *In re Ford* (1982) 3 Ohio App. 3d 416, 420 (State Teachers Retirement System funds are "trust funds, not state funds"); R.C. 113.05 ("[t]he custodial funds of the treasurer of state ... are not part of the state treasury").

And, there is no dispute that, although portions of the retirement funds originated from prior ***State contributions***, the monies previously disbursed by the State into the trust funds are irrevocably protected from being seized by the General Assembly whenever it seeks to balance the State's budget. Those prior State contributions are now in and subject to an equitable trust estate outside the state treasury and, thus, are protected under the Retroactivity Clause from divestiture. Indeed, the court of appeals correctly concluded that the existing state retirement trust funds are "protected." [Decision ¶ 45 (Apx. 33)] *Accord*: *Dadisman v. Moore* (W.Va. 1989), 384 S.E.2d 816, 821, 826-27, 830 (PERS is a statutory trust protected by the federal and state constitutions; public employers' PERS contributions are "part of the corpus of the trust and are not thereafter state funds available for expropriation or use for any purpose other than that for which the moneys were entrusted").

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[10] The five Ohio retirement funds are the Public Employees Retirement Systems ("PERS"), the School Employees Retirement System ("SERS"), the State Teachers Retirement System ("STRS"), the Police and Fire Pension Fund ("PFPF"), and the Highway Patrol Retirement System ("HPRS").

There is also no dispute that S.B. 192 specifically patterned the Endowment Trust after the state retirement funds, so that the monies the State previously disbursed into the Endowment would be permanently beyond legislative expropriation – just as the state retirement funds are. There are no substantive differences between the monies in the Endowment Trust and the monies in the retirement trust funds that originated from the State:

	Endowment Fund	PERS Fund[11]
Statutory Creation of Trust Fund	"There is hereby created the tobacco use prevention and control endowment fund, which ... shall be used by the foundation to carry out its duties." R.C. 183.08(A).	"The funds hereby created are the employees' savings fund, the employers' accumulation fund, the annuity and pension reserve fund, the income fund, the survivors' benefit fund, the defined contribution fund, and the expense fund." R.C. 145.23.
Trustees	"The foundation is the trustee of the endowment fund." R.C. 183.08(A).	"The members of the public employees retirement board shall be the trustees of the funds created by section 145.23 of the Revised Code." R.C. 145.11(A).
Trust Beneficiaries	Ohio tobacco users, "with emphasis on reducing the use of tobacco by youth, minority and regional populations, pregnant women, and others who may be disproportionately affected by the use of tobacco." R.C. 183.07.	"A public employees retirement system is hereby created for the public employees of the state and of the several local authorities mentioned in section 145.01 of the Revised Code." R. C. 145.03(A).
Trust Purposes	"The foundation shall carry out, or provide funding for private or public agencies to carry out, research and programs related to tobacco use prevention and cessation." R.C. 183.07.	The funds are to pay pensions, disability benefits, annuities, and other benefits to public employees and their dependent survivors. R.C. 145.23.
Treasurer is Custodian of the Funds	"[T]he tobacco use prevention and control endowment fund ... shall be in the custody of the treasurer of state." R.C. 183.08(A).	"The treasurer of state shall be the custodian of the funds of the public employees retirement system." R.C. 145.26.
Funds Not in State Treasury	"[T]he tobacco use prevention and control endowment fund ... shall not be part of the state treasury." R.C. 183.08(A).	"The custodial funds of the treasurer of ... are not part of the state treasury." R.C. 113.05(B).
Trustees Control Disbursements	"Disbursements from the fund shall be paid by the treasurer of state only upon instruments duly authorized by the board of trustees of the foundation." R.C. 183.08(A).	"[A]ll disbursements [from PERS funds] shall be paid by the treasurer only upon instruments authorized by the public employees retirement board and bearing the signatures of the board." R.C. 145.26.
Commingling of Funds with Private Donations	The fund includes "grants and donations made to the tobacco use prevention and control foundation." R.C. 183.08(A).	"The system may accept gifts and bequests. Any gifts or bequests ... shall be credited to the income fund." R.C. 145.23(D).

[11] The other four retirement funds have the same similarities to the Endowment Trust as PERS does.

The court of appeals' effort to distinguish the Endowment Trust from the state retirement trust funds is offbase. The court focused on the fact that the retirement funds include employee contributions. But this doesn't change the fact that the retirement funds also consist of employer contributions ***from the State***, which are also irrevocably outside the General Assembly's power to expropriate.[12]

Simply stated, there is no credible difference between the monies ***the State*** previously disbursed into the retirement trust funds and the monies the State previously disbursed outside the state treasury into the Endowment Trust. All of these monies are part of the corpus of pre-existing, vested trust estates, which the Retroactivity Clause prohibits the General Assembly from raiding whenever there is a budget shortfall.

Proposition of Law No. II:

House Bill 544's purported liquidation and depletion of the Endowment Trust violates the Contracts Clauses of the United States Constitution, Article I, § 10, and the Ohio Constitution, Article II, § 28, by substantially impairing pre-existing trust rights and obligations.

The trial court ruled that H.B. 544's eradication of the Endowment Trust is unconstitutional for another reason: it violates the Contract Clauses of the United States and Ohio Constitutions. [2/10/09 Findings and Conclusions ¶¶ 195-211 (Apx. 112-18)] [8/11/09 Final Findings and Conclusions ¶ 258 (Apx. 60)] The federal Contracts Clause states: "No State shall ... pass any ... Law impairing the Obligation of Contracts...." United States Const., Article I, § 10. Ohio's Contracts Clause provides nearly identical language: "The General

---

[12] And, contrary to the court of appeals' statement that the Endowment was created "solely" with funds originating from the State, [Decision ¶ 43 (Apx. 32)], it is undisputed that the Endowment Trust also includes contributions that were not derived from the State: private donations, which are commingled with the rest of the trust corpus. [2/10/09 Findings of Fact, at ¶ 18 (Apx. 69)] [Pl. Ex. 17, Renner Dep. at 43-44] [Hearing Tr., Vol. II, at 14 (Renner)]

Assembly shall have no power to pass ... laws impairing the obligation of contracts...." Ohio Const., Article II, § 28.

The court of appeals incorrectly reversed the trial court's holding for the same reason it overturned the trial court's finding of a Retroactivity Clause violation – the 123rd General Assembly supposedly had no power to disburse money irrevocably into a trust. [Decision ¶¶ 39-41, 46 (Apx. 30-33)] In so ruling, the court of appeals completely ignored the holdings of the highest courts in three other states that the Contracts Clause prohibits the General Assembly from impairing previously vested rights and interests created by a trust instrument, even where that instrument is a statute. This is true because "[t]he contract clause, if it is to mean anything, must prohibit [the state] from dishonoring its existing contractual obligations when other policy alternatives are available.... If a state government could so cavalierly disregard the obligations of its own contracts, of what value would its promises ever be?" *Association of Surrogates and Supreme Court Reporters v. State of New York* (2d Cir. 1991), 940 F.2d 766, 774.

In *Dadisman v. Moore* (W.Va. 1989), 384 S.E.2d 816, the West Virginia Supreme Court ruled that the Public Employees Retirement System was a statutory trust protected by the Contracts Clauses of the federal and state Constitutions. *Id.* at 821, 826-27. The court enjoined the state's diversion of public employer contributions from PERS. *Id.* at 827, 830. The court explained that the public employers' PERS contributions are "***part of the corpus of the trust and are not thereafter state funds available for expropriation or use for any purpose other than that for which the moneys were entrusted.***" *Id.* at 830 (emphasis added).

The Hawaii Supreme Court reached the same conclusion in *Kapiolani Park Preservation Society v. City of Honolulu* (Haw. 1988), 751 P.2d 1022. There, the state, by legislative enactment, transferred land to a trustee for use as a public park and reserved no right of

revocation. *Id.* at 1025. The legislature subsequently attempted to repeal the statute and sell the land. *Id.* at 1026. The court held: ***"It is not within the power of the Legislature to terminate a charitable trust...."*** *Id.* at 1027 (emphasis added). The court further held that the legislature's attempt to repeal the statutory trust impaired trust obligations in violation of the federal Contracts Clause. *Id.*

And, in *Toledo v. Seiders*, 23 Ohio Cir. Dec. 613 (1910), *aff'd* by this Court at 83 Ohio St. 495 (1911), the court followed the Supreme Court of Maine's ruling that a statutory trust is protected by the Contract Clauses of the state and federal constitutions. In *Seiders*, the General Assembly enacted a law to transfer trust property, held by the city of Toledo for a university endowment, to a local school district. The court held the General Assembly was "without authority to take the entire control and management of [the trust property] from the trustees." 1910 WL 1216, at **2, 5-6. The court relied on *New Gloucester School Fund v. Bradbury*, (1834), 11 Me. 118, in which the Supreme Court of Maine held that a statutory trust, granting endowment funds to trustees to establish a college, ***"constituted a contract" protected by the Contract Clauses of the state and federal Constitutions***. 1834 WL 473, at *5 (emphasis added). As such, a subsequent statute that sought to transfer the pre-existing endowment funds from the original trustees was an unconstitutional impairment of contract. *Id.* at **5-6.

As in these cases, the Contracts Clauses of the Ohio and Federal Constitutions forbid the General Assembly from attempting to eradicate the Endowment Trust, a previously funded statutory trust outside the state treasury and created for a special, permanently dedicated purpose.

Proposition of Law No. III:

The State cannot take advantage of its own misconduct by wrongfully setting up the very open meetings infractions that the State now claims invalidate the contract the Tobacco Use Prevention and Control Foundation entered into with American Legacy Foundation for the continuation of tobacco prevention and cessation programs in Ohio.

Plaintiff-Appellant American Legacy Foundation ("Legacy") supports the first two propositions of law set forth above and presents this third proposition as an ***additional*** basis for reversing the court of appeals' decision, if necessary to ensure that the Endowment Trust monies are protected for their dedicated purpose of fighting tobacco use in Ohio.

Legacy asserted below that H.B. 544 violates the Ohio and Federal Contracts Clauses by impairing Legacy's $190 million contract to provide continuation of lifesaving tobacco prevention programs throughout Ohio (the "Legacy contract"). The lower courts, however, never reached this constitutional issue because they ruled that Legacy does not have a valid contract as a result of the Foundation Board of Trustees' failure to comply with the Open Meetings Act, R.C. 121.22, when it authorized that contract. [Decision at ¶¶ 77-78 (Apx. 46)] But the open meeting violations upon which the State bases its challenge to the Legacy contract resulted from the wrongful conduct of the State's constitutionally mandated chief legal counsel, then Attorney General Marc Dann. The facts are egregious; the State should not permit – let alone benefit from allowing – its most senior officials to refuse to provide legal advice when urgently requested by their client and then rely on the resulting legal missteps as a basis for invalidating the *bona fide* actions of the Foundation's Board of Trustees. But that is exactly what would happen if the lower courts' rulings invalidating the Legacy contract are upheld.

The facts are as clear as they are troubling. After the State announced that it sought to dissipate the Endowment Trust on April 2, 2008, the Foundation's executive director, Michael

Renner, urgently sought legal advice from the Attorney General's office. [Hearing, Tr., Vol. II, at 15-21, 26-28 (Renner)] [Pl. Ex. 17, Renner Dep. at 58, 197-203, 205] As Mr. Renner testified, he had no doubt that the Attorney General's office was fully apprised of the elevated nature of the need to provide legal advice to the Trustees for their April 4, 2008 Board meeting. [Hearing Tr., Vol. II, at 34-35] In response, Mr. Renner was advised that, on the afternoon of April 3, General Dann was holding a "high-level meeting" to discuss the situation confronting the Foundation and the legal issues about which the Foundation had urgently sought advice. [*Id.* at 22-26, 31-35] The message Mr. Renner received from the Attorney General's office assured him that a lawyer from its office would get back to the Foundation after the "high level meeting" and before the Board meeting the next morning. [*Id.* at 24-26] These communications left Mr. Renner confident that a lawyer from the Attorney General's office would attend the April 4 Board meeting: "[I]t never occurred to me otherwise." [*Id.* at 31-32]

But no lawyer from the Attorney General's office showed up at the Board meeting. [*Id.* at 40] [Hearing Tr., Vol. I, at 82 (Crane)] This absence was shocking to the Trustees because the Attorney General had assured that a lawyer from his office attended every prior similar Board meeting. [Hearing Tr., Vol. II, at 246-49, 260 (Renner)] [Hearing Tr., Vol. I, at 82-84, 89 (Crane)] [Pl. Ex. 16, Jagers Dep. at 16-19, 74-76] [Hearing Tr., Vol. III, at 45-47 (Richards)] [Hearing Tr., Vol. I, at 163, 179 (Francis)] And, in spite of having a clear conflict as counsel for the Governor and legislature which sought to strip the Foundation of its trust monies,[13] General Dann also failed to appoint and send special counsel to represent the Trustees at this critical

[13] Rule 1.7(a) of the Ohio Rules of Professional Conduct states that "[a] lawyer's ... continuation of representation of a client creates a conflict of interest if ... (1) the representation of that client will be directly adverse to another current client," or "(2) there is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client."

Board meeting. [Hearing Tr., Vol. II, at 19-20, 40-42, 63-65 (Renner)] [Pl. Ex. 17, Renner Dep. at 204, 210-11] General Dann confirmed his conflict a week after the April 4 Board meeting by threatening the Foundation's Trustees with personal liability if they did not succumb to the demands of the Governor and legislature. [Hearing Tr., Vol. I, at 182-83 (Francis)]

The Trustees couldn't believe that the Attorney General had abandoned them at the April 4 Board meeting – leaving them to "fend for themselves" at the most critical time in the Foundation's history, when the State was threatening to liquidate nearly all of the monies in the Endowment Trust for which the Foundation was trustee. [Hearing Tr., Vol. I, at 82-84, 89 (Crane)] [Pl. Ex. 16, Jagers Dep. at 16-19] [Pl. Ex. 19, Francis Dep. at 92] [Hearing Tr., Vol. I, at 179 (Francis)] As one Trustee put it: "I cannot imagine any bigger, potentially, of a day in the history of that Tobacco Foundation than that day was." [Pl. Ex. 21, Richards Dep. at 26-27]

But the Trustees needed legal advice at their meeting to ensure that they acted in compliance with the Open Meetings Act. [Hearing Tr., Vol. II, at 42-43 (Renner)] Without it, the Trustees simply did not know how to comply with its requirements. Thus, according to the lower courts, the Trustees violated R.C. 121.22 by going into executive session to discuss imminent litigation with the State over the raid on the Foundation's trust monies because their attorney, the Attorney General, wasn't present. [Decision ¶¶ 65-69 (Apx. 40-42)] The court of appeals also found open meeting defects because the Trustees did not make a proper motion to go into executive session and failed to limit their deliberations during executive session. [*Id.* at ¶¶ 70-73 (Apx. 42-45)] As a result, the lower courts held that the Trustees' authorization of the Legacy contract was invalid, and, thus, the lower courts never reached Legacy's claim that H.B. 544 unconstitutionally impairs the Legacy contract.

But each of the purported open meetings infractions was avoidable if only General Dann had fulfilled his duty to have legal counsel attend the Board meeting. But he didn't; rather, after his "high level" consideration of the Trustees' urgent request and need for legal advice, he and his office provided none. In failing in his duty, General Dann, the constitutionally mandated agent of the State, wrongfully created the very open meeting defects that the State now asserts to invalidate the Legacy contract. ***But the State should not be able to "booby trap" an open meeting by its own wrongful conduct and then use the ill-gotten fruits of that wrongful conduct as the basis for invalidating the Foundation's contract with an innocent third party, like Legacy.***

It is fundamental that a party cannot take advantage of its own wrongdoing. *State v. Harrison* (1993) 88 Ohio App. 3d 287, 290 ("[w]e are convinced that the overriding principle to be applied is that neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong"); *Eden Realty Co. v. Weather-Seal Inc.* (1957) 102 Ohio App. 219, 223 ("[i]t is [a] far-reaching principle of the law that a party shall not be allowed to take advantage of his own wrong"). That is exactly what the State seeks to do here, but the law is to the contrary.

Roberto v. Brown County General Hosp. (Ohio App. 12th Dist. 1988), 1988 WL 12962, so holds. There, state hospital trustees attempted to avoid contractual obligations to a former administrator by claiming that the contract was adopted in violation of the Open Meetings Act. The court dismissed the State's attempt to invalidate its own contract because after considering the law and the purposes sought to be served by R.C. 121.22, it concluded the State should not be permitted to "assert[ ] any violation of the sunshine law in the instant contracts." *Id.* at *4. The court explained:

> ***As we view it, allowing a public body to rely on the sunshine law to escape its … contract … is rife with inequity and potential pitfalls. In cases such as this, the sunshine law, which was designed to open government business to public scrutiny, becomes the quintessential "booby trap" for a [party contracting with the public body]. The sunshine law should not be permitted to be so perverted….***
>
> [*Id.* at *5 (bracketed language modified to show application to this case)]

As in *Roberto*, the State (General Dann) booby trapped the Board's meeting and its deliberations. And, as in *Roberto*, the State is attempting to use its own open meeting booby trap as a basis for invalidating a contract with an innocent third party, Legacy. General Dann had an irreconcilable conflict between adverse clients. Instead of providing independent counsel to the Trustees, he and his office simply were unresponsive to the Foundation's urgent request for legal advice as to how they should proceed. Having failed to make counsel available to the Trustees to advise them as to the technical niceties of the Open Meetings Act, the State is precluded from using its own failings as a basis for invalidating Legacy's contract.

Accordingly, in the event this Court addresses Legacy's conditional Proposition of Law No. III, the Court should (i) reverse the court of appeals' conclusion that the Legacy contract is invalid under the Open Meetings Act, (ii) remand the case to the court of appeals for consideration of Legacy's claim that H.B. 544 substantially impairs its contract in violation of the Ohio and Federal Contracts Clauses by attempting to expropriate nearly all the monies in the Endowment Trust,[14] and (iii) maintain the lower courts' injunction prohibiting the State from dissipating the Endowment Trust until final adjudication of Legacy's claim.

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[14] Such a remand is necessary because, after the court of appeals wrongly invalidated the Legacy contract under the Open Meetings Act, the court expressly did not consider other issues the trial court had decided concerning Legacy's claim. [Decision ¶ 77 (Apx. 46)]

CONCLUSION

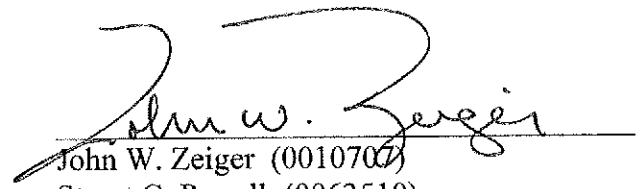
For all of these reasons, those portions of H.B. 544 and the new biennial budget, H.B. 1, that seek to terminate the Endowment Trust and forever divert its pre-existing corpus to non-trust purposes are unconstitutional. They violate the Retroactivity Clause of the Ohio Constitution and the Contracts Clauses of the Ohio and United States Constitutions. As it did below, the State undoubtedly will emphasize that it needs to divert the monies from the Endowment Trust for its current budget shortfalls. But this does not excuse constitutional violations. This Court's recent comments in *State ex rel. LetOhioVote.org v. Brunner* (2009), 123 Ohio St. 3d 322, are particularly apt here:

> We are not unmindful of the effect our decision may have on the state budget, nor of the ... efforts of the members of the executive and legislative branches of state government to fulfill their constitutional duties to balance the budget in Ohio; ***however, our own constitutional duty is to ensure compliance with the requirements of the Ohio Constitution irrespective of their effect on the state's current financial conditions.***
>
> [*Id.* at ¶ 55 (emphasis added)]

The court of appeals' decision is not only fundamentally wrong, it is dangerous in its implications for Ohio's addicted smokers. Eradication of the Endowment Trust would have a grave impact on the lives and health of literally tens of thousands of Ohioans who desperately need the Endowment's tobacco cessation programs. As the trial court found, dismantling these programs will result in a ***"substantial increase in tobacco-related premature death and disease in Ohio."*** [8/11/09 Final Judgment Entry, Findings of Fact ¶ 237 (Apx. 55)]

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

Respectfully submitted,



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The undersigned hereby certifies that a copy of the foregoing was served via electronic mail and U.S. mail, postage prepaid, this 4th day of May, 2010 upon:

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200741

APPENDIX

ORIGINAL

IN THE SUPREME COURT OF OHIO

10-0118

BOARD OF TRUSTEES OF THE TOBACCO USE PREVENTION AND CONTROL FOUNDATION, et al.,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
Plaintiffs-Appellants,	:	
v.	:	Court of Appeals
KEVIN L. BOYCE, TREASURER OF STATE, et al.,	:	Case Nos. 09AP-768, 09AP-785 09AP-832
Defendants-Appellants.	:	

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

NOTICE OF APPEAL OF PLAINTIFFS-APPELLANTS ROBERT G. MILLER, JR., DAVID W. WEINMANN, AND AMERICAN LEGACY FOUNDATION

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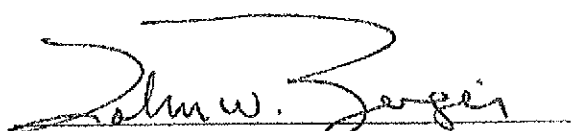
NOTICE OF APPEAL OF PLAINTIFFS-APPELLANTS ROBERT G. MILLER, JR., DAVID W. WEINMANN, AND AMERICAN LEGACY FOUNDATION

Plaintiffs-Appellants Robert G. Miller, Jr., David W. Weinmann, and American Legacy Foundation hereby give notice of appeal to the Supreme Court of Ohio from the Nunc Pro Tunc Judgment Entry of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals Case Nos. 09AP-768, 09AP-769, 09AP-785, 09AP-786, 09AP-832, and 09AP-833 on January 5, 2010, and the Decision and Judgment Entry of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals Case Nos. 09AP-768, 09AP-769, 09AP-785, 09AP-786, 09AP-832, and 09AP-833 on December 31, 2009.

This is an appeal as of right because this case raises substantial constitutional questions. Ohio Const. Art. IV, § 2(B)(2)(a)(ii). This case is also one of public and great general interest.

Respectfully submitted,



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833-001:198109

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Board of Trustees of the Tobacco Use Prevention and Control Foundation et al.,	:	
Plaintiffs-Appellees,	:	No. 09AP-768
v.	:	(C.P.C. No. 08CV 005363)
Kevin L. Boyce, Treasurer of State et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees,	:	
(State of Ohio et al.,	:	
Defendants-Appellants).	:	
Robert G. Miller, Jr. et al.,	:	
Plaintiffs-Appellees,	:	No. 09AP-769
v.	:	(C.P.C. No. 08CV 007691)
State of Ohio et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	
Board of Trustees of the Tobacco Use Prevention and Control Foundation et al.,	:	
Plaintiffs-Appellees,	:	No. 09AP-785
v.	:	(C.P.C. No. 08CV 005363)
Kevin L. Boyce, Treasurer of State et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees,	:	
(Ohio Department of Health & Director Alvin D. Jackson,	:	
Defendants-Appellants).	:	
Robert G. Miller, Jr. et al.,	:	
Plaintiffs-Appellees,		

v. : No. 09AP-786
: (C.P.C. No. 08CV 007691)
State of Ohio et al., :
: (REGULAR CALENDAR)
Defendants-Appellees, :
:
(Ohio Department of Health & :
Director, Alvin D. Jackson, :
:
Defendants-Appellants). :
:
Board of Trustees of the Tobacco Use :
Prevention and Control Foundation et al., :
:
Plaintiffs-Appellees/ :
Cross-Appellees, :
:
(American Legacy Foundation, :
:
Intervening Plaintiff- :
Cross-Appellant), :
:
No. 09AP-832
v : (C.P.C. No. 08 CV 005363)
:
Kevin L. Boyce, Treasurer of State et al., : (REGULAR CALENDAR)
:
Defendants-Appellees/ :
Cross-Appellees. :
:
Robert G. Miller, Jr. et al., :
:
Plaintiffs-Appellees/ :
Cross-Appellees, :
:
(American Legacy Foundation, :
:
Intervening Plaintiff- :
Cross-Appellant), :
: No. 09AP-833
v. : (C.P.C. No. 08 CV 007691)
:
State of Ohio et al., : (REGULAR CALENDAR)
:
Defendants-Appellees/ :
Cross-Appellees. :

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on December 31, 2009, appellants' first, third and fourth assignments of error are sustained, their second assignment of error is moot, and intervening-plaintiff/cross-appellant's conditional cross-assignment of error is overruled. It is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas denying declaratory and injunctive relief to intervening-plaintiff/cross-appellant is affirmed, and the judgment of the trial court granting declaratory and injunctive relief to appellees is reversed, and these matters are remanded to the trial court for further proceedings consistent with this court's decision.

In addition, appellees' October 13, 2009 motion to strike is denied, and this court's stay order entered on August 18, 2009, shall remain in full force and effect until such time as the Supreme Court of Ohio, if an appeal to that court is filed, finally determines the matter. Costs shall be assessed against the appellees and cross-appellant.

Judge Patrick M. McGrath

Judge Lisa L. Sadler

Judge G. Gary Tyack

20657 - T16

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Board of Trustees of the Tobacco Use Prevention and Control Foundation et al.,	
Plaintiffs-Appellees,	
v.	No. 09AP-768 (C.P.C. No. 08CV 005363)
Kevin L. Boyce, Treasurer of State et al.,	(REGULAR CALENDAR)
Defendants-Appellees,	
(State of Ohio et al.,	
Defendants-Appellants).	
Robert G. Miller, Jr. et al.,	
Plaintiffs-Appellees,	
v.	No. 09AP-769 (C.P.C. No. 08CV 007691)
State of Ohio et al.,	(REGULAR CALENDAR)
Defendants-Appellants.	
Board of Trustees of the Tobacco Use Prevention and Control Foundation et al.,	
Plaintiffs-Appellees,	
v.	No. 09AP-785 (C.P.C. No. 08CV 005363)
Kevin L. Boyce, Treasurer of State et al.,	(REGULAR CALENDAR)
Defendants-Appellees,	
(Ohio Department of Health & Director Alvin D. Jackson,	
Defendants-Appellants).	
Robert G. Miller, Jr. et al.,	
Plaintiffs-Appellees,	

20657 - T17

v. : No. 09AP-786 (C.P.C. No. 08CV 007691)

State of Ohio et al., : (REGULAR CALENDAR)

Defendants-Appellees, :

(Ohio Department of Health & Director, Alvin D. Jackson, :

Defendants-Appellants). :

Board of Trustees of the Tobacco Use Prevention and Control Foundation et al., :

Plaintiffs-Appellees/ Cross-Appellees, :

(American Legacy Foundation, :

Intervening Plaintiff-Cross-Appellant), :

v : No. 09AP-832 (C.P.C. No. 08 CV 005363)

Kevin L. Boyce, Treasurer of State et al., : (REGULAR CALENDAR)

Defendants-Appellees/ Cross-Appellees. :

Robert G. Miller, Jr. et al., :

Plaintiffs-Appellees/ Cross-Appellees, :

(American Legacy Foundation, :

Intervening Plaintiff-Cross-Appellant), :

v. : No. 09AP-833 (C.P.C. No. 08 CV 007691)

State of Ohio et al., : (REGULAR CALENDAR)

Defendants-Appellees/ Cross-Appellees. :

NUNC PRO TUNC JUDGMENT ENTRY[1]

For the reasons stated in the decision of this court rendered herein on December 31, 2009, appellants' first, third and fourth assignments of error are sustained, their second assignment of error is moot, and intervening-plaintiff/cross-appellant's conditional cross-assignment of error is overruled. It is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas denying declaratory and injunctive relief to intervening-plaintiff/cross-appellant is affirmed, and the judgment of the trial court granting declaratory and injunctive relief to appellees is reversed, and these matters are remanded to the trial court for further proceedings consistent with this court's decision.

In addition, appellees' October 13, 2009 motion to strike is denied, and the injunction issued by this court on August 18, 2009, shall remain in full force and effect until such time as the Supreme Court of Ohio considers this matter. Costs shall be assessed against the appellees and cross-appellant.

Judge Patrick M. McGrath

Judge Lisa L. Sadler

Judge G. Gary Tyack

[1] This judgment entry replaces, nunc pro tunc, the original judgment entry entered on December 31, 2009, and is effective as of that date.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Board of Trustees of the Tobacco Use Prevention and Control Foundation et al.,	:	
Plaintiffs-Appellees,	:	No. 09AP-768
v.	:	(C.P.C. No. 08CV 005363)
Kevin L. Boyce, Treasurer of State et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees,	:	
(State of Ohio et al.,	:	
Defendants-Appellants).	:	
Robert G. Miller, Jr. et al.,	:	
Plaintiffs-Appellees,	:	No. 09AP-769
v.	:	(C.P.C. No. 08CV 007691)
State of Ohio et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	
Board of Trustees of the Tobacco Use Prevention and Control Foundation et al.,	:	
Plaintiffs-Appellees,	:	No. 09AP-785
v.	:	(C.P.C. No. 08CV 005363)
Kevin L. Boyce, Treasurer of State et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees,	:	
(Ohio Department of Health & Director Alvin D. Jackson,	:	
Defendants-Appellants).	:	

Robert G. Miller, Jr. et al.,

Plaintiffs-Appellees,

v.

State of Ohio et al.,

Defendants-Appellees,

(Ohio Department of Health & Director, Alvin D. Jackson,

Defendants-Appellants).

Board of Trustees of the Tobacco Use Prevention and Control Foundation et al.,

Plaintiffs-Appellees/ Cross-Appellees,

(American Legacy Foundation,

Intervening Plaintiff-Cross-Appellant),

v.

Kevin L. Boyce, Treasurer of State et al.,

Defendants-Appellees/ Cross-Appellees.

Robert G. Miller, Jr. et al.,

Plaintiffs-Appellees/ Cross-Appellees,

(American Legacy Foundation,

Intervening Plaintiff-Cross-Appellant),

v.

No. 09AP-786
(C.P.C. No. 08CV 007691)

(REGULAR CALENDAR)

No. 09AP-832
(C.P.C. No. 08CV 005363)

(REGULAR CALENDAR)

No. 09AP-833
(C.P.C. No. 08CV 007691)

State of Ohio et al., : (REGULAR CALENDAR)

Defendants-Appellees/ Cross-Appellees. :

D E C I S I O N

Rendered on December 31, 2009

Zeiger, Tigges & Little LLP, John W. Zeiger and *Stuart G. Parsell*, for plaintiffs-appellees Robert G. Miller, Jr. and David W. Weinmann and intervening-plaintiff/cross-appellant American Legacy Foundation.

Richard Cordray, Attorney General, *Alexandra T. Schimmer, Richard N. Coglianese*, and *Craig A. Calcaterra*, for defendants-appellants/cross-appellees State of Ohio and Ohio Attorney General Richard Cordray; *Katherine J. Bockbrader*, for defendants-appellants/cross-appellees Ohio Department of Health and Director Alvin D. Jackson; *Damian Sikora* and *Aaron Epstein*, for defendant-appellee, Ohio Treasurer of State; *Steven McGann*, for plaintiff-appellee Board of Trustees of the Tobacco Use Prevention and Control Foundation; *Susan E. Ashbrook*, for amici curiae Ohio General Assembly and Governor Ted Strickland.

Bricker & Eckler LLP, Anne Marie Sferra and *Daniel C. Gibson*, for amici curiae Ohio Dental Association, Ohio Optometric Association, Ohio State Chiropractic Association, and Ohio Association of Community Health Centers.

MacMurray, Peterson & Shuster, and *Helen MacMurray*, for amici curiae former Ohio Attorney General Betty D. Montgomery, former Ohio Senate President Richard H. Finan, and Former Director of the Ohio Department of Health Dr. J. Nick Baird.

Peck, Shaffer & Williams LLP, Thomas A. Luebbers and *Erin A. Sutton*, for amici curiae County Commissioners Association of Ohio, Ohio Job and Family Service Directors

Association, Public Children Services Association of Ohio, and Ohio Child Support Enforcement Agency Directors Association.

APPEALS from the Franklin County Court of Common Pleas.

PER CURIAM.

{¶1} Appellants, the Ohio Attorney General, the State of Ohio, and the Ohio Department of Health ("ODH") and its Director, appeal from the August 11, 2009 judgment of the Franklin County Court of Common Pleas granting declaratory and injunctive relief to appellees, Robert G. Miller, Jr. and David W. Weinmann, on their claim that H.B. 544 is unconstitutional because it violates the Contract Clauses of Section 10, Article I of the United States Constitution and Section 28, Article II of the Ohio Constitution, as well as the Retroactivity Clause of Section 28, Article II of the Ohio Constitution. In addition, cross-appellant American Legacy Foundation ("Legacy") has filed a conditional cross-appeal from the August 11, 2009 judgment denying it declaratory and injunctive relief on its claim that H.B. 544 substantially impaired its contract rights in violation of the Contract Clauses of the United States and Ohio Constitutions. For the following reasons, we reverse the portion of the trial court's judgment granting declaratory and injunctive relief to appellees and affirm the portion of the trial court's judgment denying declaratory and injunctive relief to Legacy.

{¶2} On November 23, 1998, the Attorneys General of 46 states, including Ohio, entered into a Master Settlement Agreement ("MSA") with four leading American tobacco product manufacturers. The MSA resolved litigation the Attorneys General brought against the tobacco companies to recover state health care expenses incurred as a result of tobacco-related illnesses. Under the MSA, Ohio is to receive approximately $10.1

billion in payments through 2025 and additional future settlement payments in perpetuity. The MSA does not limit the purposes for which Ohio may utilize the funds it receives.

{¶3} In 2000, the 123rd General Assembly passed Am.Sub.S.B. 192, which distributed MSA monies to eight different funds. Most of Am.Sub.S.B. 192 was codified as R.C. Chapter 183. Pursuant to former R.C. 183.02, MSA funds were initially to be deposited into the state treasury to the credit of the newly created "tobacco master settlement agreement fund." Thereafter, the monies were distributed to the eight funds set forth in former R.C. 183.02, including the "tobacco use prevention and cessation trust fund," which was created in the state treasury pursuant to former R.C. 183.03. Former R.C. 183.04 created the "tobacco use prevention and control foundation" ("foundation"), the general management of which was vested in a 20-member board of trustees ("board"). Former R.C. 183.07 directed the foundation to prepare a plan to reduce tobacco use by Ohioans, with particular focus on select populations, and empowered the foundation to implement its plan by carrying out, or providing funding for private or public agencies to carry out, programs and research related to tobacco use prevention and cessation. Former R.C. 183.08 created the "tobacco use prevention and control endowment fund" ("endowment fund"), which, pursuant to former R.C. 183.08, "shall be in the custody of the treasurer of state but shall not be a part of the state treasury." The endowment fund was to consist of amounts appropriated from the tobacco use prevention and cessation trust fund, as well as investment earnings and grants and donations made to the foundation, for use by the foundation in carrying out its duties. Former R.C. 183.08 also established the foundation as the trustee of the endowment fund and directed that

disbursements from the endowment fund were to be paid by the treasurer of state only upon instruments duly authorized by the board.

{¶4} The foundation was created as a self-sustaining entity and, upon its creation, was directed by the General Assembly that it "should not expect to receive funding from the state beyond the amounts appropriated to it from the tobacco use prevention and cessation trust fund." Former R.C. 183.08. Former R.C. 183.33 prohibited the appropriation or transfer of money from the general revenue fund to the tobacco master settlement agreement fund, the tobacco use prevention and cessation trust fund or the endowment fund, and also prohibited any other appropriation or transfer of money from the general revenue fund for use by the foundation.

{¶5} Section 3 of the uncodified portion of Am.Sub.S.B. 192 stated that "[e]xcept as otherwise provided, all items in this act are hereby appropriated as designated out of any moneys in the state treasury to the credit of the designated fund, which are not otherwise appropriated." To fund the anti-tobacco efforts, Section 6 appropriated nearly $235 million of the MSA proceeds to the tobacco use prevention and cessation trust fund—a fund of ODH and one of the eight funds created by Am.Sub.S.B. 192 "in the state treasury." Section 6 further directed the Director of ODH to "disburse" those funds outside the state treasury into the endowment fund to be used by the foundation to carry out its duties.

{¶6} As time passed, Ohio's economic landscape began to deteriorate. In response, on April 2, 2008, the Governor and leaders of the 127th General Assembly announced a $1.57 billion jobs stimulus package. The announcement included the stated

intent to reallocate approximately $230 million from the foundation's approximately $270 million endowment fund to the jobs stimulus package.

{¶7} Following this announcement, the board, at their regularly scheduled April 4, 2008 meeting, adopted a resolution authorizing the transfer of $190 million from the endowment fund to Legacy, a nonprofit corporation focusing on the prevention, control, and cessation of tobacco use. On April 8, 2008, Michael Renner, the foundation's Executive Director, pursuant to the authority granted him by the April 4, 2008 resolution, executed a contract with Legacy on behalf of the foundation. On the same day, Renner submitted a written request to the state treasurer to liquidate $190 million from the endowment fund and transfer it to Legacy.

{¶8} Also on April 8, 2008, the 127th General Assembly passed Am.S.B. 192. Section 3 of the uncodified portion of Am.S.B. 192 directed the state treasurer to liquidate the endowment fund, reserving the first $40 million in proceeds from the liquidation for use by the foundation for the sole purpose of paying contractual or other legally binding obligations entered into by the foundation on or before the effective date of the act. Section 3 further directed the state treasurer to deposit the remaining proceeds from the liquidation into the state treasury to the credit of the newly created jobs fund. Section 4 declared the act an emergency measure necessary to, among other things, "minimize the impact of current economic stresses by using state funds in a prudent manner to increase employment and job security."

{¶9} On April 9, 2008, the foundation filed a verified complaint for declaratory relief, which included a request for a preliminary and permanent injunction, against the Ohio Treasurer of State. The foundation sought a declaration that Am.S.B. 192 was

unconstitutional and sought to enjoin the state treasurer from transferring the monies in the endowment fund to the jobs fund. The foundation also sought a temporary restraining order, which the trial court denied on April 10, 2008. Also on April 10, 2008, the trial court granted a motion filed by the State of Ohio and the Ohio Attorney General to intervene as defendants in the action.

{¶10} On April 15, 2008, the board met and voted to rescind the portion of its April 8, 2008 resolution authorizing the transfer of $190 million from the endowment fund to Legacy. The next day, April 16, 2008, Renner notified the state treasurer in writing that the board was withdrawing its April 8, 2008 request to transfer $190 million to Legacy.

{¶11} On April 21, 2008, Legacy moved to intervene as a plaintiff in the foundation's action and filed a verified complaint seeking a declaration that it had a binding contract with the foundation requiring the transfer of $190 million of the endowment fund to it and that the provisions of Am.S.B. 192 mandating transfer of the same monies to the jobs fund was an unconstitutional impairment of its contract rights in violation of Section 10, Article I of the United States Constitution and Section 28, Article II of the Ohio Constitution. The trial court granted Legacy's motion to intervene on April 21, 2008.

{¶12} On April 28, 2008, the State of Ohio and the Ohio Attorney General filed an answer and counterclaim to Legacy's complaint. The counterclaim asserted that: (1) the board's action authorizing the contract between the foundation and Legacy was invalid because it was made in violation of Ohio's Open Meetings Act; (2) the board unlawfully delegated its statutory authority; (3) the board breached its fiduciary duty to manage the endowment fund by unlawfully adopting the resolution authorizing the contract between

the foundation and Legacy; (4) the contract between the foundation and Legacy was unenforceable for want of consideration; and (5) execution of the contract between the foundation and Legacy violated the legislative and executive intent as to the public policy of the State of Ohio.

{¶13} On May 6, 2008, the General Assembly passed H.B. 544, an emergency measure which became effective immediately. Section 1 of the uncodified portion of H.B. 544 enacted R.C. 3701.84, which effectively transferred certain powers of the foundation to ODH. Specifically, R.C. 3701.84 permits ODH to prepare and execute a plan to reduce tobacco use by Ohioans and, pursuant to that plan, permits ODH to "carry out, or provide funding for private or public agencies to carry out, research and programs related to tobacco use prevention and cessation." Section 1 also enacted R.C. 3701.841, which created in the state treasury the "tobacco use prevention fund," consisting of money deposited by the state treasurer into the fund from the liquidation of the endowment fund and gifts, grants or donations received by the ODH Director for purposes of the fund, as well as investment earnings of the fund. Sections 2 and 8 repealed R.C. 183.03 through 183.09 and Section 3 of Am.S.B.192, respectively. Section 3 abolished the foundation and declared that "[n]o validation, cure, right, privilege, remedy, obligation, or liability is lost or impaired by reason of the abolition of the foundation" and that "any such matter shall be administered by [ODH]." Section 3 further declared that all the foundation's rights, privileges, and obligations were to be administered by ODH, and that any actions or proceedings involving the foundation pending on the effective date of the act were to be prosecuted or defended in the name of ODH or its Director. Section 4 directed the state treasurer to liquidate the endowment fund, deposit the first $40 million in proceeds

from the liquidation into the state treasury to the credit of the newly created "tobacco use prevention fund." Section 4 further directed the state treasurer to deposit the remaining proceeds from the liquidation (approximately $230 million) into the state treasury to the credit of the newly created jobs fund.

{¶14} On May 9, 2008, Legacy amended its complaint to add ODH and its Director as defendants, citing the provisions of H.B. 544 which made ODH the foundation's successor. Legacy applied its constitutional impairment of contract argument to the provisions of H.B. 544.

{¶15} On May 27, 2008, appellees filed a verified complaint for declaratory relief, which included a request for a preliminary and permanent injunction, against the State of Ohio, the Attorney General, and the Ohio Treasurer of State. Appellees, former smokers, claimed that through the enactment of R.C. Chapter 183, specifically former R.C. 183.07 and 183.08, and by transferring monies into the endowment fund outside the state treasury, the General Assembly created and funded a trust without reserving the right to revoke it. Appellees claimed that as participants in smoking cessation programs funded by the foundation, they were third-party beneficiaries of the trust, and that by reallocating endowment fund monies to the jobs fund via H.B. 544, appellants were improperly attempting to revoke the trust. Accordingly, appellees requested that the court enter judgment declaring: (1) that H.B. 544 is unconstitutional as violating the Contract Clauses of Section 10, Article I of the United States Constitution and Section 28, Article II of the Ohio Constitution and the General Assembly's appropriations limitations under the Ohio Constitution; and (2) that H.B. 544 illegally attempts to misappropriate non-treasury funds

and unlawfully breach an irrevocable trust. Appellees also requested that the court enjoin the state treasurer from transferring the monies in the endowment fund to the jobs fund.

{¶16} Upon appellees' motion, the trial court consolidated their action with that of the foundation. The trial court imposed a freeze order over the monies at issue until such time as it ruled on the motions for preliminary injunction.

{¶17} The trial court held a preliminary injunction hearing on June 2 through June 4, 2008. On October 3, 2008, the court requested that the parties provide additional briefing on the issue of whether the endowment fund constituted an irrevocable trust. The parties submitted additional briefing on the issue on October 31, 2008.

{¶18} On February 10, 2009, the trial court issued an order denying Legacy's motion for preliminary injunction, concluding that it had failed to demonstrate it was likely to prevail on the merits of its constitutional impairment of contract claim. The court found specifically that H.B. 544 did not substantially impair Legacy's rights under the contract with the foundation because that contract was invalid. In so concluding, the court found that: (1) the board's action authorizing the contract was invalid because it was made in violation of Ohio's Open Meetings Act; (2) the board's attempts to delegate its statutory authority were unlawful; (3) the contract was never approved or ratified by the board as required by Ohio law; and (4) the contract did not meet state requirements for a grant agreement under R.C. 9.231.

{¶19} The trial court granted appellees' motion for preliminary injunction, concluding that they had a substantial likelihood of success on the merits of their claim. The court first concluded that appellees had standing to prosecute the action, as each had a personal stake in the existing controversy and possessed a special right and

interest in the monies comprising the endowment fund, separate and distinct from those of the general public, to ensure that the funds continued to be utilized for tobacco control, prevention, and cessation purposes in Ohio. The court further concluded that through the enactment of R.C. Chapter 183, specifically former R.C. 183.07 and 183.08, and by transferring monies into the endowment fund outside the state treasury, the General Assembly plainly evinced the intent to create a trust. The court found that the statutory scheme creating the endowment fund had all the elements of a trust: a trustee (the foundation), a trust corpus (the endowment fund), and trust beneficiaries (Ohio's youth and tobacco users). The court further found that the trust was irrevocable, as the General Assembly had failed to reserve the right to revoke the trust upon creating and funding it. The court also found that H.B. 544 unconstitutionally impaired the obligations of the trust and the vested rights of the trust beneficiaries, including appellees, through its attempt to divert monies from the endowment fund to the jobs fund. In addition, the court found that H.B. 544's impairment of the trust was not reasonable and necessary to serve important state purposes, as the state could employ equally effective alternative means of funding the jobs stimulus proposal.

{¶20} On March 3, 2009, appellees amended their complaint to add ODH and its Director as defendants and to assert an additional claim that H.B. 544 violated the Retroactivity Clause of Section 28, Article II of the Ohio Constitution.

{¶21} Following a June 1, 2009 trial on the merits, the trial court issued a decision on August 11, 2009, incorporating the findings of fact and conclusions of law contained in the order granting the preliminary injunction. The court entered judgment against Legacy on its claims, finding that the contract between it and the foundation was invalid and

unenforceable. The court also entered judgment for appellees on their claims, finding, in ¶226, as follows:

> The General Assembly and the State plainly intended to create the Endowment Fund (the "Trust") 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 the Ohio Tobacco Use Prevention and Control Foundation (the "Foundation") as "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 (subsequent to, and as distinguished from, the General Assembly's prior appropriations to ODH for tobacco cessation purposes).

{¶22} Having so found, the court concluded that those portions of H.B. 544 that purported to transfer the monies from the endowment fund or revoke the trust violated the Retroactivity Clause of the Ohio Constitution and the Contract Clauses of the United States and Ohio Constitutions. Accordingly, the court permanently enjoined the State of Ohio, the Treasurer of State, the Attorney General and ODH and its Director from enforcing any provision of H.B. 544 related to the endowment fund. The court further ordered that all monies in the endowment fund were to remain in the custody of the state treasurer and not be a part of the state treasury and that those monies were not to be subject to control, appropriation or expropriation by the General Assembly. In addition, the court retained continuing jurisdiction to enforce its order, protect the trust, and oversee its administration.

{¶23} This court subsequently granted appellants' motion to stay and granted appellees' motion for injunction pending appeal. On appeal, appellants advance the following four assignments of error:

> [1]. The trial court erred in finding that the General Assembly created an irrevocable charitable trust when it created the endowment fund under the supervision of the Ohio Tobacco Use Prevention and Control Foundation.
>
> [2]. The trial court erred in ruling that Appellees have standing to challenge the General Assembly's enactment of H.B. 544.
>
> [3]. The trial court erred in ruling that H.B. 544 violates Article II, §28 of the Ohio Constitution and Article I, § 10 of the United Constitution.
>
> [4]. The trial court erred in ruling that H.B. 544 violated the Retroactivity Clause of the Ohio Constitution.

{¶24} Legacy has filed a conditional cross-assignment of error, as follows:

> The trial court committed reversible error by holding that the contract between American Legacy Foundation (Legacy) and the Ohio Tobacco Use Prevention and Control Foundation is not enforceable and, thus, ruling against Legacy on its claim that H.B. 544 violates the Contracts Clauses of the Ohio and United States Constitutions.

{¶25} In addition, the Ohio General Assembly, together with Governor Ted Strickland, the County Commissioners Association of Ohio, together with the Ohio Job and Family Service Directors Association, the Public Children Services Association of Ohio, the Ohio Child Support Enforcement Agency Directors Association, and the Ohio Dental Association, together with the Ohio Optometric Association, the Ohio State Chiropractic Association, and the Ohio Association of Community Health Centers, have filed amicus briefs in support of appellants. Former Ohio Attorney General Betty D. Montgomery, together with former Ohio Senate President Richard H. Finan and former

Director of the Ohio Department of Health J. Nick Baird, M.D., and The Citizens' Commission to Protect the Truth, have filed amicus briefs in support of appellees and cross-appellant.

{¶26} As appellants' four assignments of error are interrelated, we shall address them together. Appellants contend the trial court improperly concluded that the endowment fund constituted an irrevocable charitable trust created under R.C. Chapter 183, that appellees had standing to challenge the enactment of H.B. 544, and that H.B. 544 unconstitutionally impaired the obligations of the trust and the vested rights of the trust beneficiaries, including appellees, through its attempt to divert monies from the endowment fund to the jobs fund.

{¶27} Preliminarily, we note that the interpretation of the constitutionality of a legislative enactment presents a question of law. *Andreyko v. Cincinnati,* 153 Ohio App.3d 108, 2003-Ohio-2759. "Questions of law are reviewed de novo, independently and without deference to the trial court's decision." Id.

{¶28} The Supreme Court of Ohio has repeatedly held that legislative enactments are entitled to a strong presumption of constitutionality. *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512, ¶20, citing *N. Ohio Patrolmen's Benevolent Assn. v. Parma* (1980), 61 Ohio St.2d 375, 377. "When the validity of a statute is challenged on constitutional grounds, the sole function of the court is to determine whether it transcends the limits of legislative power," not to judge the "policy or wisdom" of the statute. *Ohio Congress* at ¶20, quoting *State ex rel. Bishop v. Mt. Orab Village School Dist. Bd. of Edn.* (1942), 139 Ohio St. 427, 438. Accordingly, a party challenging the constitutionality of a legislative enactment bears the burden of

proving that it is unconstitutional beyond a reasonable doubt. *Austintown Twp. Bd. of Trustees v. Tracy*, 76 Ohio St.3d 353, 356, 1996-Ohio-74; *Ohio Congress* at ¶20 ("[Legislative enactment] should not be declared unconstitutional 'unless it appears beyond a reasonable doubt that the legislation and constitutional provision are clearly incompatible.' "). In reviewing constitutional claims, the court "must give due deference to the General Assembly," *Ohio Congress* at ¶20, and "apply all presumptions and pertinent rules of construction so as to uphold, if at all possible, a [legislative enactment] asserted as unconstitutional." *State ex rel. Purdy v. Clermont Cty. Bd. of Elections*, 77 Ohio St.3d 338, 345, 1997-Ohio-278 (citation omitted).

{¶29} Neither appellants nor appellees dispute that when H.B. 544 was enacted, the endowment fund resided in a custodial account, that is, a fund in the custody of the state treasurer but not part of the state treasury. Indeed, former R.C. 183.08 expressly stated as much—the endowment fund "shall be in the custody of the treasurer of state but shall not be a part of the state treasury." Appellees contend that the General Assembly's creation of the endowment fund as a custodial account expressly outside the state treasury manifested its intention that the endowment fund constitute an irrevocable trust permanently beyond its control. Appellants challenge appellees' contention that a custodial account outside the state treasury is inherently an irrevocable fund.

{¶30} As appellants submit, the legal nature of a custodial account is best understood in the context of the state funding process more broadly and in comparison to appropriated funds that reside within the state treasury. State programs are generally funded through biennial appropriations. At the beginning of each biennium, the General Assembly appropriates a specific amount of money from the state treasury for a specific

purpose. This is the process contemplated by Section 22, Article II of the Ohio Constitution. First, "money shall be drawn from the treasury" only upon "a specific appropriation, made by law." Second, "no appropriation shall be made for a longer period than two years."

{¶31} Consistent with those provisions, the General Assembly requires state agencies to expend "appropriations made to a specific fiscal year" on "liabilities incurred within that fiscal year." R.C. 131.33. At the end of the fiscal year, unspent money automatically "revert[s] to the funds from which the appropriations were made," id., usually the general revenue fund. In other words, for appropriated funds residing within the state treasury, any unspent agency funds remaining at the end of any fiscal year automatically revert to the general revenue fund for the General Assembly to reallocate pursuant to that year's budgetary needs.

{¶32} In certain situations, however, the General Assembly prescribes a different funding mechanism that is not subject to those rules. Pursuant to R.C. 113.05, the General Assembly may create a custodial account—an account maintained by the state treasurer but that is not part of the state treasury for purposes of the appropriation process under Section 22, Article II of the Ohio Constitution. The custodial account is 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.

{¶33} The choice of how to fund a specific state program—through regular biennial appropriations or the creation of a custodial account—is left to the General Assembly's discretion. But the fact that the General Assembly chooses the latter path

does not mean that funds placed in a custodial account are shielded in perpetuity from future legislation. Only in a narrow sense are custodial accounts protected from "reappropriations"—that is, they are not automatically reappropriated at the end of every biennium pursuant to the biennial appropriation process set forth in Section 22, Article II of the Ohio Constitution and R.C. 131.33. This 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.

{¶34} Although appellees bear the burden of proof in this case, they offer no authority supporting the proposition that custodial funds, once created, cannot be abolished, amended, or transferred by the General Assembly. To the contrary, the Ohio Constitution provides that the General Assembly's legislative power is plenary—it can pass any law so long as the legislation is not constitutionally prohibited. See Section 1, Article II, of the Ohio Constitution; *State ex rel. Jackman v. Cuyahoga Cty. Court of Common Pleas* (1967), 9 Ohio St.2d 159, 162 (The constitutional grant of authority at Section 1, Article II vests in the General Assembly the plenary power to enact any law except those which conflict with the Ohio or United States Constitutions.). As the Supreme Court of Ohio has long recognized, this constitutional provision guarantees that the General Assembly's legislative power "will be ample to authorize the enactment of a law," presumably including a law dissolving, amending, or liquidating a custodial account, "unless the legislative discretion has been qualified or restricted by the constitution in reference to the subject-matter in question. If the constitutionality of the law is involved [sic] in doubt, that doubt must be resolved in favor of the legislative power. The power to legislate for all the requirements of civil government is the rule, while a restriction upon

the exercise of that power in a particular case is the exception." *State ex rel. Poe v. Jones* (1894), 51 Ohio St. 492, 504.

{¶35} Thus, the General Assembly retains its power to legislate with respect to custodial funds, like the endowment fund, unless the funds have expressly been rendered unreachable through a constitutional amendment. Thus, the only way to have limited the power of the General Assembly to reallocate the tobacco settlement money would have been to amend the Ohio Constitution to restrict the use of the funds and to make the endowment fund undissolvable. States desiring to permanently restrict the use of their tobacco settlement money have done so expressly through constitutional amendments. See, e.g., Fla. Const., Art. X, Section 27; Idaho Const. Art. VII, Section 18; Mont. Const. Art. XII, Section 4. Ohio has never promulgated a constitutional amendment restricting the use of its tobacco settlement funds. Accordingly, the General Assembly retained its power to legislate with regard to those funds. Indeed, under R.C. 183.32 prior to its repeal by Am.Sub.H.B. 119, the General Assembly provided for a legislative committee to periodically reexamine the use of the MSA funds and to recommend changes to reflect the state's priorities. The securitization of the MSA funds illustrates the General Assembly's continuing authority to expend that money as it deems fit.

{¶36} As previously noted, the sole basis for appellees' constitutional claims is the contention that the endowment fund was an irrevocable charitable trust that conferred upon appellees, as former smokers, permanently vested rights in the endowment fund and its programs. We disagree.

{¶37} Appellees urge this court to graft the law of private charitable trusts onto public funds. Specifically, appellees contend that the General Assembly manifested its

intention to establish the endowment fund as a trust by expressly designating the foundation as trustee of the endowment fund and by imposing mandatory fiduciary duties upon the foundation as trustee. Appellees argue that the only way the General Assembly could have terminated the endowment fund was to have enacted a right to revoke the trust when it was created or before it was funded. To be sure, Ohio follows the prevailing view that a private trust, once created, may not be revoked unless the settlor has expressly reserved the power to revoke the trust. However, this principle does not apply in these circumstances.

{¶38} The Ohio Constitution prohibits one General Assembly from binding a subsequent one as to any fiscal or other matter: "It is sound law that one General Assembly cannot make a binding promise that the next General Assembly will not change the law." *State ex rel. Foreman v. Brown* (1967), 10 Ohio St.2d 139, 158-59 (Schneider, J., concurring). See also *State ex rel. Youngstown v. Jones* (1939), 136 Ohio St. 130, 136 (A legislature has no power to bind successive legislatures.). That principle is a constitutional one, derived from the General Assembly's plenary power to legislate as to any matter, except as limited by the state and federal Constitutions. See Section 1, Art. II of the Ohio Constitution; *Jackman* at 162.

{¶39} While no Ohio court has directly addressed this issue, case law from at least one other jurisdiction confirms that a state legislature cannot create an irrevocable public trust. In *Barber v. Ritter* (Colo. 2008), 196 P.3d 238, the Colorado Supreme Court considered an issue similar to the one before us here. During the economic downturn between 2001-2004, the Colorado General Assembly transferred more than $442 million from 31 cash special funds into the state's general revenue fund in order to balance the

state budget. Several of those transfers were made from special funds designated as "trusts." The plaintiffs in that case claimed, just as appellees do here, that the General Assembly did not have the authority to transfer the funds because they resided in "trusts" and because none of the statutes creating the trusts reserved the legislature's right to revoke or amend them.

{¶40} Noting that the General Assembly's power to legislate was "absolute" and "plenary," particularly with respect to public monies, the Colorado Supreme Court held that "[t]o hold that the General Assembly could limit this plenary power to appropriate by creating an irrevocable public trust would be to effectively hold that the General Assembly could abrogate its constitutional powers by statute. This is not the law." Id. at 254. In other words, the court determined that the transfers were constitutional precisely because it would have been unconstitutional, i.e., a violation of the General Assembly's plenary legislative power, to construe the public trust funds as irrevocable. Id. The court ultimately concluded that "the status of the three cash funds as public trusts does not, and constitutionally cannot, have any limiting effect on the legislature's plenary power to amend or repeal those funds' enabling statutes." Id.

{¶41} We are persuaded by the sound reasoning of the Colorado Supreme Court, which directly echoes the mandates of the Ohio Constitution and the Ohio Supreme Court with regard to the General Assembly's legislative power. Because the General Assembly has plenary legislative power to revoke or transfer public funds, it acted constitutionally through H.B. 544 in transferring the monies in the endowment fund to other economic priorities.

{¶42} Furthermore, appellees' contention that the endowment fund is similar to Ohio's public employee retirement funds and, thus, enjoys the same constitutional protections as those funds is without merit. Public retirement funds consist of compulsory contributions made by specific individuals, i.e., public employees, and their employers. Those contributions are then held in trust for the sole benefit of the public employee contributors, who have a vested interest in the funds. *State ex rel. Preston v. Ferguson* (1960), 170 Ohio St. 450, 464. As Ohio courts, including this court, have long recognized, public retirement accounts are "not to be considered state funds in the general sense." *In re Appeal of Ford* (1982), 3 Ohio App.3d 416, 420.

{¶43} In contrast, the General Assembly created the endowment fund using discretionary general revenue funds the state received from the settlement with the tobacco companies. The funds were received by the state as general state monies, subject to expenditure by the General Assembly for any purpose. The tobacco use prevention and cessation trust fund was likewise created by statute and designated as the recipient of some of the settlement money. The endowment fund was, in turn, created by statute, and was funded by the tobacco use prevention and cessation trust fund. In other words, the endowment fund was created solely from state funds, not from a source that connected them intrinsically with the rights of particular persons.

{¶44} Moreover, public retirement funds provide a pension for specific public employees, and the board overseeing the funds owes a fiduciary duty to those specific beneficiaries. R.C. 145.11 ("[t]he board and other fiduciaries shall discharge their duties with respect to the funds solely in the interest of the participants and beneficiaries; for the exclusive purpose of providing benefits to participants and their beneficiaries[.]"). The

public employee retirement systems do not exercise their statutory functions on behalf of the state but, rather, on behalf of specific, identifiable beneficiaries. This is wholly unlike the foundation and the endowment fund, which served a generalized public purpose and whose trustees had no fiduciary obligations to any specific, identifiable individuals. See former R.C. 183.07 (the purpose of the foundation is to "prepare a plan to reduce tobacco use by Ohioans[.]").

{¶45} In short, appellees' attempts to compare the endowment fund to the public retirement funds are unavailing. Public retirement funds are protected, but for reasons wholly inapplicable to the endowment fund. Like most of the state's custodial accounts, the endowment fund was simply a public fund subject to the General Assembly's power to abolish, amend, or transfer it as it deems fit.

{¶46} As noted above, the sole basis for the trial court's ruling that H.B. 544 violates the Contract Clauses of the United States and Ohio Constitutions and the Retroactivity Clause of the Ohio Constitution was its finding that the endowment fund constituted an irrevocable charitable trust that created vested rights for appellees as former smokers who participated in smoking cessation programs funded by the foundation. Having concluded, however, that the endowment fund was not an irrevocable charitable trust, it created no vested rights for appellees or any other individual; accordingly, appellees' constitutional claims fail. Appellants' first, third, and fourth assignments of error are sustained.

{¶47} Appellants also claim that the trial court erred in concluding that appellees had standing to challenge the constitutionality of H.B. 544. Given our conclusion that appellees' claims are without merit and that there are no constraints on the General

Assembly's ability to expend the funds under these circumstances, we need not address appellants' contention. Accordingly, appellants' second assignment of error is moot.

{¶48} Having concluded that the trial court improperly found H.B. 544 unconstitutional, we must address Legacy's cross-assignment of error. Legacy contends the trial court erred in ruling that the contract between it and the foundation was invalid and unenforceable, rendering Legacy's constitutional impairment of contract claim without merit.

{¶49} In analyzing whether legislative enactment violates the Contract Clauses of the United States and Ohio Constitutions, a court must initially ask " 'whether the change in state law has "operated as a substantial impairment of a contractual relationship." ' " *State ex rel. Horvath v. State Teachers Ret. Bd.* (1998), 83 Ohio St.3d 67, 76, quoting *Gen. Motors Corp. v. Romein* (1992), 503 U.S. 181, 186, 112 S.Ct. 1105, 1109, quoting *Allied Structural Steel Co. v. Spannaus* (1978), 438 U.S. 234, 244, 98 S.Ct. 2716, 2722. This inquiry involves three components: "whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Horvath* at 76, quoting *Romein*, 503 U.S. at 186, 112 S.Ct. at 1109. The "obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them." *Home Bldg. & Loan Assn. v. Blaisdell* (1934), 290 U.S. 398, 431, 54 S.Ct. 231, 238.

{¶50} Pursuant to the foregoing, we must first determine whether there exists a contractual relationship between Legacy and the foundation. As noted, the trial court concluded that no contractual relationship exists between the two entities as a result of the board's noncompliance with R.C. 121.22, Ohio's Open Meetings Act. The trial court

further concluded that the contract between the board and Legacy is invalid because: (1) the board unlawfully delegated its statutory authority; (2) Renner executed the contract without ratification by the board; and (3) the contract does not meet requirements for grant agreements.

{¶51} Evidence presented at the hearing on the motions for preliminary injunction establishes the following. The April 2, 2008 announcement regarding the stimulus proposal raised concerns for several board members. Indeed, one board member testified that upon hearing the announcement, he immediately believed the stimulus proposal would precipitate an imminent legal dispute about whether the General Assembly or the foundation had authority over the endowment fund. As such, prior to the April 4, 2008 board meeting, that board member discussed with several other board members the nature of the foundation, its legal status, and the effect that any subsequent legislative and/or legal action might have on the board's mission and fiduciary responsibilities. Pursuant to those discussions, that board member informed Renner and several other board members that he would propose at the April 4, 2008 meeting that the board transfer money from the endowment fund to an outside entity for use in tobacco prevention and cessation.

{¶52} In the meantime, on April 2, 2008, Renner left a voicemail message with Susan Walker, the assistant attorney general who represented the foundation, requesting legal advice related to the stimulus proposal. Renner testified that his voicemail message described the legal questions at issue and informed Walker that he needed her legal advice for the board's April 4, 2008 meeting. Due to concerns about the attorney general's dual representation of parties with potentially conflicting claims to the monies in

the endowment fund, Renner also requested that the Attorney General appoint special outside legal counsel for the foundation.

{¶53} Walker, who was out of the state on business, did not respond to Renner's voicemail message; however, she informed Britt Strottman, another assistant attorney general, of Renner's requests and asked her to notify senior management in the Attorney General's office. On April 3, 2008, Strottman left a voicemail message with Renner stating that the Attorney General was presently engaged in an important meeting to discuss the issues raised by Renner. Strottman requested that Renner set forth the foundation's requests for legal advice in writing and indicated that an assistant attorney general would contact him before the board's April 4, 2008 meeting.

{¶54} Renner unsuccessfully attempted to return Strottman's call after office hours on April 3, 2008. Pursuant to Strottman's request, Renner prepared a letter to the Attorney General, describing the issues about which the board requested advice. Due to time constraints, Renner was unable to deliver the letter to the Attorney General's office that day; accordingly, he resolved to present it to an assistant attorney general at the board meeting the next day.

{¶55} At the time the board convened its April 4, 2008 meeting, the Attorney General's office had not provided a substantive response to the legal questions posed by Renner, nor had it appointed special counsel for the board. Renner testified that although Walker had previously informed him that she could not attend the meeting due to a work conflict, and that he had not expressly requested that another assistant attorney general attend in her place, he fully expected an assistant attorney general to attend the meeting, as one routinely attended board meetings, particularly when there were legal issues to

discuss. However, no one from the attorney general's office attended the meeting. Although Renner and the board members expressed concern about the absence of legal counsel, no one called the attorney general's office to request that a lawyer attend the meeting. Moreover, Renner testified that the board members discussed, but rejected, a suggestion that the board convene a special meeting when an assistant attorney general could be present.

{¶56} The official minutes from the April 4, 2008 board meeting reflect that shortly after the meeting convened, the board chairman explained that the board needed to go into executive session to discuss legal issues related to the events surrounding the endowment fund. Following this announcement, one of the board members moved to go into executive session "to consider confidential legal matters." The motion passed by unanimous roll call vote.

{¶57} During the executive session, the board discussed several issues, including: (1) whether the board or the General Assembly had legal authority over the endowment fund; (2) whether the endowment fund constituted a trust for the benefit of Ohio smokers; (3) whether to transfer funds from the endowment fund to an outside entity; and, if so, the amount of funds to transfer and the potential recipients of the transferred funds; (4) the alternatives for legal action against the General Assembly to protect the endowment fund; (5) the board's obligation as fiduciaries of the endowment fund; (6) the potential conflict of interest as to the Attorney General and the need for independent outside counsel; (7) the likelihood of "imminent" litigation with the Governor and General Assembly if the board transferred endowment fund monies to an outside entity; and (8) the authorization of Renner to carry out the transfer.

{¶58} Upon conclusion of the executive session, the board returned to the public portion of the meeting. According to the official meeting minutes, the board chairman thanked the board for the two-hour discussion that occurred in executive session. Thereafter, one of the board members moved to request the Attorney General "to appoint special legal counsel to represent the Ohio Tobacco Use Prevention and Control foundation to utilize the foundation endowment dollars as intended in Ohio Revised Code 183." Discussion related to the appointment of special counsel lasted approximately ten minutes. Following a vote, the "special counsel" resolution passed 13-1.

{¶59} Immediately following the "special counsel" vote, another board member made the following motion: "to authorize the transfer of $190,000,000 from the Tobacco Use Prevention and Control foundation endowment fund to one or all of three organizations equally: Campaign for Tobacco Free Kids, American Legacy foundation, Ohio Hospital Association for Healthy Communities foundation, to carry out the mission of the Ohio Tobacco Prevention foundation and fulfill the board's fiduciary duties. In addition, to authorize the Executive Director, Michael Renner, to do all things necessary and prudent to carry out the transfer and to alter distribution if satisfactory contractual agreements cannot be reached with one or more of the organizations." The board adopted the transfer resolution by a vote of 10-4 without discussion.

{¶60} After the board meeting, Renner contacted all three organizations named in the resolution. Legacy was the only organization able to respond within the foundation's time frame and willing to enter into a contract in connection with the transfer.

{¶61} Thereafter, on April 8, 2008, Renner, pursuant to the authority granted him by the board's transfer resolution, executed a contract with Legacy on behalf of the

foundation, whereby, in return for the foundation's transfer of $190 million from the endowment fund to Legacy, Legacy committed to utilize those funds in connection with smoking cessation and prevention programs. Renner testified that prior to executing the contract, an assistant attorney general reviewed and "signed off" on the contract. (Depo. 97.)

{¶62} Under the terms of the contract, Legacy agreed to: (1) focus use of the funds upon Ohio populations; (2) prepare a plan, consistent with that of the foundation, to reduce tobacco use by Ohioans, targeting particular groups; and (3) carry out, or provide funding for private or public agencies to carry out, research and programs related to tobacco prevention and cessation, and to that end, establish an objective process to determine what research and program proposals to fund. After executing the contract, Renner delivered a letter on behalf of the foundation to the state treasurer, requesting that the treasurer disburse and transfer $190 million of the endowment fund to Legacy.

{¶63} Legacy contends that the trial court erroneously concluded that the contract between it and the foundation is invalid and unenforceable as a result of the board's noncompliance with R.C. 121.22, Ohio's Open Meetings Act. More particularly, Legacy challenges the trial court's findings that the board violated R.C. 121.22 by failing to state a proper legal basis under R.C. 121.22(G) to convene in executive session and by deliberating in executive session upon matters it was required to discuss in open session.

{¶64} Ohio's Open Meetings Act "is to be liberally construed to require a public body at all times to take official action and conduct deliberations upon official business in meetings open to the public. R.C. 121.22(A). Its purpose is to assure accountability of elected officials by prohibiting their secret deliberations on public issues." *State ex rel.*

Cincinnati Enquirer v. Hamilton Cty. Commrs. (Apr. 26, 2002), 1st Dist. No. C-010605, citing *State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio St.3d 540, 544, 1996-Ohio-372. If specific procedures are followed, public officials may discuss certain sensitive information in a private executive session from which the public is excluded. R.C. 121.22(G) lists the seven matters that a public body may consider in executive session. A public body may convene in executive session only after a motion and vote that specifically identifies the permissible topic. R.C. 121.22(G); *State ex rel. Long v. Council of the Village of Cardington*, 92 Ohio St.3d 54, 59, 2001-Ohio-130 (If a public body decides to conduct an executive session, the public body must specify in its motion those matters that it will discuss in the executive session.). The executive session may then be held "for the sole purpose of the consideration of" one of the enumerated exceptions. R.C. 121.22(G).

{¶65} Legacy contends that the motion to enter executive session stated a proper basis under R.C. 121.22(G)(3), which permits executive session for the purpose of conducting "conferences with an attorney for the public body concerning disputes involving the public body that are the subject of pending or imminent court action." We note, initially, that the motion does not mention conferencing with legal counsel for the board. Further, pursuant to R.C. 109.02, the Attorney General is legal counsel for all state agencies, including the board. Legacy concedes that no assistant attorney general attended the April 4, 2008 board meeting. Legacy contends, however, that Renner, a licensed attorney and the board's Executive Director, attended the meeting and provided legal counsel to the board; accordingly, Legacy argues, Renner acted as the "attorney for the public body," and, thus, the R.C. 121.22(G)(3) exception applies. We disagree.

{¶66} Several board members testified that in the absence of an assistant attorney general, the board questioned Renner and three of the board members, all of whom are licensed attorneys in Ohio, about the legal matters at issue and that the four attorneys responded to the board's questions utilizing their legal training and expertise. However, Renner, as well as several board members, testified that all four attorneys expressly stated that their responses were not made in any official capacity as the board's attorneys. In addition, several board members testified that they did not believe that Renner or the three attorney board members acted as legal counsel for the foundation. The four attorneys, including Renner, testified that they did not consider themselves to be attorneys for the board.

{¶67} Ohio law establishes that board members or employees who happen to be attorneys are not the "attorney for the public body" contemplated by R.C. 121.22(G)(3). *Awadalla v. Robinson Memorial Hosp.* (June 5, 1992), 11th Dist. No. 91-P-2385 (meeting minutes reflect attorney board member Stephen Colechhi was designated as Senior Vice President; accordingly, the evidence did not support an argument that he served as the hospital's attorney); *In re Smith* (May 15, 1991), 5th Dist. No. CA-90-11. (R.C. 121.22(G)(3) did not apply because the county prosecutor, who was the attorney for the public body, was not present at the meeting).

{¶68} Legacy contends that *Awadalla* was superceded by the Ohio Supreme Court's decision in *State ex rel. Leslie v. Ohio Housing Finance Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508. Legacy's contention is without merit, as *Leslie* considered a narrow, unrelated issue; that is, whether the attorney-client privilege exists between a state agency and its in-house counsel when that counsel is not an assistant attorney

general. The court held that those communications are privileged. Id. at ¶36. *Leslie* did not expressly or implicitly overrule *Awadalla.* Indeed, the court did not mention either *Awadalla* or the Open Meetings Act. Finally, *Leslie* does not stand for the proposition that an Executive Director or board member who is also an attorney can serve as the attorney for a board for purposes of discussing "pending or imminent court action" in executive session.

{¶69} Here, the board's official meeting minutes and the testimony of several board members demonstrates that Renner was present at the board meeting in his capacity as Executive Director, not as the board's attorney. Because the evidence does not support the argument that neither Renner nor any of the other attorneys present at the meeting were acting as legal counsel for the board, the trial court correctly found that the board did not convene in executive session to confer with "an attorney for the public body."

{¶70} Secondly, the motion does not cite "pending or imminent court action" as the reason for entering executive session. Rather, the motion states only that executive session was required "to consider confidential legal matters." The term "confidential legal matters" encompasses a myriad of subjects which may or may not be related to, or result in, court action. A finding that this statement was sufficient to satisfy the notice requirement of R.C. 121.22(G)(3) would render the express requirement that the matters the board intended to discuss in executive session were the subject of "pending or imminent court action" meaningless. Thus, we conclude that a reference to "confidential legal matters" is insufficient to satisfy the notice requirement of R.C. 121.22(G)(3).

{¶71} Moreover, even if the board properly convened in executive session and discussed issues that may have qualified as discussions related to "imminent court action" if the board's attorney had been present, the board's discussions went well beyond this subject matter to basic policy decisions facing the board—topics that should have been discussed in open session. A resolution is invalid unless adopted in an open meeting of the public body. R.C. 121.22(H). Additionally, "[a] resolution, rule, or formal action adopted in an open meeting that results from deliberations in a meeting not open to the public is invalid unless the deliberations were for a purpose specifically authorized in division (G) * * * and conducted at an executive session held in compliance with this section." Id. As noted previously, the board discussed at length whether to transfer money from the endowment fund to an outside entity, the amount of funds to transfer, and potential recipients of the transferred funds. We do not agree with Legacy's contention that all these topics were inextricably entwined with the subject of imminent litigation. Assuming arguendo that the board's discussions about transferring funds to an outside entity qualified as related to "imminent court action," the board's specific discussions regarding the amount of funds to transfer and to whom to transfer the funds were not related to such court action and thus were required to be held in open session.

{¶72} " 'Deliberations' involve more than information-gathering, investigation, or fact-finding." *Springfield Loc. School Dist. Bd. of Edn. v. Ohio Assn. of Pub. School Emp., Loc. 530* (1995), 106 Ohio App.3d 855, 864, citing *Holeski v. Lawrence* (1993), 85 Ohio App.3d 824, 829. Deliberations involve the weighing and examining of reasons for and against a course of action. Id., citing Webster's Third New International Dictionary (1961), 596. See also *Thiele v. Harris* (June 11, 1986), 1st Dist. No. C-860103 ("[A]fter a public

body has obtained the facts, it deliberates by thoroughly discussing all of the factors involved, carefully weighing the positive factors against the negative factors, cautiously considering the ramifications of its proposed action, and gradually arriving at a proper decision which reflects this legislative process." (Emphasis sic.)). "Deliberations involve a decisional analysis, i.e., an exchange of views on the facts in an attempt to reach a decision." *Piekutowski v. S. Cent. Ohio Educ. Serv. Ctr. Governing Bd.*, 161 Ohio App.3d 372, 379, 2005-Ohio-2868. While it is permissible for a public body to gather information in private, a public body cannot deliberate privately in the absence of specifically authorized purposes. Id.

{¶73} Having reviewed the evidence in the record, it is clear that the board deliberated during the executive session on the issues of the amount of the endowment fund to transfer and to whom to transfer the funds. Indeed, several board members testified that the board took a straw poll during the executive session concerning the proposal to transfer $190 million to one or more of three outside entities. Renner testified that all the board members were asked to state their opinions on the transfer motion. In addition, several board members testified that a consensus formed during the executive session in favor of adopting the proposal set forth in the transfer resolution. The record indicates that there was absolutely no discussion by the board about the transfer resolution in the public session. Specifically, as previously noted, the meeting minutes indicate that following the motion and vote on the "special counsel" resolution, one of the board members immediately moved to transfer $190 million of the endowment fund to one or more of the three entities discussed in executive session. At least two board members testified that there was no discussion on the motion during the public portion of

the meeting. Given the absence of any public discussion by the board about the specifics of the transfer resolution, it is reasonable to conclude that the board's discussion regarding the amount and potential recipients of the transferred funds occurred during the executive session.

{¶74} However, evidence that a public body deliberated on a public issue in executive session does not automatically result in invalidation of a resolution. "Besides the act of deliberation, there must be proof of causation." *Springfield Loc. School Dist. Bd. of Edn.*, supra. Thus, there must be evidence in the record that the public body arrived at its decision on the matter as a result of the nonpublic deliberations. Id. at 863-64. Here, the meeting minutes reflect that the board did not discuss the transfer resolution in open session. At least one board member testified that the transfer motion made in open session resulted from discussions held during executive session. Accordingly, we agree with the trial court's finding that the board violated R.C. 121.22 by deliberating in executive session upon matters it was required to discuss in open session.

{¶75} Legacy claims, citing *Jones v. Brookfield Twp. Trustees* (June 30, 1995), 11th Dist. No. 92-T-462 and *Roberto v. Brown Cty. Gen. Hosp.* (Feb. 8, 1988), 12th Dist. No. CA87-06-009, that the Attorney General waived its right to assert an Open Meetings Act violation by failing to send an assistant attorney general to the board meeting. Neither case applies here. *Jones* involved board members using their own Open Meetings Act violation to invalidate their own actions. *Roberto* also involved board members seeking to invalidate their own board's action. Further, *Roberto* contained an additional equitable component: Roberto had relied upon the allegedly invalid employment agreement for five years. No such equivalent reliance exists here.

{¶76} As noted previously, the Open Meetings Act is designed to prevent public officials from "meeting secretly to deliberate on public issues without accountability to the public." *Cincinnati Post* at 544. As the Supreme Court of Ohio recognized: "One of the strengths of American government is the right of the public to know and understand the actions of their elected representatives. This includes not merely the right to know a government body's final decision on a matter, but the ways and means by which those decisions were reached." *White v. Clinton Cty. Bd. of Commrs.*, 76 Ohio St.3d 416, 419, 1996-Ohio-380.

{¶77} After thoroughly reviewing the record, we conclude that the board violated R.C. 121.22 by improperly convening in executive session and by deliberating upon issues not raised in the motion to convene, and that the resolution resulted from those nonpublic deliberations. Absent the transfer resolution, which is invalid as a result of the Open Meetings Act violation, Renner lacked authority to enter into the contract with Legacy. Accordingly, the contract between Legacy and the foundation is invalid and unenforceable. Having concluded that the contract between the board and Legacy is invalid and unenforceable as a result of the board's non-compliance with the Open Meetings Act, we need not consider the trial court's other reasons for finding the contract unenforceable.

{¶78} Given our conclusion that no contractual relationship exists between the board and Legacy, Legacy's constitutional impairment of contract claim necessarily fails. Accordingly, Legacy's cross-assignment of error is overruled.

{¶79} For the foregoing reasons, appellants' first, third and fourth assignments of error are sustained, their second assignment of error is moot, and Legacy's conditional

cross-assignment of error is overruled. We affirm the judgment of the Franklin County Court of Common Pleas denying declaratory and injunctive relief to Legacy but reverse the judgment granting declaratory and injunctive relief to appellees and remand these matters to the trial court for further proceedings consistent with this decision.

Judgment affirmed in part, reversed in part, and matters remanded to trial court.

McGRATH, SADLER and TYACK, JJ., concur.

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

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

Plaintiffs,

v.

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

Defendants.

CASE NO. 08 CV 005363

JUDGE FAIS

FINAL APPEALABLE ORDER

TERMINATION NO. 18
BY

ROBERT G. MILLER, JR., et al.

Plaintiffs,

v.

STATE OF OHIO, et al.

Defendants.

FINAL APPEALABLE ORDER

CASE NO. 08 CV 07691

JUDGE FAIS

TERMINATION NO. 18
BY

FINAL JUDGMENT ENTRY

Following trial on the permanent injunction held June 1, 2009, and based on the evidence admitted at trial, the Court readopts and incorporates herein its Findings of Fact and Conclusions of Law in the Order Granting Preliminary Injunction, filed February 10, 2009, and expressly finds that each fact set forth therein is supported by clear and convincing evidence. The Court acknowledges and reserves unto each party all objections to the extent the Court's prior Findings of Fact and Conclusions of Law are different than that party's proposed Findings of Fact and Conclusions of Law filed on July 3, 2008.

FINDINGS OF FACT

In addition to the Court's previous Findings of Fact that are incorporated herein, the Court finds that the following facts have been proven by clear and convincing evidence:

I. The Amended Complaint

224. Plaintiffs Robert G. Miller, Jr. and David Weinmann, in their Amended Complaint filed March 3, 2009, allege that Substitute H.B. 544 and Amended S.B. 192 of the 127th General Assembly not only violate the Contracts Clauses of the United States Constitution, Art. I, § 10, and the Ohio Constitution, Art. II, § 28, but also retroactively impair substantive rights in violation of the Retroactivity Clause of the Ohio Constitution, Art. II, § 28, by purporting to liquidate the Ohio Tobacco Use Prevention and Control Endowment Fund (the "Endowment Fund") and divert those monies to the Jobs Fund for the Stimulus Proposal (as defined in the Court's February 10, 2009 Order).

II. The State's Funding Of The Trust

225. In 2000, the General Assembly appropriated $234,861,033 of tobacco settlement payments to a fund controlled by the Director of the Ohio Department of Health ("ODH") for fiscal year 2001. [State Ex. G, Am. Sub. S.B. 192, § 6] That legislation further states: "The Director of Health shall disburse moneys appropriated in this appropriation item to the Tobacco Use Prevention and Control Endowment Fund created by section 183.08 of the Revised Code to be used by the Tobacco Use Prevention and Control Foundation to carry out its duties." [State Ex. G, Am. Sub. S.B. 192, § 6] In accordance with this legislation, the State in fact disbursed the previously appropriated monies to the Endowment Fund outside the state treasury. [Hearing Tr., Vol. II, at 115-16 (Renner)]

226. The General Assembly and the State plainly intended to create the Endowment Fund (the "Trust") 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 the Ohio Tobacco Use Prevention and Control Foundation (the "Foundation") as "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 (subsequent to, and as distinguished from, the General Assembly's prior appropriations to ODH for tobacco cessation purposes). [State Ex. G, Am. Sub. S.B. 192, § 6] [Hearing Tr., Vol. I, at 73-76 (Crane)] [Hearing Tr., Vol. II, at 12-13 (Renner)]

III. Undisputed Evidence Shows That The State Has Less Drastic Alternatives To Serve The State's Purpose

227. As this Court previously found in its Order Granting a Preliminary Injunction, and in connection with Plaintiffs' claims that H.B. 544 violates the Contracts Clauses of the United States Constitution, Art. I, § 10, and the Ohio Constitution, Art. II, § 28: "The State has reasonable and equally effective alternative means of funding $230 million for the Stimulus Proposal and achieving the stated purposes of the Stimulus Proposal without the need to divert monies from the Endowment Fund. [Hearing Tr., Vol. III, at 81-86 (Proctor)] The State could fund the $230 million portion of the Stimulus Proposal that H.B. 544 seeks to take from the Endowment Fund by the issuance of general obligation bonds – the same method by which Governor Strickland proposed on February 6, 2008 to fund $1.5 billion of the jobs stimulus package – without diverting any monies from the Endowment Fund." [Hearing Tr., Vol. III, at 75-86 (Proctor)] [Pl. Exs. 11, 12, 24]

228. After the preliminary injunction hearing in early June 2008 in this case, another law went into effect that purports to further appropriate the monies that, pursuant to H.B. 544, were to be transferred from the liquidated Endowment Fund to the Jobs Fund. Am. Sub. H.B. 554, effective June 12, 2008, purports to appropriate $150 million over a three-year period from the yet-to-be-funded Jobs Fund to new biomedical and bioproducts programs in Ohio. [6/1/09 Hearing Tr., at 13, 24-25, 29 (Griffin)]

229. Yet, the depletion of the Endowment Fund is not necessary to achieve the goals of the Stimulus Proposal or creating Ohio jobs, whether through the biomedical and bioproducts programs or otherwise. As the Court previously found, diversion of the Endowment Fund monies is not necessary when there is a less drastic alternative to serve the State's goal of creating Ohio jobs. Instead of offering evidence that the State is unable to create Ohio jobs or fund the new biomedical and bioproducts programs unless the Endowment Fund is liquidated, the State's witness, John Griffin, admitted that alternative sources of funding are, in fact, available without the necessity of liquidating the Endowment Fund. Mr. Griffin merely focused his testimony on the importance of creating Ohio jobs through the new biomedical and bioproducts programs, not whether the State has alternative means of creating Ohio jobs or funding those programs without liquidating the Endowment Fund. [6/1/09 Hearing Tr., at 13-14 (Griffin)]

230. The State still does not contest the credible testimony of Allen Proctor, a public finance and budgeting expert, that H.B. 544's depletion of the Endowment Fund is not necessary because there is an equally effective, less drastic alternative to serve the State's goal of creating jobs in Ohio: the State's issuance of general obligation bonds. [Hearing Tr., Vol. III, at 75-86] [Pl. Exs. 11, 12, 24]

231. In fact, the State's witness, Mr. Griffin, conceded at trial that Ohio's new biomedical and bioproducts programs could be funded through the State's issuance of bonds:

> Q: And you are not aware of any constraints that would keep the State of Ohio from issuing bonds to fund Ohio's new biomedical and bioproducts job stimulus programs, are you?
>
> A: There is a five percent cap constitutional on debt from the State that would be one constraint that we obviously would have to deal with.
>
> Q: And these programs could be funded within that cap, couldn't they?
>
> A: Yes.
> [6/1/09 Hearing Tr., at 31-32 (Griffin)]

232. Mr. Griffin also acknowledged that the federal government has now passed job stimulus legislation that dwarfs Ohio's Stimulus Proposal and related legislation. [6/1/09 Hearing Tr., at 32-33 (Griffin)] See American Recovery and Reinvestment Act, Pub. L. No. 111-5, 98 Stat. 1861, 123 Stat. 115 (2009) (the "Federal Stimulus Program"). The State of Ohio is receiving $8,200,000,000 from the Federal Stimulus Program, which will save or create more than 130,000 Ohio jobs. [Pl. Ex. 28] [6/1/09 Hearing Tr., at 33-36 (Griffin)] In addition, substantial other federal stimulus funds are directly available to Ohio companies, including Ohio biomedical and bioproducts programs, for the purpose of creating Ohio jobs. [*Id.*]

233. Mr. Griffin further testified that there are a multitude of alternative funding sources available for biomedical and bioproducts programs in Ohio:

- Ohio's Third Frontier Program has $700 million available for all phases of Ohio biomedical and bioproducts programs. [6/1/09 Hearing Tr., at 29-31 (Griffin)]
- Ohio is receiving $96 million of federal stimulus funds for its energy program, which provides funding for development of bioproducts. [*Id.* at 37-41] [Pl. Exs. 29, 30]
- The Federal Stimulus Program is providing $786.5 million for advanced research and development of biofuels, which are bioproducts, including $480 million for demonstration-scale biorefineries – the same types of biorefineries that Ohio's bioproducts program would be funding. [6/1/09 Hearing Tr., at 41-43 (Griffin)] [Pl.

Ex. 31] These federal stimulus dollars are available to the same Ohio companies that would be applying for funds from the Ohio bioproducts program. [6/1/09 Hearing Tr., at 44 (Griffin)]

- There is another $3.4 billion of federal stimulus funds available for biofuels (bioproducts) programs. [*Id.* at 44-45] [Pl. Ex. 33]

- The Federal Stimulus Program is providing a total of $10.4 billion for biomedical research activities, including two separate grant programs currently providing a combined total of $400 million for biomedical research and development, which is available to the State and Ohio biomedical and bioproducts companies. [6/1/09 Hearing Tr., at 45-46, 71-75 (Griffin)] [Pl. Exs. 35, 36, 37, 38]

- Even without the Federal Stimulus Program, the National Institute of Health and National Science Foundation annually provides over $800 million to Ohio technology companies, including those in the biomedical and bioproducts areas. [6/1/09 Hearing Tr., at 52 (Griffin)]

- The Federal Small Business Innovative Research Program annually provides several hundreds of millions of dollars to Ohio companies, including those in the biomedical and bioproducts areas. [*Id.* at 52-53]

- The Ohio Venture Capital Authority has $150 million of financing available for Ohio technology companies, including biomedical and bioproducts companies. [*Id.* at 53]

- The Ohio Innovative Loan Program provides $20 million each year to Ohio technology companies, including biomedical and bioproducts companies. [*Id.* at 53-54]

- The Ohio Thomas Edison Program provides $16 million of funding each year for Ohio technology companies, including biomedical and bioproducts organizations. [*Id.* at 54]

- The Ohio Entrepreneurial Signature Program has $60 million of funding available for Ohio biomedical and bioproducts companies. [*Id.* at 54-55]

- Ohio's Advanced Energy Job Stimulus Program has $150 million of funding available for advanced energy programs, which overlap with the proposed new Ohio bioproducts program. [*Id.* at 55-56]

- The Ohio Research Commercialization Grant Program has $2 million of funding available each year for Ohio biomedical and bioproducts programs. [*Id.* at 56-57]

- The Federal Farm Bill, the Ohio Department of Development's ("ODOD's") Chapter 166 Loan Program, ODOD's Research and Development Loan Program, combined with local property tax abatements, infrastructure assistance, and Third Frontier

marketing assistance, provide two to three times the amount of funding for Ohio biomedical and bioproducts programs than the amounts those programs were slated to receive from the Endowment Fund – i.e., $300 to $450 million over the next three years. [*Id.* at 57-59] [Pl. Exs. 40, 41]

- The Ohio Technology Investment Tax Credit Program provides $2.5 million of funding each year for Ohio technology companies, including biomedical and bioproducts programs. [*Id.* at 60]

- Private venture capital and equity investors provide an average of $180 million each year for developing Ohio companies, including biomedical and bioproducts companies. [*Id.* at 60-61]

- ODOD's Economic Development Contingency Fund annually has $4 million, which is available for Ohio biomedical and bioproducts programs. [*Id.* at 61]

234. In total, in addition to the State's ability to issue bonds to fund job-creation programs such as the new biomedical and bioproducts programs, the Federal Stimulus Program and other existing government programs provide in excess of $4 billion of funding that is available to biomedical and bioproducts programs in Ohio.

235. Many of these and other state and federal government programs overlap with Ohio's proposed new biomedical and bioproducts programs by providing hundreds of millions of dollars of funding for the same stages of the commercialization process that the new Ohio programs were to be funding. [*Id.* at 62-71] [Pl. Ex. 27, at pg. 2]

IV. Irreparable Harm, Harm To Third Parties, and Public Interest

236. Depletion of the Endowment Fund and discontinuance or reduction in the Ohio tobacco prevention and cessation programs funded by the Endowment Fund would cause irreparable harm to Plaintiffs Miller and Weinmann, who rely on those programs to become and remain tobacco free. [Hearing Tr., Vol. I, at 146-48 (Weinmann)] [Hearing Tr., Vol. II, at 170 (Miller)]

237. Depletion of the Endowment Fund, and discontinuance or reduction of the tobacco prevention and cessation programs funded by the Endowment Fund, would result in a substantial increase in tobacco-related premature death and disease in Ohio, [Hearing Tr., Vol. II, at 176-77, 204-06 (Healton)] [Pl. Ex. 18, Wewers Dep. at 26-27], and result in a substantial increase in medical expense for both Ohioans and the State of Ohio for treatment of tobacco-related disease. [Hearing Tr., Vol. II, at 206-07 (Healton)]

CONCLUSIONS OF LAW

In addition to the Court's previous Conclusions of Law that are incorporated herein, the Court makes the following Conclusions of Law:

V. Standing For Amended Complaint

238. In addition to the Court's prior determinations as to why Plaintiffs Miller and Weinmann have standing to bring this action, they have standing to pursue the claims in their Amended Complaint for another reason. As actual participants in the tobacco cessation programs funded by the Endowment Fund, Plaintiffs Miller and Weinmann are specifically identifiable beneficiaries of the Trust. Thus, they have standing under the Ohio Trust Code to bring this action to prevent the State's attempt to terminate the Trust. R.C. 5804.10(B), read in conjunction with R.C. 5804.13, expressly states that a "beneficiary may commence a proceeding to ... disapprove a proposed ... termination" of a charitable trust.

VI. Permanent Injunction Standards

239. "Injunctive relief is warranted when a statute is unconstitutional, enforcement will infringe upon constitutional rights and cause irreparable harm, and there is no adequate remedy at law." *United Auto Workers, Local Union 1112 v. Philomena*, 121 Ohio App. 3d 760, 781

(10th Dist. 1998). See also *Franklin County Dist. Board of Health v. Paxson*, 152 Ohio App. 3d 193, ¶ 25 (10th Dist. 2003).

240. A trial court's issuance of a permanent injunction is particularly warranted where, as here, the moving party not only prevails on the merits under substantive law and shows an impending threat of irreparable harm, but also shows that (i) the harm outweighs any injury that the injunction may inflict on the other party, and (ii) the injunction would serve the public interest. See *Paxson*, 152 Ohio App. 3d at ¶ 25 (injunctive relief involves balancing of equities).

VII. Plaintiffs Prevail On The Merits

241. Plaintiffs Miller and Weinmann prevail on the merits of the substantive law because they have established, by clear and convincing evidence, that H.B. 544 not only violates the Contracts Clauses of the United States Constitution, Art. I, § 10, and the Ohio Constitution, Art. II, § 28, but also violates the Retroactivity Clause of the Ohio Constitution, Article II, § 28, by retrospectively impairing Plaintiffs' pre-existing substantive rights, imposing new substantive burdens, and disabling the Trust and its tobacco prevention and cessation programs.

242. While the State, under the Contracts Clauses of the federal and state Constitutions, may impair a contractual obligation if it is necessary to serve an important State purpose, there is no such necessity exception for the enactment of retroactive laws. The Retroactivity Clause of the Ohio Constitution, Article II, § 28, states: "The general assembly shall have no power to pass retroactive laws...." A new statute that expressly applies retroactively is unconstitutional if it impairs or affects substantive, as opposed to merely remedial, rights. *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St. 3d 100, 106-07 (1988). Accord: *Smith v. Smith*, 109 Ohio St. 3d 285, ¶ 6 (2006) ("[a] statute that applies retroactively and that is substantive violates Section 28, Article II of the Ohio Constitution").

243. An unconstitutional substantive law is "[e]very statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past...." *Van Fossen*, 36 Ohio St. 3d at 106, quoting *Cincinnati v. Seasongood*, 46 Ohio St. 296, 303 (1889). Accord: *Smith*, 109 Ohio St. 3d at ¶ 6 (a statute is substantive where it "impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction"); *State v. Walls*, 96 Ohio St. 3d 437, at ¶ 9 (2002) (it is "settled in Ohio that a statute runs afoul of [the prohibition in Section 28, Article II of the Ohio Constitution against retroactive laws] if it takes away or impairs vested rights acquired under existing laws").

244. Conversely, "remedial laws are those affecting only the remedy provided," such as "laws which merely substitute a new or more appropriate remedy for the enforcement of an existing right." *Van Fossen*, 36 Ohio St. 3d at 107.

245. This Court undertakes review of H.B. 544 mindful of the presumption of the constitutionality of legislative enactments. Yet, there can be no reasonable doubt that H.B. 544 violates the Retroactivity Clause of the Ohio Constitution, Art. II, § 28.

246. H.B. 544, on its face, applies retrospectively to the pre-existing Trust. Section 4 of H.B. 544 expressly directs the Treasurer to liquidate the entire Endowment Fund, which has existed for more than eight years:

> "Notwithstanding any provision of law to the contrary, on the effective date of this section, the Treasurer of the State shall liquidate the Tobacco Use Prevention and Control Foundation Endowment Fund created by section 183.08 of the Revised Code in a prudent manner. The Treasurer of State shall deposit into the state treasury to the credit of the Tobacco Use Prevention Fund (Fund 5BX0), which is hereby created, the lesser of $40 million or 14.8 per cent of the proceeds from the liquidation. The Treasurer of State shall deposit the remaining proceeds from liquidation

into the state treasury to the credit of the Jobs Fund (Fund 5Z30), which is hereby created."

247. Thus, H.B. 544 expressly applies restrospectively, just like the statute in *Van Fossen*, where the Supreme Court held that a new statute "clearly expressed legislative intent" that it be applied retrospectively because it applied to cases existing on its effective date "notwithstanding any provision of any prior statute or rule of law." 36 Ohio St. 3d at 106.

248. H.B. 544 is also clearly substantive, not remedial. By liquidating the Endowment Fund and attempting to divert those monies to the Jobs Fund, H.B. 544 impairs the substantive and vested trust rights and interests of Plaintiffs Miller and Weinmann and the other actual Ohio beneficiaries of the Trust and the Trust corpus, the Endowment Fund. H.B. 544 also substantively imposes new burdens on – indeed, disables – the Trust, the tobacco prevention and cessation programs it funds, and the Ohio tobacco users participating in those programs, including the individual Plaintiffs. *Bank One Trust Co., N.A. v. Reynolds*, 173 Ohio App. 3d 1, ¶¶ 19-27 (2007) (holding that new statute, which retroactively impaired a beneficiary's trust interests, violated Art. II, § 28 of the Ohio Constitution because the statute imposed a new burden on substantive rights).

249. The Ohio Supreme Court holds that "[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, whether actual enjoyment by the beneficiaries of the charitable trust is present or [in the] future." *Brown v. Buyer's Corp.*, 35 Ohio St. 2d 191, 196 (1973). When such a duty by the trustee is created, the right of use and enjoyment of the trust for charitable purposes becomes "fixed and irrevocable." *Id.*

250. The right of use and enjoyment of the Endowment Fund for purposes of reducing tobacco use by Ohioans became vested, and thus fixed and irrevocable, more than eight years ago, when the State funded the Trust and imposed a fiduciary duty upon the Ohio Tobacco Use Prevention and Control Foundation, as trustee, to carry out and fund tobacco use prevention and cessation programs and related research in Ohio. R.C. 183.07 and 183.08.

251. Plaintiffs Miller and Weinmann therefore have prevailed on the merits in establishing that H.B. 544 retroactively impairs substantive and vested trust rights in violation of the Ohio Constitution, Art. II, § 28.

252. The prohibition under Ohio Constitution, Art. II, § 28 against retroactive, substantive laws is absolute. The General Assembly cannot pass retroactive, substantive laws even if there is purportedly an important public purpose for doing so. The State cites no law to the contrary.

253. To the extent that Amended S.B. 192, prior to its repeal on May 6, 2008, purported to liquidate the Endowment Fund and divert its monies elsewhere, Amended S.B. 192 is also unconstitutional and of no legal effect for the same reasons.

VIII. Irreparable Harm

254. There is clear and convincing evidence that, absent permanent injunctive relief, Plaintiffs Miller and Weinmann, as well as the other Trust beneficiaries who actually were participating in the tobacco prevention and cessation programs funded by the Endowment Fund, will immediately suffer irreparable harm resulting from depletion of the Endowment Fund and the discontinuance or reduction of the programs on which they rely to become and remain tobacco free. These Plaintiffs have no adequate remedy at law.

IX. No Harm To The State, Harm To Third Parties, And Public Interest

255. The harm that would be suffered by the individual Plaintiffs and the other, third-party Trust beneficiaries if permanent injunctive relief is not granted far outweighs any harm to the State if injunctive relief is granted. Enjoining the enforcement of an unconstitutional statute does not harm the State. Moreover, no harm will result from granting injunctive relief because the State has other, equally effective alternative means of achieving its stated purpose of creating Ohio jobs without depleting the Endowment Fund.

256. Granting permanent injunctive relief actually benefits the State and the public by permitting the Endowment Fund monies to continue to be used to carry out life-saving tobacco prevention and cessation programs in Ohio, which also reduces the State's cost of providing health care to its citizens.

X. Plaintiffs Miller And Weinmann Are Entitled To Final Declaratory And Injunctive Relief

257. Based on the Findings of Fact and Conclusions of Law set forth herein, as well as the Court's readopted Findings of Fact and Conclusions of Law in its February 10, 2009 Order Granting Preliminary Injunction, Plaintiffs Miller and Weinmann are entitled to a final judgment declaring that those portions of H.B. 544 and Am. S.B. 192 that purport to (i) liquidate or transfer the monies from the Endowment Fund or (ii) terminate the Trust or revoke its terms, violate the Retroactivity Clause of the Ohio Constitution, Art. II § 28, and thus are void *ab initio*, invalid, and unenforceable.

258. Based on the Findings of Fact and Conclusions of Law set forth herein, as well as the Court's readopted Findings of Fact and Conclusions of Law in its February 10, 2009 Order Granting Preliminary Injunction, Plaintiffs Miller and Weinmann are entitled to a final judgment declaring that those portions of H.B. 544 and Am. S.B. 192 that purport to (i) liquidate or

transfer the monies from the Endowment Fund or (ii) terminate the Trust or revoke its terms, also violate the Contracts Clauses of the United States Constitution, Art. I, § 10, and the Ohio Constitution, Art. II, § 28, and thus are void *ab initio*, invalid, and unenforceable.

259. For all of these reasons, Plaintiffs Miller and Weinmann are entitled to a permanent injunction, protecting the Endowment Fund and enjoining all Defendants and their agents from enforcing, implementing, or otherwise acting on the invalid provisions of H.B. 544 and Am. S.B. 192.

XI. Order Of The Court

For the reasons stated in the Court's Findings of Fact and Conclusions of Law, FINAL JUDGMENT is hereby entered as follows:

(A) Judgment is entered against Intervening Plaintiff American Legacy Foundation ("Legacy") and in favor of Defendants State of Ohio, Attorney General of the State of Ohio, Treasurer of the State of Ohio, Ohio Department of Health ("ODH") and its Director Alvin D. Jackson, and Cross-Claim Defendant Tobacco Use Prevention and Control Foundation and Board of Trustees (the "Foundation"), on Legacy's claims for declaratory and injunctive relief, because the $190 million contract between Legacy and the Foundation, dated April 8, 2008, is not valid or enforceable.

(B) Judgment is entered in favor of Plaintiffs Robert G. Miller, Jr. and David W. Weinmann and against Defendants State of Ohio, Ohio Attorney General, Ohio Treasurer of State, and ODH and its Director Alvin D. Jackson, on the claims of Plaintiffs Miller and Weinmann for declaratory and injunctive relief as follows:

(a) Those portions of Substitute H.B. 544 and Amended S.B. 192 of the 127th General Assembly that purport to (i) liquidate or transfer the monies from the Ohio Tobacco Use

Prevention and Control Endowment Fund (the "Endowment Fund" or "Trust"), or (ii) terminate the Trust or revoke its terms, clearly violate the Retroactivity Clause of the Ohio Constitution, Art. II § 28, and the Contracts Clauses of the United States Constitution, Art. I, § 10, and the Ohio Constitution, Art. II, § 28, and, thus, are void *ab initio*, invalid, and unenforceable.

(b) Defendants State of Ohio, the Treasurer of the State of Ohio, the Attorney General of the State of Ohio, ODH and its Director Alvin D. Jackson, and each of their successors in office, as well as all other officials, agents and representatives of the State of Ohio, and anyone acting in concert with them or on their behalf, are hereby permanently enjoined from: (i) enforcing, implementing, or otherwise acting on any provision of H.B. 544 or Am. S.B. 192 relating to the Endowment Fund or purporting to terminate the Trust or revoke its terms; (ii) terminating or seeking to terminate the Trust; and (iii) using, expending, disbursing, appropriating, transferring, liquidating, diverting, or otherwise removing the monies and other assets of the Endowment Fund for any purpose except as set forth in subparagraph 2(c) below. All actions, orders, directives, instructions or other state actions that purport to enforce or take any action relating to, or in reliance on, those invalid provisions of H.B. 544 and Am. S.B. 192, are hereby rendered void, ineffective and permanently enjoined.

(c) All assets, investments, funds, proceeds, monies or other amounts that are in the Endowment Fund shall remain in the Endowment Fund, which shall be in the custody of the Treasurer of the State of Ohio but "shall not be a part of the state treasury," and shall not be subject to control, appropriation, or reappropriation by the General Assembly; provided, however, that, as done previously in this case, any party, pending appeal of this judgment or thereafter, may apply to the Court for use or disbursement of monies in the Endowment Fund solely for the purpose of reducing tobacco use by Ohioans by carrying out, or providing funding

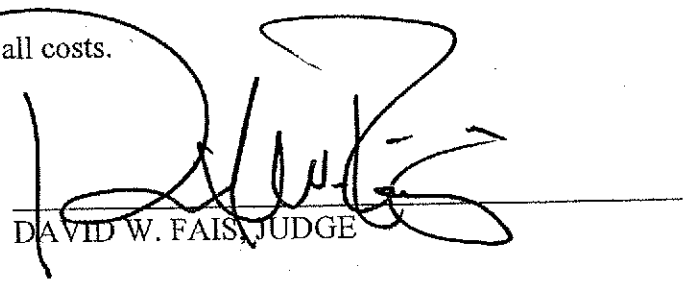
for private or public agencies to carry out, research and programs related to tobacco use prevention and cessation, in accordance with the original terms of the Trust. No assets, investments, funds, proceeds, monies or other amounts that are in or derived from the Endowment Fund shall be used, expended, disbursed, appropriated, transferred, liquidated, diverted, or otherwise removed for any other purpose.

(C) These consolidated actions are hereby terminated, except that this Court retains continuing jurisdiction to enforce this order, protect the assets of the Trust and oversee its administration.

(D) All objections and rights of appeal are reserved to each of the parties to the extent that this final judgment is inconsistent with each respective party's proposed Findings of Fact and Conclusions of Law previously filed in this case.

(E) The parties shall equally pay all costs.

IT IS SO ORDERED.



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IN THE COURT OF COMMON PLEAS FRANKLIN COUNTY, OHIO
CIVIL DIVISION

BOARD OF TRUSTEES OF THE TOBACCO USE PREVENTION AND CONTROL FOUNDATION, et al.,	:	CASE NO. 08 CV 005363
Plaintiffs,	:	JUDGE FAIS
v.	:	
KEVIN L. BOYCE, TREASURER OF STATE, et al.,	:	
Defendants.	:	

ROBERT G. MILLER, JR., et al.	:	
Plaintiffs,	:	Case No. 08 CV 07691
v.	:	JUDGE FAIS
STATE OF OHIO, et al.	:	
Defendants.	:	

ORDER GRANTING PRELIMINARY INJUNCTION

FINDINGS OF FACT

I. Introduction

1. Intervening Plaintiff the American Legacy Foundation ("Legacy") and Plaintiffs Robert G. Miller, Jr. and David Weinmann (collectively, "Plaintiffs") seek a preliminary injunction enjoining Defendant Kevin L. Boyce, Treasurer of State, Defendant Alvin D. Jackson, Director and Ohio Department of Health, and Intervening Defendants State of Ohio and Ohio Attorney General (collectively, the "State Defendants") from acting under the provisions of H.B. 544, and its predecessor, Amended S.B. 192, to transfer monies from the Endowment Fund

of the Ohio Tobacco Use Prevention and Control Foundation ("Foundation") to the "Jobs Fund." Legacy asserts it has a binding contract with the Foundation requiring the transfer of $190 million of the Endowment Fund to it and that the provisions of H.B. 544 mandating transfer of the same monies to the Jobs Fund constitutes an unconstitutional impairment of its contract rights in violation of Art. I, § 10 of the United States Constitution and Art. II, § 28 of the Ohio Constitution. Additionally, Legacy, Miller and Weinmann assert that the Endowment Fund is an irrevocable trust established by the General Assembly for the benefit of Ohio smokers who seek and need smoking cessation assistance and that H.B. 544 unconstitutionally impairs the vested rights of those individuals who are the beneficiaries of the Endowment Fund, in violation of the same constitutional prohibitions.

2. The State Defendants argue that Amended S.B. 192 has been repealed and has no legal effect and that H.B. 544 preserves, and does not impermissibly impair, Legacy's contract rights. They also assert a broad range of challenges to Legacy's contract, claiming it is invalid under the Ohio Open Meetings Act, R.C. 121.22(H), and that even if it is not, it does not constitute an enforceable contract. As to the trust issue, the State Defendants dispute the status of the Endowment Fund as a trust and challenge Miller's and Weinmann's standing to bring a claim.

II. The Parties

3. Legacy is a nonprofit corporation headquartered in Washington, D.C. Legacy was founded in 1999 pursuant to the 1998 Master Settlement Agreement between the tobacco industry and 46 states, including Ohio. [Hearing Tr., Vol. II, at 173 (Healton)] Legacy was incorporated by the National Association of Attorneys General. Its eleven-member Board of

Directors consists of two state governors, two state attorneys general, two state legislators, and five medical and public health experts. [Hearing Tr., Vol. II, at 173-76 (Healton)]

4. Legacy's mission is to build a world where young people reject tobacco and anyone can quit. [Hearing Tr., Vol. II, at 174 (Healton)] Legacy is a national leader in funding and carrying out research and programs for tobacco control, prevention, and cessation. [Renner Dep. at 195-96] [Hearing Tr., Vol. I, at 96-98 (Crane)] [Hearing Tr., Vol. II, at 106-07 (Renner)]

5. Plaintiff Robert G. Miller, Jr. resides in Toledo, Ohio. Mr. Miller, who is now age 51, started smoking when he was 14 and has struggled to quit smoking since he was 28 years old. Last year, he joined a tobacco prevention and cessation program funded by the Foundation, which enabled him to quit smoking. After Mr. Miller stopped participating in the program, he fell back into his prior habit of smoking two packs of cigarettes each day this past winter. Mr. Miller therefore rejoined the tobacco cessation program this spring and was again able to quit smoking. [Hearing Tr., Vol. II, at 160-70 (Miller)]

6. Plaintiff David Weinmann resides in Cleveland, Ohio. Mr. Weinmann started smoking when he was 13 years old, became addicted, and was diagnosed with tongue cancer at age 29. The cancer rapidly spread throughout his neck. Between 85% and 90% of these cancers are caused by smoking. Mr. Weinmann joined a tobacco cessation program funded by the Foundation in April 2007. The program helped save his life by helping him quit smoking. Mr. Weinmann still struggles with wanting to smoke and seeks the continuation of tobacco cessation programs in Ohio to help him stay tobacco free. [Hearing Tr., Vol. I, at 141-48 (Weinmann)]

7. Plaintiff Board of Trustees of the Foundation commenced this action on April 9, 2008, challenging the constitutionality of Amended S.B. 192, which was passed on April 8, 2008

and which threatened to liquidate the Endowment Fund. The Foundation's Board of Trustees is also a Cross-claim Defendant as to Legacy's Complaint.

8. Defendant Kevin L. Boyce is sued by all Plaintiffs as a Defendant in his official capacity as the Ohio Treasurer of State (the "Treasurer").

9. The Ohio Attorney General is an Intervening Defendant and is sued by all Plaintiffs in his official capacity (the "Attorney General").

10. Alvin D. Jackson, M.D. is the Director of the Ohio Department of Health ("ODH"), and he, in his official capacity, and ODH are sued as Defendants in this case.

III. The History Of The Ohio Tobacco Use Prevention And Control Endowment Fund

11. In 1998, the State of Ohio and 45 other states entered into a landmark settlement with the tobacco industry to provide compensation for the states' tobacco-related health care expenditures. The terms of the settlement were incorporated into the 1998 Master Settlement Agreement. [Hearing Tr., Vol. II, at 10-11 (Renner)]

12. In 2000, the Ohio General Assembly passed legislation setting forth how Ohio would use its portion of the tobacco settlement payments. This legislation was codified as R.C. Chapter 183, which created the Ohio Tobacco Use Prevention and Control Foundation (the "Foundation"). [Hearing Tr., Vol. II, at 11-12 (Renner)]

13. R.C. 183.07 required the Foundation to prepare a plan to reduce tobacco use by Ohioans and provided that the Foundation "shall carry out, or provide funding for private or public agencies to carry out, research and programs related to tobacco use prevention and cessation."

14. To fund these efforts, R.C. 183.08 created the Endowment Fund and appointed the Foundation as "the trustee of the endowment fund." R.C. 183.08 specifically provides that

"[t]he endowment fund shall be used by the foundation to carry out its duties" and that the Endowment Fund "shall be in the custody of the treasurer of state but shall not be a part of the state treasury."

15. Control of the Foundation was vested in its Board of Trustees (the "Trustees" or "Board of Trustees"), the twenty-three members of which are appointed pursuant to R.C. 183.04. The Trustees understood that they owed fiduciary duties as trustees to protect the Endowment Fund for its intended purposes. [Hearing Tr., Vol. III, at 32-33, 41, 44 (Richards)] [Hearing Tr., Vol. II, at 50-52 (Renner)] [Hearing Tr., Vol. I, at 175-76 (Francis)] [Hearing Tr., Vol. I, at 93 (Crane)] [Jagers Dep. at 23-24]

16. Michael Renner was the Foundation's first and only Executive Director – from January 2002 until May 6, 2008, when H.B. 544 was passed. Mr. Renner has been a licensed attorney in Ohio since 1973, was previously a litigation partner with the Columbus law firm of Bricker and Eckler for seventeen years, and served as Chief Legal Counsel for Ohio Attorney General Betty Montgomery from 1995 until he became the Foundation's Executive Director in 2002. [Hearing Tr., Vol. II, at 6-10 (Renner)]

17. Given his background, Mr. Renner was frequently asked legal questions by the Foundation's Trustees and staff. Mr. Renner evaluated legal issues presented to him and provided responses when he believed he was competent to do so. [Hearing Tr., Vol. II, at 231-32 (Renner)]

18. The Endowment Fund consists of tobacco industry settlement payments that were appropriated to it by the General Assembly, as well as any grants and private donations received by the Foundation prior to 2002, which were deposited in, and commingled with the

corpus of, the Endowment Fund. R.C. 183.08(A). [Renner Dep. at 43-44] [Hearing Tr., Vol. II, at 14 (Renner)]

19. R.C. 183.08(A) provided that "[d]isbursements from the [endowment] fund shall be paid by the treasurer of state only upon instruments duly authorized by the board of trustees of the foundation."

20. R.C. 183.07 provided that the Foundation "shall prepare a plan to reduce tobacco use by Ohioans, with emphasis on reducing the use of tobacco by youth, minority and regional populations, pregnant women, and others who may be disproportionately affected by the use of tobacco."

21. Through the enactment of R.C. Chapter 183, and specifically R.C. 183.07 and 183.08, and by transferring monies into the Endowment Fund outside the state treasury, the General Assembly plainly evinced an intent to create a trust (the "Trust"). Those statutes expressly create a "trustee" (the Foundation) and a trust corpus (the Endowment Fund), and identify the beneficiaries of the trust (Ohio's youth and tobacco users). [Hearing Tr., Vol. II, at 12-13 (Renner)] [Hearing Tr., Vol. I, at 73-76 (Crane)]

22. The General Assembly, when it created and funded the Trust, did not reserve the right to revoke the Trust.

23. On or about April 4, 2008, the Endowment Fund had assets of approximately $264 million. [Hearing Tr., Vol.II, at 13-14 (Renner)]

IV. The State's Announced Plan To Use The Endowment Fund For Purposes Unrelated To Tobacco Prevention (the Stimulus/Jobs Fund) and the Action Taken by the Foundation and Members of the Board of Trustees Before the April 4, 2008 Board Of Trustees Meeting

24. On April 2, 2008, Governor Ted Strickland and leaders of the Ohio General Assembly publicly announced that they had agreed on a bipartisan compromise to fund a $1.57 billion economic stimulus package (the "Stimulus Proposal") in an effort to create jobs in Ohio. The announcement included the stated intent to reallocate $230 million from the Foundation's $264 million Endowment Fund to the Stimulus Proposal. [Hearing Tr., Vol. I, at 77-78 (Crane)] [Hearing Tr., Vol. II, at 15 (Renner)]

25. The announced plan to reallocate the monies in the Endowment Fund gave rise to serious legal concerns by the Foundation and its Trustees, as the Trustees believed they had a fiduciary responsibility for assuring the use of the Endowment Fund to help Ohioans quit smoking, pursuant to R.C. 183.07-.08 . [Hearing Tr., Vol. II, at 15 (Renner)] [Hearing Tr., Vol. III. at 33-35 (Richards)] [Renner Dep. at 45] [Richards Dep. at 73-74]

26. Following the announced, intended plan to reallocate the monies in the Endowment Fund to other purposes, the Trustees believed that litigation with the State over use of the Endowment Fund monies was imminent. [Crane Dep. at 16-17] [Renner Dep. at 63] [Walker Dep. at 66-67] [Hearing Tr., Vol. I, at 79, 81-84 (Crane)] Thus, the Trustees began to take immediate action.

27. The Board of Trustees of the Foundation ("the Board") had a regularly scheduled meeting set for April 4, 2008.

28. After the announcement of the bipartisan agreement on funding for the Stimulus Proposal on April 2, 2008, and in view of the competing claims to the monies in the Endowment Fund arising therefrom, Mr. Renner, on or about April 2, 2008, left a voicemail message with Ms. Susan Walker, the Assistant Attorney General with responsibility for representing the Foundation, requesting legal advice concerning legal issues raised by the Stimulus Proposal.

[Hearing, Tr., Vol. II, at 15-16 (Renner)] In his voicemail message, Mr. Renner described the legal questions at issue. [Hearing Tr., Vol. II, at 16-21, 26-28 (Renner)] [Renner Dep. at 58, 197-203, 205] [Walker Dep. at 44]

29. Because of concerns regarding the Attorney General's dual representation of parties with potentially conflicting claims to the monies in the Endowment Fund, Mr. Renner, in his April 2, 2008 voicemail message to Ms. Walker, also requested the Attorney General to appoint special outside legal counsel for the Foundation. [Hearing Tr., Vol. II, at 21-22 (Renner)] [Walker Dep. at 17-19, 34-37]

30. Upon learning of the plan to use funds from the Foundation to fund a portion of the bipartisan economic stimulus package, Executive Director Michael Renner sent an e-mail to all Board members on April 2, 2008 at approximately 3:01 p.m. [Defendant's Exhibit K]

31. On Thursday, April 3, 2008, Ms. Brit Strottman, an Assistant Attorney General in the Tobacco Enforcement Section of the Attorney General's Office, left a voicemail message with Mr. Renner, stating that the Attorney General's office had received Mr. Renner's April 2 message and that Attorney General Marc Dann was having a "high-level meeting" that same day to discuss the issues raised by Mr. Renner. [Hearing Tr., Vol. II, at 22-24 (Renner)] Ms. Strottman indicated that a lawyer in the Attorney General's office would get back to him before the Board of Trustees' meeting on April 4. She also requested Mr. Renner to set forth the Foundation's requests for legal advice in writing. [Hearing Tr., Vol. II, at 24-26 (Renner)]

32. As requested, Mr. Renner prepared a letter to Attorney General Dann, describing the issues as to which the Foundation and its Trustees were seeking legal advice. [Hearing Tr., Vol. II, at 26-31 (Renner)] Because he was unable to deliver the letter earlier, Mr.

Renner intended to hand deliver the letter to an Assistant Attorney General at the Board of Trustees' meeting the next day, on April 4. [Hearing Tr., Vol. II, at 31 (Renner)]

33. Board member Dr. Robert Crane spoke with most of the members of the Board and with Executive Director Michael Renner prior to the April 4, 2008 Board meeting about having an executive session at the meeting. [Hearing Tr. Vol. I, p. 118-119 (Crane)]

34. During these conversations, Dr. Crane suggested, and the parties to the conversations were inclined to discuss, what the nature of the Foundation was, its legal status, and the effect that a subsequent legislative action and/or legal action might have on the Board's mission and fiduciary responsibilities. [Hearing Tr., Vol. I, p. 121-122 (Crane)]

35. When Michael Renner spoke with Dr. Crane on the morning of the April 4, 2008 meeting, he believed that Dr. Crane was considering a proposal to transfer money out of the Endowment Fund and that said proposal would be put forward at the board meeting that day. [Defendant's Ex. X, Renner Dep., p 179]

36. Marie Collart, Susan Jagers, and Mary Ellen Wewers all spoke with Dr. Crane prior to the April 4, 2008 meeting. Mr. Renner also received a phone call from Dr. Crane on the morning of the April 4, 2008 meeting. [Hearing Tr., Vol. III, p. 127 (Collart); Defendant's Ex. U, Jagers Dep., p. 44-45; Defendant's Ex. T, Wewers Dep., p. 33]

37. Ms. Collart testified that Dr. Crane asked her whether she would support a possible proposal that could be discussed in the executive session the next day, and she told him she would not support it. [Hearing Tr., Vol., III, p. 127-128 (Collart)]

38. Ms. Jagers testified that she spoke to Dr. Crane regarding the future of the Foundation and ensuring that the funds would be used for tobacco prevention and cessation efforts in Ohio. They may have talked about the entities that might receive the endowment

funds, specifically Legacy. They also discussed the need for quick action. [Defendant's Ex. U, Jagers Dep., p. 47]

38. Ms. Jagers also spoke with Board members Larry McAllister, James Sandman, and Stephen Francis before the April 4, 2008 meeting. She and Mr. McAllister discussed Governor Strickland's proposal and came up with a plan so that the funds could still be used for tobacco prevention and cessation. They also generally discussed the economic stimulus package. [Defendant's Ex. U, Jagers Dep., pp. 52, 55, 56, 58]

39. Ms. Jagers spoke with both Mr. Sandman and Mr. Francis regarding protecting the endowment fund for the use of tobacco control in Ohio. [Defendant's Ex. U, Jagers Dep., pp. 52, 55, 56, 58]

40. Ms. Wewers testified that she talked to Dr. Crane before the April 4, 2008 meeting and they discussed a resolution that he intended to bring up at the Board meeting the next day. She also testified that he had mentioned it to other board members. [Defendant's Ex. T, Wewers Dep., pp. 35-36]

V. The April 4, 2008 Board Of Trustees Meeting

41. On April 4, 2008, the Board of Trustees convened its regularly scheduled, properly noticed meeting. [Hearing Tr., Vol. I, at 155 (Francis)] [Hearing Tr., Vol. I, at 81-82 (Crane)] A quorum of the Trustees was present. [Pl. Ex. 1, 4/4/08 Board Minutes]

42. No lawyer from the Attorney General's office attended the April 4, 2008 Board meeting. [Hearing Tr., Vol. II, at 40 (Renner)] [Hearing Tr., Vol. I, at 82 (Crane)]

43. Mr. Renner was surprised that no Assistant Attorney General attended the April 4 Board meeting. [Hearing Tr., Vol. II, at 40 (Renner)] [Renner Dep. at 208] Even if Ms. Walker was not able to attend, as she had previously informed him she would not be able to attend, Mr.

Renner fully expected another lawyer from the Attorney General's office to attend the Board meeting, as had occurred on "multiple occasions in the past." [Hearing Tr., Vol. II, at 246-47, 260 (Renner)] [Jagers Dep. at 75-76] It was routine for a lawyer from the Attorney General's office to attend the meetings of the Foundation's Board of Trustees, particularly when there was a legal question to be discussed. [Hearing Tr., Vol. III, at 45-47 (Richards)] [Hearing Tr., Vol. I, at 82 (Crane)] [Jagers Dep. at 74-76]

44. The Trustees themselves "had concerns as to why no lawyer from, or anyone appointed by, the Attorney General's office attended the April 4 Board meeting." [Hearing Tr., Vol. I, at 179 (Francis)] Several Trustees believed that the Attorney General had abandoned them at the most critical time in the Foundation's history, leaving the Trustees and Mr. Renner to "fend for themselves" regarding the dispute about which the Foundation was seeking legal advice from the Attorney General. [Hearing Tr., Vol. I, at 82-84, 89 (Crane)] [Jagers Dep. at 16-19] [Francis Dep. at 92] [Crane Dep. at 102-03]

45. However, when asked the following question: "When it became clear to you that nobody from the Attorney General's office was arriving, did you make any phone calls to try to get somebody there from the AG's office?", Mr. Renner responded that he did not. [Defendant's Exhibit X; Renner deposition, p. 222]

46. When no Assistant Attorney General appeared at the April 4, 2008 Board meeting, no one attempted to find an Assistant Attorney General to attend during the course of the meeting. Additionally, no one phoned the Attorney General's office on April 4, 2008 to request that an Assistant Attorney General attend the meeting. [Hearing Tr., Vol. III, p.129-130 (Collart); Defendant's Exhibit W, Renner depo, p. 130; 222; Defendant's Exhibit S2, Stafford deposition, p. 39; Defendant's Exhibit V, Rummel depo, p. 24]

47. The Attorney General's office, prior to the April 4 meeting, did not provide a substantive response to the legal questions to which the Foundation had orally requested legal advice on April 2, nor did it appoint special counsel for the Foundation. [Hearing Tr., Vol. II, at 19-20, 40-42, 63-65 (Renner)] [Renner Dep. at 204, 210-11]

48. The Minutes reflect that in the open session of the April 4 Board meeting, "Dr. Rummel explained to Board members there were legal issues related to the recent events surrounding the Foundation's Endowment Fund that needed to be discussed in Executive Session." [Defendant's Ex. 1, p. 1]

49. Trustee Robert Crane then moved to go immediately into Executive Session to discuss confidential legal matters concerning this legal "dispute" with the General Assembly and Governor over control of the Endowment Fund. [Hearing Tr., Vol. I, at 86-88 (Crane)] [Crane Dep. at 22-23] [Hearing Tr., Vol. II, at 42-43, 62-63 (Renner) ("imminent" "litigation atmosphere"] [Jagers Dep. at 25-26] [Pl. Ex. 1, pg. 2]

50. The motion was seconded by Dr. Letson and passed with a roll call with all members voting yes." [Defendant's Ex. 1, p. 12]

51. Executive Director Michael Renner testified that the Minutes are an accurate summary in all respects of what happened at the Board meetings, and Mr. Rick Richards agreed that the Minutes accurately reflect the events as he recalls them. Ms. Anita Jones, the person who kept the Minutes, testified at the time of her deposition, that she recalled Dr. Crane using the words "to consider confidential legal matters." [Defendant's Ex. X, Renner Dep., p. 143; Hearing Tr., Vol. III, p. 51 (Richards); Hearing Tr., Vol. III, p. 122 (Jones)]

52. The Executive Session lasted from 9:15 a.m. to 11:30 a.m. [Defendant's Exhibit A, at 1]

53. The description in the Minutes of the Board's April 4, 2008 meeting is merely a summary, not a word-for-word description, of what Chairman Rummel and Dr. Crane stated as the reasons for going into executive session. [Hearing Tr., Vol. III, at 117-19 (Jones)] [Crane Dep. at 22] [Hearing Tr. at 84, 124 (Crane)].

54. After the motion by Dr. Crane, the Trustees took a roll call vote and unanimously approved going into executive session. [Pl. Ex. 1, pg. 2] [Hearing Tr., Vol. I, at 88 (Crane)]

55. During the executive session, in the absence of a lawyer from the Attorney General's office, the Trustees sought and received legal advice from Mr. Renner, as well as from three Trustees who are licensed attorneys in Ohio: Susan Jagers, Stephen Francis, and Rick Richards. [Hearing Tr., Vol. II, at 48-54 (Renner)] [Hearing Tr., Vol. I, at 177-78 (Francis)] [Hearing Tr., Vol. I, at 89-90, 112 (Crane)] [Hearing Tr., Vol. III, at 43-44, 62-63 (Richards)] [Crane Dep. at 102-03] [Jagers Dep. at 18-21, 71-72] [Renner Dep. at 64-69] [Richards Dep. at 99-100] The Trustees and Mr. Renner discussed the same legal issues about which Mr. Renner was seeking legal advice from the Attorney General's office when he called on April 2, 2008. [Hearing Tr., Vol. I, at 177 (Francis)] [Hearing Tr., Vol. II, at 18-19 (Renner)]

56. Throughout the preliminary injunction hearing in this case, the legal counsel appointed by the Attorney General to represent the Foundation for purposes of the preliminary injunction hearing, as well as one or more of the testifying Trustees, asserted that the discussions during the April 4 executive session between the Trustees and Executive Director Renner, a licensed Ohio attorney, were subject to the attorney-client privilege. [Hearing Tr., Vol. II, at 44-45, 47, 54-55, 57-58 (McGann objections)] [Hearing Tr., Vol. I, at 88-89, 112 (Crane)] During portions of the hearing, the Court preliminarily found that an attorney-client "privilege did attach" during the executive session, and made rulings on objections on that basis, but also

determined "the privilege was waived" to the extent the Trustees, at later depositions in this action and without objection by their then-appointed special legal counsel, testified about the substance of their communications with Mr. Renner during the executive session. [Hearing Tr., Vol. III, at 92-93]

57. The legal issues the Trustees and Mr. Renner discussed during the executive session included:

- Whether the Trustees or the General Assembly had legal authority over the monies in the Endowment Fund given the provision in R.C. 183.08 stating that the Endowment Fund "shall be in the custody of the treasurer of state but shall not be part of the state treasury." [Hearing Tr., Vol. II, at 49-52 (Renner)] [Jagers Dep. at 20] [Rummel Dep. at 70-71] [Francis Dep. at 30-31] [Hearing Tr., Vol. I, at 177-78 (Francis)] [Hearing Tr., Vol. I, at 92 (Crane)]

- Whether the Endowment Fund is in fact a trust fund for the benefit of Ohio smokers. [Hearing Tr., Vol. II, at 50-51 (Renner)]

- Whether to transfer money ($190 million) from the Endowment Fund to an outside entity. [Hearing Tr., Vol. III, p. 130 (Collart); Hearing Tr., Vol. I, p. 125-126 (Crane); Hearing Tr., Vol. II, p. 123 (Renner); Hearing Tr., Vol. III, p. 18 (Richards); Defendant's Ex. T, Wewers Dep., pp. 49-50; Defendant's Ex. U, Jagers Dep., p. 82, 85; Defendant's Ex. S-2, Stafford Dep., p. 19; Hearing Tr., Vol. I, pp. 175, 176 (Francis)]

- The amount of funds to transfer [Hearing Tr., Vol. II, p. 123 (Renner)]

- Transference of the $190 million to one or more of the three entities listed in the Transfer Resolution: the Campaign for Tobacco Free Kids; the American Legacy Foundation; and the Ohio Hospital Association for Health Communities Foundation. [Hearing Tr., Vol. III, p. 130 (Collart); Hearing Tr., Vol. I, p. 126 (Crane); Defendant's Ex. W, Renner Dep., p. 69; Defendant's Ex. T, Wewers Dep., p. 50; Defendant's Ex. S-2, Stafford Dep., p. 24; Defendant's Ex. V, Rummel Dep., p. 27; Hearing Tr., Vol. I, p. 175 (Francis)]

- Alternatives for legal action against the General Assembly and other steps to protect the Endowment Fund. [Jagers Dep. at 21-22] [Richards Dep. at 21-22, 74] [Renner Dep. at 63-64] [Hearing Tr., Vol. I, at 92-93, 95-96 (Crane)] [Hearing Tr., Vol. II, at 53 (Renner)]

- The obligations of the Trustees as fiduciaries regarding the Endowment Fund in the context of the dispute with the State and what they needed to do to fulfill their fiduciary obligations. [Hearing Tr., Vol. II, at 50-52 (Renner)] [Hearing Tr., Vol. III, at 41, 44 (Richards)] [Hearing Tr., Vol. I, at 175-76 (Francis)] [Hearing Tr., Vol. I, at 93 (Crane)] [Jagers Dep. at 23-24] [Francis Dep. at 26] [Rummel Dep. at 71-72] [Renner Dep. at 68]

- The conflict of interest confronting the Attorney General given his representation of parties with adverse claims to the monies in the Endowment Fund and the Trustees' resulting need for outside independent legal counsel. [Jagers Dep. at 20-21] [Richards Dep. at 21-22] [Renner Dep. at 59-60] [Hearing Tr., Vol. I, at 93 (Crane)] [Hearing Tr., Vol. II, at 56-57 (Renner)]

- The likelihood of "imminent" litigation with the Governor and General Assembly if the Trustees acted to protect the Endowment Fund by transferring it to another organization such as Legacy, and consideration of the Trustees' defenses to any resulting lawsuit. [Hearing Tr., Vol. III, at 39-41 (Richards)] [Hearing Tr., Vol. I, at 175-76 (Francis)] [Hearing Tr., Vol. II, at 52-53 (Renner)] [Hearing Tr., Vol. I, at 93 (Crane)] [Jagers Dep. at 22-23] [Francis Dep. at 25-27] [Richards Dep. at 90-91] [Renner Dep. at 63-64]

- Giving Executive Director Michael Renner authority to carry out the transfer. [Hearing Tr., Vol. I, p. 126 (Crane); Hearing Tr., Vol. III, p. 21 (Richards); Hearing Tr., Vol., I, p. 159 (Francis); Defendant's Ex. S-2, Stafford Dep., p. 25]

58. During the executive session, the Trustees sought Mr. Renner's advice concerning these legal questions, and he provided the Trustees with responses based upon his legal training and experience. [Hearing Tr., Vol. II, at 49-56 (Renner)] [Hearing Tr., Vol. III, at 62-63 (Richards)]

59. During the Executive Session, Board member Stephen Francis wrote various dollar amounts for different funding scenarios – such as $190 million and $230 million – on a dry erase board. [Hearing Tr., Vol., I, p. 186 (Francis); Hearing Tr., Vol. III, p. 138-139 (Collart); Hearing Tr., Vol. II, pp. 125-126 (Renner); Defendant's Ex. X, Renner Dep., pp. 149-150; Defendant's Ex. U, Jagers Dep., p. 88-89; Defendant's Ex. V, Rummel Dep., p. 42]

60. No formal vote, motion, or action was taken in the executive session. [Hearing Tr., Vol. I, at 178-79 (Francis)] [Hearing Tr., Vol. III, at 41-42 (Richards)] [Hearing Tr., Vol. I, at 93 (Crane)] [Crane Dep. at 75] [Jagers Dep. at 36] [Francis Dep. at 34]

61. However, some Board members felt that a consensus formed during the April 4, 2008 Executive Session in favor of adopting the proposal set forth in the transfer resolution.

[Hearing Tr., Vol. III, p. 139 (Collart); Hearing Tr., Vol. III, p. 24 (Richards); Defendant's Ex. S-2, Stafford Dep., pp. 39, 41; Hearing Tr., Vol. III, p. 126 (Renner)]

62. Board member Lisa Stafford testified that a straw vote was taken on the transfer resolution during the April 4 Executive Session. [Defendant's Ex. S-2, Stafford Dep., pp. 39, 40]. She defined "straw vote" as "a means of seeing if the proposal is going to be able to pass out in the full vote." The result of the straw vote on the transfer resolution was the same in the Executive Session as it was in the open meeting later. [Defendant's Ex. S-2, Stafford Dep., pp. 39, 40]

63. Board member Marie Collart testified that there was a "straw poll" regarding the transfer resolution during executive session, and "it was clear that the majority were in favor of it." [Hearing Tr., Vol. III, p. 139 (Collart)]

64. Executive Director Renner confirmed that "during the Executive Session there was an attempt to get an understanding as to whether or not the majority [sic] those Board members felt taking aggressive action was something they should do." He further testified that he believed "that there were one or more of the Board members [who] inquired as to whether any of the others would be willing to support that action or not, and there was no votes taken. But I think there was an effort by some to find – try and figure out if they are totally out on a limb with this or other Board members were of like mind." [Hearing Tr., Vol. III, p. 126 (Renner)]

65. Board member Mary Ellen Wewers recalled that, during the Executive Session, she was asked to state whether she would be for or against the transfer resolution. In fact, everyone in the room was asked to state whether they would be for or against the resolution. This question came towards the end of the Executive Session. She recalled Ms. Stafford was

opposed to the transfer motion. Board members Richards, Collart, and Wise expressed more uncertainty than opposition. [Defendant's Ex. T, Wewers Dep. Pp. 63-66]

66. Ms. Jagers had a written version of the transfer motion that she read to the Board members in executive session. [Hearing Tr., Vol. III, p. 137 (Collart)]

67. After discussing the details of the proposed transfer in executive session, Ms. Jagers, Mr. Francis, and Dr. Crane worked on the wording of the transfer motion during a break but before resuming the open portion of the meeting. [Hearing Tr., Vol. III, p. 26 (Richards); Defendant Ex. U, Jagers Dep., p. 110-111; Hearing Tr., Vol. I, p. 126, 127 (Crane); Hearing Tr., Vol. I, p. 165 (Francis); Defendant's Ex. S-2, Stafford Dep., p. 49)

68. Executive Director Renner spoke on the telephone with Legacy's COO, David Dobbins, between the end of the executive session and the return to the open meeting. The phone call was initiated by Mr. Renner, who "alert[ed] Mr. Dobbins to the job stimulus proposal at the State of Ohio and that there had been a consideration of trying to determine if there were outside tobacco control entities who would be willing to operate a tobacco control program in the State of Ohio if a grant were made to them." [Hearing Tr., Vol. II, pp. 131, 132, 174, 175] Mr. Renner also "inquired as to whether AFL [Legacy] might be such an entity that would be willing to commit programming for the citizens of the State of Ohio." [Id., p. 175]

69. Before the Board went back into Open Session on April 4, Executive Director Renner had the Foundation's communications director send out a media advisory indicating that the Board would be holding a press conference immediately after the meeting. [Hearing Tr., Vol. II, p. 133 (Renner)]

70. After concluding the executive session, the Trustees returned to the regular, open, session of their meeting. A resolution was offered and adopted seeking the appointment of

special legal counsel to represent the Foundation in determining the legality of the State's effort to take the Endowment Fund monies. [Pl. Ex. 1, pg. 2] [Hearing Tr., Vol. I, at 94-95 (Crane)]

71. The discussion regarding the "special counsel motion" lasted for a period of 2-10 minutes, according to different sources. Per Dr. Rummel, the one paragraph summary of that discussion, which is in the Minutes, is an accurate reflection of the extent of the discussion. Based upon his independent memory, Dr. Rummel does not recall any additional discussion in open session. [Hearing Tr., Vol. III, p. 131 (Collart); Defendant's Ex. V, Rummel Dep., p.43-44; Defendant's Ex. X, Renner Dep., p. 135; Defendant's Ex. I., p. 2]

72. The "special counsel motion" went as follows: Mr. Ingram made the motion to ask the Ohio Attorney General to appoint special legal counsel to represent the Ohio Tobacco Use Prevention Foundation to utilize the Foundation endowment dollars as intended in Ohio R.C. 183. The motion was seconded. Senator Miller made a few remarks comparing the Foundation's situation to past situations when funding directed to the Foundation was diverted to different purposes, and a vote was taken. The "special counsel" resolution was adopted 13-1. [Defendant's Ex. 1, p. 2]

73. Then a resolution was proposed and adopted "to authorize the transfer of $190,000,000 from the Tobacco Use Prevention and Control Foundation endowment fund to one or all of three organizations equally: Campaign for Tobacco Free Kids, American Legacy Foundation, Ohio Hospital Association for Healthy Communities Foundation, to carry out the mission of the Ohio Tobacco Prevention Foundation and fulfill the board's fiduciary duties. In addition, to authorize the Executive Director, Michael Renner, to do all things necessary and prudent to carry out the transfer...." [Pl. Ex. 1, pg. 3] [Hearing Tr., Vol. I, at 179 (Francis)] [Hearing Tr., Vol. I, at 96 (Crane)]

74. The process for contracting for the transfer set forth in this resolution was consistent with the Board's regular practice, since the inception of the Foundation, to authorize Executive Director Renner to negotiate and execute contracts with Board-approved recipients in Board-approved amounts. [Hearing Tr., Vol. II, at 104 (Renner)]

75. The Minutes of the April 4, 2008 meeting reflect that the Board voted on the transfer resolution without further discussion. It was stated as follows: Ms. Jagers then made a motion to authorize the transfer of $190,000,000 from the Tobacco Use Prevention and Control Foundation endowment fund to one or all of three organizations equally; Campaign for Tobacco Free Kids, American ALF Foundation, Ohio Hospital Association for Health Communities Foundation, to carry out the mission of the Ohio Tobacco Prevention Foundation and fulfill the board's fiduciary duties. In addition, to authorize the Executive Director, Michael Renner, to do all things necessary and prudent to carry out the transfer and to alter distribution if satisfactory contractual agreements cannot be reached with one or more of the organizations. [Defendant's Ex. 1, p. 3]

VI. The Alleged Contract Between The Foundation And Legacy

76. Following the April 4 Board meeting, Mr. Renner, with the assistance of his staff, contacted all three organizations identified by the Trustees as acceptable recipients of up to $190 million from the Endowment Fund. Legacy was the only one of the three organizations that was able to respond within the Foundation's time frame and was willing to enter into a contract in connection with the transfer and agree to a restricted use of money from the Endowment Fund. [Hearing Tr., Vol. II, at 67-68 (Renner)]

77. On April 8, 2008, Mr. Renner, pursuant to the purported authority granted to him by the April 4 resolution, executed a purported contract on behalf of the Foundation with Legacy

whereby, in return for the Foundation's agreement to transfer $190 million from the Endowment Fund to Legacy, Legacy committed to use those funds to undertake a number of new responsibilities in connection with smoking cessation and prevention programs for the benefit of Ohioans (the "Legacy contract"). [Pl. Ex. 3] [Hearing Tr., Vol. II, at 68-69 (Renner)]

78. Under the Legacy contract, Legacy agreed to:

- "[F]ocus use of funds received from this grant upon Ohio populations...."
- "[P]repare a plan to reduce tobacco use by Ohioans, with emphasis on reducing the use of tobacco by youth, minority and regional populations, pregnant women, and others who may be disproportionately affected by the use of tobacco."
- "[C]arry out, or provide funding for private or public agencies to carry out, research and programs related to tobacco use prevention and cessation."
- "[E]stablish an objective process to determine which research and program proposals to fund."

79. Before Mr. Renner executed the Legacy contract on behalf of the Foundation, he had the contract itself reviewed by one of the "contract business lawyers" at the Attorney General's office. That attorney "signed off" on the contract. [Renner Dep. at 97-98]

80. The terms of the Legacy contract are consistent with the Foundation's mission and strategic plan, [Crane Dep. at 46-47] [Hearing Tr., Vol. I, at 102 (Crane)], and provide for use of Endowment monies for the same purposes originally identified by the General Assembly when the monies were appropriated and transferred into the Endowment Fund. [Renner Dep. at 108] [Crane Dep. at 47]

81. After the Foundation and Legacy executed the Legacy contract, Mr. Renner, on April 8, 2008, delivered a letter on behalf of the Foundation to the Treasurer, instructing the Treasurer to disburse and transfer $190 million of the Endowment Fund to Legacy. Mr.

Renner's action was performed as authorized by the alleged April 4 resolution. [Pl. Ex. 4] [Renner Dep. at 94-95] [Hearing Tr., Vol. II, at 73 (Renner)] [Hearing Tr., Vol. I, at 101 (Crane)]

82. S.B. 192, a bill initially relating to plumbing inspections, was amended on April 8, 2008 to add new language purporting to liquidate the Endowment Fund and transfer all but $40 million of its funds to a new "Jobs Fund," which was part of the Stimulus Proposal. S.B. 192, as amended, was swiftly passed by both houses of the General Assembly and signed into law later that same day.

83. After the Legacy contract was purportedly executed, and by no later than 2:33 pm on April 8, 2008, the Treasurer had received the Foundation's instructions to disburse $190 million to Legacy. This occurred before Amended S.B. 192 was signed by Governor Strickland and became law. [Pl. Ex. 7, Treasurer's Admission No. 2] [Pl. Ex. 8, State's Admission No. 3] [Hearing Tr., Vol. II, at 71-73 (Renner)]

84. The Treasurer did not immediately disburse and transfer the funds from the Endowment Fund to Legacy as instructed by the Foundation. [Hearing Tr., Vol. II, at 105 (Renner)]

85. The applicable portions of Amended S.B. 192 were subsequently repealed by House Bill 544 ("H.B. 544") on May 6, 2008. The State Defendants maintain that those repealed portions of Amended S.B. 192 have no legal effect. [Hearing Tr., Vol. III, at 151-52]

VII. The State Threatens And Then Adopts Legislation Terminating The Existence Of The Foundation

86. On April 9, 2008, the Foundation commenced this action, seeking a declaration that Sections 3 and 4 of Amended S.B. 192 were invalid and unenforceable and seeking to enjoin the Treasurer from transferring the monies in the Endowment Fund to the "Jobs Fund."

[Original Complaint] This Court entered a freeze order on April 10, 2008 to maintain the *status quo* and protect the Endowment Fund until it could hold a preliminary injunction hearing.

87. On April 10, 2008, the State of Ohio and then Ohio Attorney General Marc Dann intervened as Defendants. [Pl. Ex. 23] After April 10, 2008 but prior to April 15, 2008, Attorney General Dann telephoned Mr. Renner and stated that unless the Foundation dismissed this lawsuit or otherwise provided assurances that Legacy would not pursue its claims to the monies in the Endowment Fund, the State would adopt legislation terminating the existence of the Foundation. [Hearing Tr., Vol. II, at 79-80, 84-85, 91-93 (Renner)]

88. During this same time period, the Attorney General's office threatened the possibility of personal lawsuits against the Trustees if they did not rescind the Legacy contract. [Hearing Tr., Vol. I, at 182-83 (Francis)] [Hearing Tr., Vol. II, at 96 (Renner)]

89. As a result, the Trustees held a special Board meeting on April 15, 2008, at which they voted to rescind the April 4 resolution directing the Treasurer to transfer $190 million from the Endowment Fund to Legacy and to hold the transfer in abeyance while this litigation resolved Legacy's entitlement to it. The Trustees took this action to show "good faith" in an effort to head off legislative action terminating the existence of the Foundation. [Hearing Tr., Vol. I, at 182-84 (Francis)] [Hearing Tr., Vol. II, at 79-80, 96 (Renner)] The Board of Trustees, however, did not take any action to rescind the Legacy contract itself at the April 15, 2008 Board meeting. [Hearing Tr., Vol. II, at 77-80, 99-100 (Renner)]

90. On May 6, 2008, the General Assembly passed, and the Governor signed, H.B. 544, which abolishes the Foundation. H.B. 544 also seeks to liquidate the Endowment Fund and to transfer all of its monies save $40 million to a newly created "Jobs Fund" in pursuance of the Stimulus Proposal. See H.B. 554 (Pl. Ex. 9). Uncodified Section 4 of H.B. 544 provides:

> Section 4. Notwithstanding any provision of law to the contrary, on the effective date of this section, the Treasurer of the State shall liquidate the Tobacco Use Prevention and Control Foundation Endowment Fund created by section 183.08 of the Revised Code in a prudent manner. The Treasurer of State shall deposit into the state treasury to the credit of the Tobacco Use Prevention Fund (Fund 5BX0), which is hereby created, the lesser of $40 million or 14.8 per cent of the proceeds from the liquidation. The Treasurer of State shall deposit the remaining proceeds from liquidation into the state treasury to the credit of the Jobs Fund (Fund 5Z30), which is hereby created.

91. By virtue of the General Assembly's declaration that H.B. 544 is an "emergency" measure, the bill, unless invalidated, became immediately effective upon the signature of Governor Strickland on May 6, 2008. By its terms, it would deplete the Endowment Fund and prevent $190 million of those funds from being transferred to Legacy. [Wewers Dep. at 26-27] [Hearing Tr., Vol. I, at 102-03 (Crane)]

VIII. Irreparable Harm, The Balance Of Harms, And The Public Interest

92. Tobacco is a highly addictive drug. [Hearing Tr., Vol. II, at 188 (Healton)] It is extremely difficult to quit smoking. The vast majority of people who quit smoking do not succeed the first time; the average number of quit attempts is anywhere between 5, 8, and 11, depending on the study. Only about three percent of smokers are able to successfully quit cold turkey. [Hearing Tr., Vol. II, at 188 (Healton)] More than 95% of people who try to quit smoking on their own resume the addictive habit within one year. [Hearing Tr., Vol. I, at 77 (Crane)] [Hearing Tr., Vol. II, at 187-88 (Healton)]

93. "[T]obacco use is ... the single most preventable cause of premature morbidity [illness] and mortality [death]." [Wewers Dep. at 18-19] Tobacco use causes life-threatening diseases, such as cancer, heart attacks, strokes, emphysema, chronic bronchitis, sudden infant death syndrome, and premature births. [Wewers Dep. at 18-19] [Hearing Tr., Vol. I, at 72 (Crane)] Approximately 390,000 Ohioans currently suffer from tobacco-related disease in Ohio.

[Hearing Tr., Vol. II, at 204 (Healton)] Tobacco use causes between 18,000 to 20,000 premature deaths in Ohio each year. [Hearing Tr., Vol. II, at 203 (Healton)] [Hearing Tr., Vol. I, at 71-72 (Crane)]

94. Two-thirds of adolescent smokers will go on to smoke their entire life. [Hearing Tr., Vol. II, at 196 (Healton)]. And, one-half of those lifetime smokers will die prematurely – an average of 13 to 14 years early – as a result of tobacco-induced disease. [Hearing Tr., Vol. II, at 196-197 (Healton); Hearing Tr., Vol. I, at 77 (Crane)]

95. Independent, peer-reviewed research demonstrates that tobacco control expenditures are correlated with reduced youth smoking and increased cessation. [Hearing Tr. Vol. II, at 195 (Healton)] During the existence of the Foundation, from 2000 through 2007, adult smoking rates in Ohio dropped from about 26% to about 22%. Id. at 198. During the same period, youth smoking rates in Ohio dropped from about 33% to 20%. Id. at 196.

96. If a tobacco control program is eliminated or cut-back, there will be either an immediate increase in the smoking rate or the truncation of a pre-existing decline trend, followed by an increase. Id. at 204-205. A one percent increase in youth smokers in Ohio will result in 2,200 future premature deaths. A one percent increase in adult smokers in Ohio will result in 35,000 future premature deaths. Id. at 205-206.

97. The State has reasonable and equally effective alternative means of funding $230 million for the Stimulus Proposal and achieving the stated purposes of the Stimulus Proposal without the need to divert monies from the Endowment Fund. [Hearing Tr., Vol. III, at 81-86 (Proctor)] The State could fund the $230 million portion of the Stimulus Proposal that H.B. 544 seeks to take from the Endowment Fund by the issuance of general obligation bonds – the same method by which Governor Strickland proposed on February 6, 2008 to fund $1.5 billion of the

jobs stimulus package – without diverting any monies from the Endowment Fund [Hearing Tr., Vol. III, at 75-86 (Proctor)] [Plaintiff's Ex. 11, 12]

CONCLUSIONS OF LAW

IX. Jurisdiction

97. This Court has jurisdiction to declare the rights, status, and legal relations of the parties. R.C. 2721.02. This Court also has jurisdiction to construe the constitutional provisions, statutes, contracts and other documents at issue in this action. R.C. 2721.03 and 2721.04.

98. This Court has exclusive jurisdiction over Plaintiffs' claims alleging constitutional violations. It is well settled that the Court of Claims has no jurisdiction over such claims. *Langford v. Ohio Dep't of Rehabilitation and Correction* (10th Dist., No. 01AP-580), 2001 Ohio 8870, at *4 ("the Court of Claims lacks jurisdiction to hear a claim to the extent that it asserts constitutional violations").

99. This Court also has jurisdiction over Plaintiffs' other claims for declaratory and other injunctive relief, because Plaintiffs do not seek money damages against the State in this action. In *Racing Guild of Ohio v. Ohio State Racing Comm'n* (1986), 28 Ohio St. 3d 317, 320, the Ohio Supreme Court held: "Declaratory judgment actions were permitted against state agencies prior to the enactment of the Court of Claims Act.... Thus, there is no question that the exclusive jurisdiction of the Court of Claims does not bar the courts of common pleas from obtaining subject matter jurisdiction over declaratory judgment actions against the state." *See also* R.C. 2743.02(A)(1) (Court of Claims Act has "no applicability" to suits over which common pleas courts had jurisdiction prior to Act's enactment).

100. The cases cited by the State in opposition to this Court's jurisdiction are inapplicable because, unlike the Plaintiffs in this action, the plaintiffs in the cases cited by the

State actually sought money damages against the State. See *Cristino v. Ohio Bureau of Workers' Compensation* (2008), 118 Ohio St. 3d 151 (plaintiffs sought full legal restitution – a "lump-sum payment" – from the State); *Parker v. Giant Eagle, Inc.*, (7th Dist., No. 01 C.A. 174), 2002 Ohio 5212 (plaintiff sought "monetary damages" from the State, which would be paid from "the state's treasury"); *Great-West Life & Annuity Ins. Co. v. Knudson* (2002), 534 U.S. 204, 221 (petitioners sought "the imposition of personal liability on respondents for a contractual obligation to pay money").

101. However, this Court has a duty to decide constitutional issues only when absolutely necessary. *Cramer v. Auglaize Acres* (2007), 113 Ohio St. 3d 266 ** ¶8. See also *Smith v. Leis*, 106 Ohio St.3d 309. Additionally, "[n]o court should * * * indulge the constitutional issue if the litigant is entitled to relief upon other grounds." *Burt Realty Corp. v. Columbus* (1970), 21 Ohio St.2d 265, 269. *Greenhills Home Owners Corp. v. Greenhills* (1966), 5 Ohio St.2d 207.

X. Standing

102. "The essence of the doctrine of standing is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Racing Guild of Ohio v. Ohio State Racing Comm'n* (1986), 28 Ohio St. 3d 317, 321. See also *State ex rel. Dallman v. Court of Common Pleas, Franklin Cty.* (1973), 35 Ohio St. 2d 176, 178-79 ("the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy,' as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution'") (internal citations omitted). If a party can show

"damage...different in character from that sustained by the public generally," the party has standing to challenge the constitutionality of the statute. *State ex rel. Masterson v. Ohio State Racing Comm'n* (1954), 162 Ohio St. 366, 368.

103. The Attorney General has exclusive standing to determine the existence of a charitable trust and to enforce the performance of any charitable trust, except for those persons that have a special interest that is separate and distinct from that of the general public. R.C. 109.24. *Kemper v. Trustees of Lane Seminary* (1848), 17 Ohio 293. See also Restatement of Law 2nd, Trusts, § 391, comment c; *Brown v. Battelle Memorial Inst.* (10th Dist., Dec. 28, 1973), No. 73 AP-233, 1978 Ohio App. LEXIS 1923, *6.

104. In *Plant v. Upper Valley Medical Center* (2nd Dist., Apr. 19, 1996), No. 95-CA-52, 1996 Ohio App. LEXIS 1529, *8, the court held that a party may not maintain an action simply because he/she is a concerned citizen taken from the public at large. Where the plaintiff has no greater interest than any other taxpayer or concerned citizen, that party is not entitled to maintain an action to enforce a charitable trust. Where the party is not mentioned in the document creating the charitable trust as an actual or selected beneficiary, the party is at best a probable beneficiary and does not have standing to enforce the trust.

105. Here, the individual Plaintiffs are mentioned in the class of beneficiaries, as they are Ohio smokers affected by the use of tobacco who are seeking help to quit.

106. Each of the individual Plaintiffs has standing to prosecute this action. Each has a personal stake in the existing controversy and has a special right and interest in the monies comprising the Endowment Fund, to ensure that those funds continue to be used for tobacco control, prevention, and cessation purposes in Ohio. These special rights and interests are distinct from those of the general public.

107. Legacy has standing and a right to intervene in this action pursuant to R.C. 2721.12(A), which provides that where, as here, an action for declaratory judgment is filed, "all persons who have or claim any interest that would be affected by the declaration shall be made parties to the action or proceeding." Legacy also has standing to bring its claims in this case because, in view of Legacy's purported contract to receive $190 million from the Endowment Fund, Legacy has a personal stake in the outcome of this controversy sufficient to assure "concrete adverseness" between the parties. Unless invalidated, H.B. 544 adversely affects Legacy's interest in the Endowment Fund.

108. Plaintiffs Miller and Weinmann, as members of the special class of beneficiaries of the Endowment Fund, also have standing in this action to seek to protect the *res* of that Trust for its intended purposes. The Attorney General's failure to take action to protect the Trust, and its adoption of a litigation posture directly adverse to the enforcement and administration of the Trust, permits these individual Plaintiffs to bring this action.

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.

111. The State's reliance upon the Attorney General's power under R.C. 109.24 to enforce charitable trusts, and upon *State ex rel. Lee v. Montgomery*, 88 Ohio St. 3d 233 (2000), and *Plant v. Upper Valley Medical Center, Inc.*, 1996 WL 185341 (Ohio App. 1996), is misplaced because neither R.C. 109.24 nor the cases cited by the State preclude standing by members of the class of beneficiaries of a charitable trust where, as here, the Attorney General has not only abandoned the rights of those beneficiaries, but also is taking positions directly adverse to their rights.

112. Here, Plaintiffs Miller and Weinmann, as smokers who have used the programs to quit, have a special interest separate and distinct from that of the general public, as well as a special interest in the enforcement of the trust. See Restatement of the Law of Trusts 2d 278, §391.

XI. Preliminary Injunction Standards

113. "The purpose of a preliminary injunction is to preserve the status quo of the parties pending final adjudication of the case upon the merits." *Yudin v. Knight Indus. Corp.*, 109 Ohio App. 3d 437, 439 (1996).

114. Courts consider four factors in determining whether to issue a preliminary injunction: (1) whether the plaintiff has shown a strong or substantial likelihood or probability of success on the merits; (2) whether the plaintiff has shown that irreparable injury will result if the preliminary injunction is not granted; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether a preliminary injunction would serve the public interest. *Penzone v. Koster*, 2008 WL 256547, ¶ 9 (Ohio App. 10th Dist. 2008).

XII. There is Not a Likelihood of Success on the Merits on Legacy's Claim of Impairment of Contracts. The Legacy Contract is not Valid and Enforceable.

A. Law Against Impairment of Contracts

115. The Constitution of both the State of Ohio and the United States of America protect against statutes that impair the obligation of contracts. U.S. Constitution Art. I, §10; Ohio Constitution, Art. II, §28.

116. The Ohio Constitutional prohibition against laws impairing the obligations of contracts is co-extensive with that of the United States Constitution. *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St. 3d 216, ¶10.

117. The test for determining whether a statute violates the contract clause of the Ohio or United States Constitutions has the same three components: "whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *State ex rel Horvath v. State Teachers Ret. Bd.* (1988), 83 Ohio St. 3d 67.

The "obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them." *Home Building & Loan Ass'n v. Blaisdell* (1934), 290 U.S. 398, 431.

118. Plaintiffs have failed to establish that they are substantially likely to prevail on the merits of: the existence of a binding contractual relationship between Legacy and the Board; the claim that H.B. 544 impairs that relationship; or that any impairment is substantial.

119. Legacy cannot demonstrate a likelihood of success on the merits of its impairment of contract claim for several reasons. First, H.B. 544 does not substantially impair any rights that Legacy has under the purported agreement because it is not a valid contract. Second, the Board's action allegedly authorizing the purported agreement is invalid because it was made in violation of the Open Meetings Act. Third, the Board's attempts to delegate its statutory authority were unlawful. Fourth, the purported agreement was never approved or ratified by the Board, as required by Ohio law.

B. The Agreement Is Not Invalidated By A Lack of Consideration. The Element of Consideration Is Present In the Purported Agreement.

120. The elements of a contract include the following: an offer, an acceptance, contractual capacity, consideration (the bargained-for legal benefit or detriment), a manifestation of mutual assent, and legality of object and of consideration. *Lake Land Emp. Group of Akron, LLC v. Columber*, 101 Ohio St. 3d 242, 2004 Ohio 786.

121. The Legacy contract contains bargained-for mutual promises by Legacy and the Foundation and is supported by valuable consideration. It is a "well-established principle of contract law" that "the law will not enter into an inquiry as to the adequacy of the consideration, but will leave the parties to be the sole judges of the benefits to be derived from their contracts."

Columbus Medical Equipment Co. v. Watters, 13 Ohio App. 3d 149, 150 (10th Dist. 1983); See also *Great American Ins. Co. v. Colonial Ins. Co. of Cal.*, 1995 WL 705206, at *4 (Ohio App. 10th Dist. 1995) ("[w]here there is some consideration to support a contract, the courts will not inquire into the adequacy of that consideration.").

122. Contrary to the State's argument and even assuming that this contract did not confer a benefit on the Foundation, which it did, valid contract consideration does not require a benefit to the Foundation. Rather, "[c]onsideration may consist of either a detriment to the promisee *or* a benefit to the promisor," and such a detriment "may consist of some forbearance, loss, or responsibility given, suffered, or undertaken by the promisee." *Lake Land Employment Group of Akron, LLC v. Columber*, 101 Ohio St. 3d 242, ¶ 16 (2004) (citing *Irwin v. Lombard Univ.*, 56 Ohio St. 9, 19 (1897)) (emphasis added); *Motorists Mut. Ins. Co. v. Columbus Finance, Inc.*, 168 Ohio App. 3d 691, 696 (10th Dist. 2006) (same). "Consideration may consist of ... a return promise," and "[i]t matters not ... to whom [the consideration] goes. If it is bargained for and given in exchange for the promise, the promise is not gratuitous." Restatement (Second) of Contracts § 71, cmts. d, e (1981).

123. Under Ohio law, there is a difference between a contract supported by consideration versus a gratuitous promise that imposes conditions upon a gift. *Prendergast v. Snoeberger* (2003), 154 Ohio App. 3d 162; *Carlisle v. T&R Excavating, Inc.* (1997), 123 Ohio App. 3d 277.

124. A gift is gratuitous and unenforceable when performance of the conditions by the recipient will confer no benefit upon the promisor. *Prendergast*, supra. *Carlisle*, supra. See also *Varee v. Holzinger* (11th Dist., No. 2006-A-0072) 2007 Ohio 1924; *Bob Tatone Ford, Inc. v. Ford Motor Company,* 140 F. Supp. 2d 817 (S.D. Ohio 2000).

125. The Legacy contract is not merely a gratuitous promise by the Foundation, as the State contends. Legacy provided valuable consideration for the $190 million contract with the Foundation by promising to undertake significant new responsibilities:

- "Legacy shall focus use of funds received from this grant upon Ohio populations...."
- Legacy "shall prepare a plan to reduce tobacco use by Ohioans, with emphasis on reducing the use of tobacco by youth, minority and regional populations, pregnant women, and others who may be disproportionately affected by the use of tobacco."
- Legacy's "plan shall be consistent with the Strategic Plan of the [Ohio Foundation]."
- "Legacy shall carry out, or provide funding for private or public agencies to carry out, research and programs related to tobacco use prevention and cessation."
- "Legacy shall establish an objective process to determine which research and program proposals to fund."
- Legacy shall "independently and objectively evaluate[ ] annually" all "research and programs funded by Legacy."

126. It is well settled that a party provides adequate contract consideration when it promises to use funds promised by the other party in a particular manner and to undertake new responsibilities. For example, in *Irwin v. Lombard Univ.*, 56 Ohio St. 9 (1897) – a case the Supreme Court recently cited with approval in *Lake Land*, supra – Gilpin signed a promissory note promising to pay $1,000 in two years to Lombard University for the specific purpose of designating a professorship. In return, the University agreed to designate the professorship as Gilpin had directed, but Gilpin died before paying the $1,000. His estate refused the University's claim to the $1,000, contending a lack of consideration. The Supreme Court disagreed, finding adequate consideration. *Id.*, 56 Ohio St. at 21-22.

127. Courts in other states deciding this issue have reached the same conclusion as the Ohio Supreme Court in *Irwin*. *See e.g., Nebraska Wesleyan University v. Griswold's Estate*, 202

N.W. 609, 616 (Neb. 1925) ("[w]hile in the case of a mere promise to make a gift or donation to a college subject to no condition and imposing no obligation upon the college with respect thereto could not be enforced, we think that when, as in this case, the college is required to perform certain duties with respect to the specific fund, its acceptance thereof and reliance thereon and promise to carry out the wishes of the donor supply the consideration"); *Furman Univ. v. Waller*, 117 S.E. 356, 362 (S.C. 1923).

128. The conditions imposed upon Legacy in the alleged contract are neither precatory nor totally discretionary. Actual obligations are imposed.

129. The "gratuitous promise" cases cited by the State are not applicable, because none of those cases involves a contract where, as here, a party, in a bargained-for exchange for the other party's promise to transfer funds, made mutual promises to undertake new responsibilities and obligations in connection with those funds. See e.g., *Prendergast v. Snoeberger*, 154 Ohio App. 3d 162, ¶ 30 (2003) (no detriment to, or obligations undertaken by, the promisee); *Carlisle v. T & R Excavating, Inc.*, 123 Ohio App. 3d 277, 284 (1997) (same); *Maryland Nat'l Bank v. United Jewish Appeal Federation*, 407 A.2d 1130 (Md. App. 1979) (no mutual promise of new responsibilities by charitable institution in exchange for promisor's contribution pledge).

C. The Purported Agreement Does Not Fail Because It Is Illusory. The Purported Agreement Is Not Illusory.

130. A contract is illusory only when, by its terms, the promisor retains an unlimited right to determine the nature or extent of his performance. *Century 21 Am. Landmark, Inc. v. McIntyre* (1980), 68 Ohio App. 2d 126. See also *Imbrogno v. MIMRx.com, Inc.* (10th Dist., No. 03AP-345), 2003 Ohio 6108. An apparent promise which according to its terms makes performance optional with the promisor is in fact no promise, although it is often called an

illusory promise. *Andreoli v. Brown* (1972), 35 Ohio App. 2d 53, 55, quoting Restatement, Contracts, Section 2 (1925), paragraph (b) of the Comment.

131. "Where the parties, following negotiations, make mutual promises which thereafter are integrated into an unambiguous written contract, duly signed by them, courts will give effect to the parties' expressed intentions." *Aultman Hospital Ass'n v. Hospital Care Corp.*, (1989), 46 Ohio St. 3d 51, 53.

132. Legacy made a mutual promise and committed to undertake a multitude of new responsibilities with specific restrictions imposed by the Foundation. Legacy does not have unlimited discretion in the spending of the funds. For example, Legacy promised to use the funds to carry out or fund "tobacco use prevention and cessation" programs and research. Under the contract, Legacy has no discretion to use the funds for citizens of other states where it is unrelated to a benefit to Ohioans. Furthermore, in the agreement, Legacy committed to prepare a strategic plan that was consistent with the Foundation's plan, with an emphasis on "youth, minority, and regional populations, [and] pregnant women." Legacy has no discretion to ignore these requirements and thus does not have unlimited discretion to determine its own performance under the contract.

133. Accordingly, the purported agreement is not illusory.

D. The Resolution Purportedly Authorizing the Transfer Agreement was Made in Violation of the Open Meetings Act.

134. The Foundation was a "public body" subject to the Open Meetings Act. R.C.121.22(B)(1)(a).

135. A meeting which has a set time and place is a prearranged meeting. *State ex rel Plain Dealer Publishing Co. v. Barnes* (1988), 38 Ohio St. 3d 165, 167.

136. The executive session on April 4, 2008 was a prearranged meeting of the Board.

137. The Open Meetings Act requires "public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law." R.C. 121.22(G). Under the Open Meetings Act, public bodies may enter into a private "executive session" only for consideration of certain matters specifically enumerated in the Act. R.C. 121.22(G). These enumerated matters include:

(1) To consider the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee or official, or the investigation of charges or complaints against a public employee, official, licensee, or regulated individual, unless the public employee, official, licensee, or regulated individual requests a public hearing.

* * *

(2) To consider the purchase of property for public purposes, or for the sale of property at competitive bidding, if premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest. * * *

(3) Conferences with an attorney for the public body concerning disputes involving the public body that are the subject of pending or imminent court action;

(4) Preparing for, conducting, or reviewing negotiations or bargaining sessions with public employees concerning their compensation or other terms and conditions of their employment;

(5) Matters required to be kept confidential by federal law or regulations or state statutes;

(6) Details relative to the security arrangements and emergency response protocols for a public body or public office, if disclosure of the matters discussed could reasonably be expected to jeopardize the security of the public body or public office;

(7) In the case of a county hospital operated pursuant to Chapter 339 of the Revised Code, a joint township hospital operated pursuant to Chapter 513 of the Revised Code, or a municipal hospital operated pursuant to Chapter 749 of the Revised Code, to consider trade secrets, as defined in section 1333.61 of the Revised Code.

138. The Open Meetings Act provides that the "motion and vote to hold that executive session shall state which one or more of the approved matters listed" in the Act are to be considered in the executive session. R.C. 121.22(G).

139. At the Foundation Board meeting on April 4, 2008, the Board did not specifically state in its motion one of the approved matters for entering an executive session provided in the Open Meetings Act.

140. "Deliberations include the weighing and examining of reasons for and against action." *Springfield Local School Dist. Bd. of Edn. v. Ohio Assn. of Publ. School Empl., Local 530* (1995), 106 Ohio App. 3d 855, 864; *Holeski v. Lawrence* (1993), 85 Ohio App. 3d 834, 829, citing *Webster's Third New International Dictionary* (1961), 596.

141. During the executive session, a majority of the members of the Board deliberated regarding the following: whether to transfer Foundation funds to a private entity; which entities should be designated as possible recipients; the amount of funds to be transferred; and whether to authorize its Executive Director to carry out the transfer. None of these issues fit within an exception to the Open Meetings Act and each issue was required to be discussed and decided in open session.

E. The Board's Discussions Did Not Fit Within the Open Meetings Exception for the Discussion of Pending and Imminent Litigation With the Board's Attorney

142. A public body has the burden of proof in demonstrating that an exception to the Open Meetings Act applied to its actions. *State ex rel. Bond v. Montgomery* (1989), 63 Ohio App. 3d 728, citing *State ex rel. National Broadcasting Co. v. Cleveland* (1988), 38 Ohio St. 3d 79.

143. Michael Renner, the Executive Director, was not the Board's attorney. The other Board members who happened to be attorneys also were not the Board's attorney. See *Awadalla v. Robinson Memorial Hospital* (11th Dist., Jun. 5, 1992), Case No. 91-P-2385, 1992 Ohio App. LEXIS 2838 *7 (the minutes of the meeting reflected that Stephen Colecchi was designated as Senior Vice President; therefore, the evidence did not support an argument that he was serving as the hospital's attorney).

144. In the instant case, *State ex rel. Leslie v. Ohio Housing Finance Authority* (2005), 105 Ohio St. 3d 261, is not applicable because that case involved communications between a chief legal counsel for an agency and an attorney who worked under her supervision. *Leslie* does not expressly or implicitly overrule *Awadalla*, supra. In fact, *Leslie* does not cite *Awadalla*. Finally, *Leslie*, does not stand for the proposition that an Executive Director or Board Member who happens to be an attorney can serve as the attorney for a Board for purposes of discussing pending or imminent legal action in executive session.

145. No attorney for the Board was present at the Board meeting on April 4, 2008. Thus, the Board did not go into executive session for the purpose of "Conferences with an *attorney for the public body* concerning disputes involving the public body that are the subject of pending or imminent court action." R.C. 121.22(G)(3) (Emphasis added).

146. No other exception to R.C. 121.22 applies to the executive session held on April 4, 2008.

147. Even if the Board properly went into executive session and discussed some topics that may have qualified as discussions regarding imminent court action if the Board's attorney had been present, the Board's discussions went beyond this subject matter to basic policy decisions facing the Board, and these topics were improperly discussed in executive session, rather than in open session. This is a violation of the Open Meetings Act.

148. The Open Meetings violation invalidates the Board's resolution purporting to authorize the transfer of $190 million, and thus invalidates the purported agreement.

149. The Open Meetings Act provides that "A resolution, rule, or formal action adopted in an open meeting that results from deliberations in a meeting not open to the public is invalid unless the deliberations were for a purpose specifically authorized in division (G) . . . and conducted at an executive session held in compliance with this section." R.C. 121.22(H).

150. The fact that a resolution is adopted in a public meeting does not cure the violation of the Open Meeting Act that occurs when that resolution results from deliberations that occurred during Executive Session. See *The Wheeling Corp. v. Columbus & Ohio River RR Co.* (2001), 147 Ohio App. 3d 460, 475. See also *Gannett v. Satellite Information Network Inc., v. Chillicothe Bd. of Edn.* (1988), 41 Ohio App. 3d 218, 221.

151. Where a resolution is adopted immediately subsequent to an executive session at which the matter in question was discussed at length, and the resolution was revised during executive session, a violation of the open meetings act has occurred. *The Wheeling Corp*, supra, at 475-476. See also *Mansfield City Council v. Richland City Council* (5th Dist., Dec. 24, 2003), No. 03 CA 55, 2003 Ohio App. LEXIS 6654 (council violated the Open Meetings Act by

discussing pending or imminent legal action with its attorney and deciding during that executive session to issue a press release that no action was going to be taken).

152. Absent the transfer resolution, which is invalid as a result of the Open Meetings Act violation, Mr. Renner lacked authority to enter into the agreement with Legacy.

153. Furthermore, the Board never ratified or approved the agreement with Legacy. In fact, the Board actually took steps to rescind it, to the extent that it withdrew the $190 million transfer request.

154. The Ohio Department of Health has never ratified or approved the purported agreement between the Foundation and Legacy. The Ohio Department of Health sent a letter to rescind the purported agreement. [Defendant's Ex. F]

155. Legacy cannot assert an impairment of contract claim based upon a purported agreement that is invalid because its only authorization resulted from discussions in closed session in violation of the Open Meetings Act.

F. Equitable Estoppel Does Not Apply to Prevent Defendants From Asserting the Board's Open Meetings Violation

156. A prima facie case for equitable estoppel requires a plaintiff to prove four elements: (1) that the defendant made a factual misrepresentation; (2) that it is misleading; (3) that it induces actual reliance which is reasonable and in good faith; and (4) that reliance causes detriment to the relying party. *Doe v. Blue Cross/Blue Shield of Ohio* (1992), 79 Ohio App. 3d 369, 379.

157. In the instant case, Plaintiffs cannot point to a factual misrepresentation that was made by the Attorney General's office, nor reasonable reliance upon that misrepresentation.

158. The cases in which a court has held that a public body cannot assert its own violation of the Open Meetings Act in order to change its earlier decisions to the detriment of

third parties are distinguishable from the instant case. First, this is not a case in which the Board members who participated in a meeting are attempting to invalidate their own actions. *The Wheeling Corp. v. C&O River RR Co.*, supra, at 478, distinguishing *Jones v. Brookfield Twp. Trustees* (12th Dist., Jun. 30, 1995), No. 92-T-4692, 1995 Ohio App. LEXIS 2805, as a case that "involved board members attempting to invalidate their own actions." In the case *sub judice*, Defendants are state elected officials and the Director of the Ohio Department of Health. The State Treasurer and the Director of the Ohio Department of Health have no connection to the Board's conduct at its meeting. Neither the Attorney General nor the State of Ohio have a connection to the Board's conduct either.

159. The equitable considerations at issue are not equivalent to those present in *Roberto v. Brown County General Hospital* (12th Dist., Feb. 8, 1988), No. CA87-06-009, 1988 Ohio App. LEXIS 372. In *Roberto*, a hospital attempted to invalidate an employment agreement upon which an employee had relied for five years. There is no such long-term reliance here.

160. Under Ohio law, anyone has standing to assert a violation of the Open Meetings Act. This includes members of State Boards and Commissions, as well as state officials. See *State ex rel. Mason v. SERB* (1999), 133 Ohio App. 3d 213.

161. The Court concludes the Defendants in this action have standing to assert a violation of the Open Meetings Act. Furthermore, the doctrine of equitable estoppel does not apply to the facts of the instant case.

G. The Purported Agreement Between Legacy and the Board is Invalid Because the Board Unlawfully Delegated its Statutory Authority

162. Government entities may delegate ministerial duties, but they cannot delegate statutory duties that require judgment and judicial discretion, absent statutory authority. *CB Transp., Inc. v. Butler Cty. Bd. of Retardation* (1979), 60 Ohio Misc. 71.

163. The Foundation was not permitted to delegate statutory duties that required judgment and discretion, absent express statutory authority. *CB Transp., Inc.*, supra, at 62.

164. Through its purported agreement with Legacy, the Foundation unlawfully delegated statutory duties requiring judgment and discretion to Legacy.

165. Former R.C. 183.07, as it was in effect on April 8, 2008, provided that the Foundation "shall prepare a plan to reduce tobacco use by Ohioans, with an emphasis on reducing the use of tobacco by youth, minority and regional populations, pregnant women, and others who may be disproportionately affected by the use of tobacco." The language of this statute subjected the Foundation to a mandatory duty, thereby requiring judgment and discretion. Nothing in Chapter 183 of the Revised Code permits the Foundation to delegate this function to Legacy or any other organization. The purported Agreement unlawfully delegated to Legacy the duty to prepare a plan to reduce tobacco use by Ohioans, as provided in former R.C. 183.07.

166. Former R.C. 183.07 further provided that the Foundation "shall establish an objective process to determine which research and program proposals to fund." As such, this language subjected the Foundation to a mandatory duty, requiring judgment and discretion. No part of Revised Code Chapter 183 permitted the Foundation to delegate this function to Legacy or anyone else.

167. The purported Agreement unlawfully delegates to Legacy the mandatory and discretionary duty to establish an objective process to determine which research and program proposals to fund, as provided in former R.C. 183.07. Thus, without such authority to delegate, the Foundation had no authority to enter into the Agreement and the Agreement is thereby void.

H. The Agreement is Invalid Because it Was Executed by the Board's Executive Director Without Ratification by the Board.

168. When an executive director enters into an agreement on behalf of a state entity, the agreement is rendered voidable. *Monarch Const. Co. v. Ohio School Facilities Comm'n* (2002), 150 Ohio App. 3d 134.

169. In *State of Ohio v. Exec'r of Buttles* (1854), 3 Ohio St. 309 the Ohio Supreme Court found that "any contract that an individual, or body corporate or politic, may lawfully make, they may lawfully ratify and adopt, when made in their name without authority; and when adopted, it has its effect from the time it was made, and the same effect as though no agent had intervened." *Buttles* at 322-323.

170. When agents of the State exceed their authority in entering into a contract, the State has the option to either ratify the contract or to repudiate it. *State of Ohio v. Buttles* (1854), 3 Ohio St. 309.

171. Here, Michael Renner, as the Executive Director, lacked authority to enter into the Agreement with Legacy on behalf of the Board without ratification and the Foundation never ratified the purported contract. As a result, the Agreement is rendered voidable. Because the Agreement was voidable, it could be rescinded. Additionally, because the Agreement was voidable, H.B. 544 does not substantially impair the alleged agreement.

172. The Foundation rescinded the portion of its earlier resolution which had authorized the transfer of $190 million to Legacy via a motion made at the special meeting held on April 15, 2008. See *Defendants' Exhibit E.*

173. Ohio Department of Health, as successor to the Foundation, also sent a letter on May 6, 2008, attempting to rescind the purported Agreement with Legacy. See *Department of Health's Exhibit A.*

174. Because the purported Agreement is void and unenforceable, no unconstitutional impairment of contract claim with Legacy results from H.B. 544.

I. The Agreement is Invalid Because it Did Not Meet State Requirements for Grant Agreements

175. Ohio law sets specific requirements for disbursement of money totaling $25,000 or more "for the provision of services for the primary benefit of individuals or the public and not for the primary benefit of a governmental entity." R.C. 9.231(A)(1).

176. The Agreement with Legacy constitutes an agreement "for the provision of services for the primary benefit of individuals or the public and not for the primary benefit of a governmental entity" as provided in R.C. 9.231(A)(1).

177. A governmental entity which enters into an agreement defined in R.C. 9.231 must enter into a written contract that includes certain requirements and conditions. R.C. 9.231(A)(1).

178. A written contract covered by R.C. 9.231 must set forth certain terms including, but not limited to: the minimum percentage of money that is to be expended on the recipient's direct costs; the records that a recipient must maintain to document direct costs; and permissible dispositions of money received by a recipient in excess of the contract payment earned, if the excess is not to be repaid to the governmental entity. R.C. 9.232.

179. The Agreement with Legacy does not include the terms required by R.C. 9.232, and it is therefore invalid. Because the Agreement is invalid, the contract is not binding and H.B. 544 does not create an unconstitutional impairment of contact with respect to Legacy.

Fifth, the purported agreement lacks consideration and is illusory. And lastly, the purported agreement is invalid because it fails to comply with Ohio R.C. 9.231.

XIII. Plaintiffs Have A Substantial Likelihood Of Success On The Merits On the Issue of Vested Trust Rights

A. The Powers of the General Assembly and the Creation of the Fund at Issue

180. The Master Settlement Agreement did not limit the purposes for which Ohio could use the funds provided. While other states enacted constitutional provisions to limit the purposes for which their Master Settlement Funds could be expended (eg: Oklahoma, Idaho), Ohio did not similarly limit the future expenditure of its funds.

181. The fund at issue, the Endowment Fund, was created by the General Assembly through the enactment of Revised Code Chapter 183 via S.B.192 in the year 2000. See *Defendant's Exhibit G, 148 Ohio Laws 10767-10805.*

182. The Master Settlement Agreement funds were deposited upon receipt into "the state treasury to the credit of the tobacco master settlement agreement fund." The funds were then allocated to other funds pursuant to a formula created by the General Assembly. See Former R.C. 183.02, Defendant's Exhibit G.

183. Even in the initial statutory allocation of the Master Settlement Agreement funds, there were funds allocated to purposes other than tobacco cessation, including law enforcement improvements, school facilities, public health, biomedical research and technology, and education technology. See Former R.C. 183.02(A)—(I).

184. A portion of the Master Settlement Agreement funds was allocated to the Tobacco Use Prevention and Cessation Trust Fund, created by former R.C. 183.03, which provided that "The Tobacco Use Prevention and Cessation Trust Fund is hereby created in the state treasury. Money credited to the fund shall be used as provided in Sections 183.04 to 183.10 of the Revised Code.

185. Former R.C. 183.08 created the Tobacco Use Prevention and Control Endowment Fund, "which shall be in the custody of the treasurer of state but shall not be a part of the state treasury. The endowment fund shall consist of amounts appropriated from the Tobacco Use Prevention and Cessation Trust Fund, as well as grants and donations made to the Tobacco Use Prevention and Control Foundation and investment earnings of the fund." The State Defendants refer to this as a "custodial account."

186. The legislative power granted to the General Assembly is plenary and is not limited to only those powers delegated by the Ohio Constitution. Art. II, §26. See also *State ex rel. Michaels v. Morse* (1956), 165 Ohio St. 599, 603 ("the General Assembly may enact any law which is not prohibited by the Constitution").

187. Article II, section 22 places no limit on the authority of the General Assembly to make appropriations. It provides in relevant part: "no money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law." Thus, money may be drawn only as duly appropriated by the General Assembly.

188. A General Assembly cannot limit the authority of a future General Assembly to legislate.

189. In *State ex rel. Hoeffler v. Griswold* (1930), 35 Ohio App. 354, 356, the Tenth District Court of Appeals held "[t]he power of the Legislature to reappropriate is as broad as it is to appropriate originally." The court further determined that "[t]he fact that the money set apart had, by the former Legislature, been itemized as to its distribution, was not compelling upon the General Assembly in the act of reappropriation." *Id.*

190. Unlike the retirement systems at issue in *In re Ford* (1982), 3 Ohio App. 3d 416 and *Jackson & Assoc. v. Public Empl. Retirement Sys.* (10th Dist., No. 02AP-1218), 2003 Ohio

7033, the Foundation's funds were appropriated to it from the general revenue fund, whereas the retirement systems receive their funds from contributions from individual members, rather than from appropriations by the General Assembly. Yet, the Court does not find this difference to be determinative in this case.

191. In AG Opinion 2008-03, n. 5, where the Endowment Fund was distinguished from the funds managed by the retirement systems, it was opined that "[t]he monies are not received from a source that connects them intrinsically with the rights of particular persons," and the General Assembly has "continuing authority to expend that money as it deems fit." However, this authority is not controlling. At best, it could be persuasive. However, the Court finds that it is not.

192. Former R.C. 183.08 states the Endowment Fund "shall consist of amounts appropriated from the tobacco use prevention and cessation trust fund . . ." 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." (Emphasis added)

193. Former R.C. 183.08 further states: "Disbursements from the fund shall be paid by the treasurer of state *only upon instruments duly authorized by the board of trustees* of the foundation." (Emphasis added)

194. The Court finds that the General Assembly did not act within the scope of its legislative authority in taking back the monies it had previously given to the Endowment Fund, as the Endowment Fund is a charitable trust created under R.C. Chapter 183. While this Court recognizes that appropriations are subject to future change in accordance with the powers granted to the General Assembly under the Ohio Constitution, this was not "re-appropriation."

The fact that these funds originally at one point came from the General Revenue Fund does not change anything.

B. H.B. 544 Unconstitutionally Impairs Vested Trust Rights

195. Plaintiffs have a substantial likelihood of success on the merits of their claim that H.B. 544 unconstitutionally impairs vested trust rights by attempting to divert monies from the Foundation to the Jobs Fund for the Stimulus Proposal, in violation of Art. I, §10 of the United States Constitution and Art. II, §28 of the Ohio Constitution.

196. The Endowment Fund is a trust fund. "A trust is created when a settlor conveys property to a trustee with a manifest intent to impose a fiduciary duty on that person requiring that the property be used for a specific benefit of others." *Branson School District RE-82 v. Romer*, 161 F. 3d 619, 633 (10th Cir. 1998), citing Restatement (2) of Trusts §§ 2, 17, 23, & 23 cmt. a (1959).

197. R.C. Chapter 183 created the Endowment Fund as a trust: the settlor (the State of Ohio) conveyed the property (transferred monies into the Endowment Fund) to a trustee (R.C. 183.08 designates the Foundation as "trustee") with a manifest intent to impose a fiduciary duty on the trustee (R.C. 183.07-.08 expressly impose fiduciary "duties" on the Foundation) requiring that the property be used for the specific benefit of others (the Fund must be used for tobacco cessation and prevention for the specific benefit of Ohio tobacco users and its youth, R.C. 183.07).

198. The statutory scheme creating the Endowment Fund has all the elements of a trust: a trustee (the Foundation), trust corpus (the Endowment Fund), and trust beneficiaries (Ohio's youth and tobacco users). *State ex rel Preston v. Ferguson* (1960), 170 Ohio St. 450, 464 ("there is no question that the funds [in the School Employees Retirement System] are trust

funds"); *United States v. Mitchell*, 463 U.S. 206, 224-25 (1983) (the General Allotment Actof 1887 and its implementing regulations created a trust: "All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottes), and a trust corpus (Indian timber, lands, and funds)"); *Dadisman v. Moore*, 384 S.E.2d 816, 821 (W.Va. 1989) ("[a] review of the [Public Employees Retirement System statute reveals a classic example of a 'statutory' trust" – public retirees are the trust beneficiaries, the PERS fund is the trust corpus, and the PERS Board of Trustees is "trustee"); *Pelt v. State of Utah*, 104 F. 3d 1534, 1542-43 (10th Cir. 1996) (Congress created a statutory trust of oil royalty funds for the benefit of a group of Navajo Indians by establishing a trust-like structure with all elements of a trust: a trustee, beneficiary, and corpus).

199. Apart from establishing all elements of a trust, the General Assembly demonstrated its intent to create the Endowment Fund as a trust in two other ways:

(1) In R.C. 183.08(A), the General Assembly expressly designated the Foundation as "trustee of the Endowment Fund. The word "trustee" has a distinct legal meaning: a "person holding property in trust." Restatement (2d) of Trusts §3(3) (1959). R.C. 1.42 mandates that "[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." *Rockfield v. First Nat'l Bank of Springfield* (1907), 77 Ohio St. 311, 326 (courts are required to give words in statutes their distinct legal meaning; when lawmakers are making law, "[t]hey cannot be presumed to have been simply dealing with legal terms in a loose" fashion); *NLRB v. Amax Coal Co.* (1981), 453 U.S. 322, 329 ("[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms").

(2) The General Assembly imposed mandatory fiduciary duties and restrictions upon the Foundation as trustee. *Ohio Society for Crippled Children and Adults, Inc. v. McElroy* (1963), 175 Ohio St. 49, syllabus ¶1 (in determining whether a trust has been created, "the question is whether the settlor not only expressed a desire that the recipient of the property use it in a certain way, but whether he expressed an intention to impose a *duty* upon the recipient to so use it.).

200. As the corpus of the Trust, the Endowment Fund can be used "only for the purposes contemplated in the trust." *Shuster v. North American Mortgage Loan Co.* (1942), 139 Ohio St. 315, 342.

201. The trust is irrevocable because the State, as settlor, did not reserve any right of revocation.

202. Having established the Endowment Fund as a trust eight years ago, the State does not now have the power to revoke the trust because it did not reserve any right of revocation when the trust was created. *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"); *Lourdes College of Sylvania v. Bishop* (1997), 94 Ohio Misc. 2d 51, 56-57 ("after the grantor has completed the creation of a trust, she is without rights, liabilities, or powers over the trust unless expressly provided for by the trust agreement . . . . . Thus, unless the grantor has retained the power, she may not modify or revoke the trust"); Restatement (2d) of Trusts § 367 (1959) ("[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").

203. R.C. Chapter 183 must be construed consistently with the well-settled trust rule of irrevocability at the time the Endowment Fund was created because the statute did not expressly

state otherwise. *State ex rel. Morris v. Sullivan* (1909), 81 Ohio St. 79, syllabus ("[s]tatutes are to be read and construed in a light of and with reference to the rules and principles of the common law in force at the time of their enactment, and in giving construction to a statute the Legislature will not be presumed or held to have intended a repeal of the settled rules of the common law, unless the language employed by it clearly expresses or imports such intention"); Restatement (3d) of Trusts § 4 cmt. g (2003) (the terms of statutory trusts, if not expressly set forth in the statute, "are supplied by the default rules of general trust law").

204. Divesting the trust beneficiaries' rights in the Endowment Fund violates the Ohio and Federal Constitutions.

205. Article II, §28 of the Ohio Constitution and the Contract Clause of Article I, §10 of the Federal Constitution prohibit the General Assembly from interfering with vested trust rights or impairing trust obligations. *State ex rel City of Youngstown v. Jones* (1939), 136 Ohio St. 130, 136, ("[t]he General Assembly . . . could not interfere with vested rights or impair the obligations of existing contracts in violation of Section 28, Article II of the state Constitution and the contract clause of Section 10 of Article I of the federal Constitution"); *State v. Walls* (2002), 96 Ohio St. 3d 437 @ ¶9 (it is "settled in Ohio that a statute runs afoul of [the prohibition in Section 28, Article II of the Ohio Constitution against retroactive laws] if it takes away or impairs vested rights acquired under existing laws").

206. The Endowment Fund's beneficiaries have constitutionally protected vested rights in the trust *res*. Once the General Assembly transferred monies to the Endowment Fund to be held by the Foundation in trust, those funds were impressed with a trust outside the state treasury, R.C. 183.08(A), and the equitable rights of the class of trust beneficiaries, including Ohio tobacco users, vested in the Fund. *First Nat'l Bank of Cincinnati v. Tenney* (1956), 165

Ohio St. 513, 518 (when a trust is created, "the settlor transfers and delivers property to a trustee . . . and designated beneficiaries take immediate vested interest in such property"); *Braun v. Central Trust Co.*, (1952), 92 Ohio App. 110, 116 (when a trust becomes effective, the legal and equitable titles "vest immediately": truest beneficiaries are "vested with the equitable title" and legal title is vested in the trustee); *Hermann v. Brighton German Bank Co.* (1914), 29 Ohio Dec. 626 at *4 ("in a trust, the equitable title vests in the cestui que trust [the beneficiaries]"); *Hatch v. Lallo*, 2002 WL 462862, *2 (Ohio App. 9th Dist. 2002) ("a settlor's transfer of the trust property's legal title to a trustee accomplishes [the] separation" of "equitable and legal" ownership interests between the trust beneficiary and the trustee).

207. The State's attempt to revoke the Trust and liquidate the Endowment Fund substantially impairs the obligations of the Trust and the vested rights of the Trust beneficiaries, including the individual Plaintiffs, in violation of the Contract Clauses of the Federal and Ohio Constitutions, Art. I, §10 of the United States Constitution and Art. II, §28 of the Ohio Constitution. *Jones*, supra, 136 Ohio St. 130, 136 ("[t]he General Assembly . . . could not interfere with vested rights or impair the obligations of existing contracts"); *Toledo v. Seiders* (1910), 23 Ohio Cir. Dec. 613, 1910 WL 1216, at **2, 5-6, aff'd as modified, (1911) 83 Ohio St. 495 (the General Assembly was "without authority to take the entire control and management of [the trust property] from the trustees . . . . "), citing *New Gloucester School Fund v. Bradbury* (1834), 11 Me. 118, 1834 WL 473, at **5-6 (statute that purported to divest statutory trust rights by transferring the endowment fund from the original trustees was an unconstitutional impairment of contract); *Dadisman*, supra, 384 S.E. 2d at 829-30 (state's diversion of public employer contributions from the Public Employees Retirement System was an unconstitutional invasion of trust funds: "We would be faithless to our constitutional duties to allow a raid on the

PERS trust for purposes of political expediency." The public employers' PERS contributions are "part of the corpus of the trust and are not thereafter state funds available for expropriation or use for any purpose other than that for which the moneys were entrusted"); *Kapiolani Park Preservation Society v. Honolulu*, 751 P. 2d 1022, 1025-27 (Haw. 1988) (state's repeal of prior statute that had created a trust and attempt to transfer away portions of trust corpus impaired the obligations of the trust in violation of the Contract Clause of the Federal Constitution).

208. H.B. 544's impairment of the Trust is not "reasonable and necessary" to serve important state purposes. *United States Trust Company of New York v. New Jersey* (1977), 431 U.S. 1, 29-31; *Energy Reserves Group, Inc. v. Kansas Power and Light Co.* (1983), 459 U.S. 400, 412-13 n. 14; *Association of Surrogates and Supreme Court Reporters v. State of New York* (2d Cir. 1991), 940 F. 2d 766, 771-72 ("when the state's legislation is self-serving and impairs the obligations of its own," courts do not defer to the legislative judgment but, instead, engage in "a more searching analysis"; the new legislation can "survive scrutiny only if it is reasonable and necessary to serve an important public purpose").

209. Depleting the Endowment Fund is unnecessary because there are less drastic alternatives to serve the State's goal under the Stimulus Proposal and H.B. 544 of creating jobs in Ohio. The State of Ohio offered no evidence on this issue. The only evidence supports the conclusion that the State's impairment of the Trust is not necessary because there is at least one equally effective and less drastic alternative to fund $230 million of the Stimulus Proposal, rather than diverting the monies from the Endowment Fund: general obligation bonds, as Governor Strickland originally proposed on a much grander scale for the same purpose earlier this year. [Hearing Tr., Vol. III, at 75-86 (Proctor)] [Pl. Exs. 11-12].

210. Plaintiffs therefore have a substantial likelihood of success on the merits in establishing that H.B. 544 impairs the Trust in violation of Art. I, §10 of the United States Constitution, and Art. II, §28 of the Ohio Constitution, and thus establishing that those portions of H.B. 544 that purport to revoke the Trust and liquidate the Endowment Fund are invalid and void *ab initio*.

211. To the extent that Amended S.B. 192, prior to its repeal on May 6, 2008, purported to liquidate the Endowment Fund and divert its moneys elsewhere, Amended S.B. 192 is also unconstitutional and of no legal effect for the same reasons.

XIV. Irreparable Harm

212. Under Ohio law, a party may only seek an injunction to guard himself, not third parties, from harm. To have standing for injunctive relief, the injunction sought must provide the moving party with some tangible good. The moving party must prove by clear and convincing evidence that he has a "personal stake" in the granting of the injunction. *Crestmont Cleveland Pshp. V. Ohio Dep't of Health* (10th Dist., 2000), 139 Ohio App. 3d 928, 936. To establish that personal stake, the moving party must show that he faces an immediate threat of irreparable injury. *Fraternal Order of Police v. City of Cleveland* (2001), 141 Ohio App. 3d 63, 74.

213. A party cannot demonstrate irreparable harm by showing that it will only sustain economic harm. A financial loss can be compensated by money damages, whereas, as the Tenth District Court of Appeals explained, "irreparable harm consists of the substantial threat of material injury that cannot be compensated with monetary damages." *Sabatino v. Sanfillipo* (10th Dist., Dec. 7, 1999), Case No. 99 AP-149, 1999 Ohio App. LEXIS 5805, *7, quoting *Agrigeneral Co. v. Lightner* (3rd Dist., 1998), 127 Ohio App. 3d 109, 115.

214. Absent the requested injunctive relief, the individual Plaintiffs will immediately suffer irreparable harm. Unlawful impairment of constitutional rights necessarily results in irreparable harm. *United Auto Workers, Local Union 1112 v. Philomena*, 121 Ohio App. 3d 760, 781 (10th Dist. 1998) (injunctive relief is warranted because enforcement of an unconstitutional provision and the resultant loss of constitutional rights causes irreparable harm); *American Civil Liberties Union of Ky. v. McReary County, Ky.*, 354 F.3d 438, 445 (6th Cir. 2003) ("when reviewing a motion for preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated") (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) ("a plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights").

215. Injunctive relief is the proper remedy in order to prevent state officials from carrying out unconstitutional statutes, including those that unconstitutionally impair a contract. *University of Hawaii Professional Assembly v. Cayetano*, 183 F.3d 1096, 1108 (9th Cir. 1999) (affirming grant of preliminary injunction against operation of statute that unconstitutionally impaired contract); *Hubbell v. Leonard*, 6 F. Supp. 145 (E.D. Ark. 1934) (appropriate relief for unconstitutional impairment of contracts was to enjoin state officials from diverting revenue sources that were already committed under the contracts and to declare the unconstitutional statutes "null and void"); *Dann v. Blackwell*, 83 F. Supp.2d 906 (S.D. Ohio 2000) (enjoining Ohio state official from enforcing unconstitutional statute); *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987) (upholding preliminary injunction preventing enforcement of unconstitutional city ordinance).

216. Without injunctive relief, Plaintiffs will also suffer imminent irreparable harm because they have no adequate remedy at law. In order for a legal remedy to be adequate, it "shall be in all respects adequate to justify the refusal of the injunction upon that ground.... It is not enough that there is a remedy at law; it must be plain, adequate and complete; or in other words, as practical, and as efficient to the ends of justice and its prompt administration, as the remedy in equity." *Mid-America Tire, Inc. v. PTZ Trading Ltd.*, 95 Ohio St. 3d 367, 380 (2002). H.B. 544 purports to completely liquidate the Endowment Fund and divert those funds elsewhere.

XV. Harm to Third Parties

217. Third parties will be harmed if injunctive relief is not granted. The intended beneficiaries of the Trust will suffer an increase in tobacco-related disease and mortality, and suffer significant additional tobacco-related health care costs, if the Endowment Fund is depleted and the scope and impact of the types of tobacco prevention and cessation programs that the Foundation formerly funded are reduced or discontinued. [Hearing Tr., Vol. II, at 176-77, 204-07 (Healton)] [Crane Dep. at 24-25] [Wewers Dep. at 18-19, 26-27]

218. No harm will result from granting preliminary injunctive relief to preserve the *status quo*, because the State has other, equally effective alternative means of achieving its stated policy interests without depleting the Endowment Fund. In addition, during the pendency of this case, the remainder of the Endowment Fund in excess of $190 million may continue to be used to fund or carry out tobacco control, prevention, and cessation research and programs in Ohio.

XVI. Public Interests Served

219. The public interest will be served by granting injunctive relief. "It is always in the public interest to prevent violation of a party's constitutional rights." *Déjà Vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001).

220. Injunctive relief will protect the public by preserving the Endowment Fund and preventing an unnecessary increase in tobacco-related disease and mortality in Ohio and the substantial costs of associated medical treatment.

221. A preliminary injunction is necessary to preserve the *status quo* pending final trial of this action.

XVII. Bond

222. This Court has the discretion to dispense with a bond for the issuance of a preliminary injunction. *Vanguard Transp. Systems, Inc. v. Edwards Transfer & Storage Co.*, 109 Ohio App. 3d 786, 793 (10th Dist. 1996) (holding that bond was not required for preliminary injunction to be operative, and stating that "the court's discretion as to the amount of the bond includes discretion to require no bond at all").

223. There is no risk of loss upon the continuation of the Court's prior freeze order because the assets of the Endowment Fund will remain in the Treasurer's custody during this case, where the funds are to be invested in a prudent manner. Therefore, no bond will be required.

XVIII. Order Of The Court

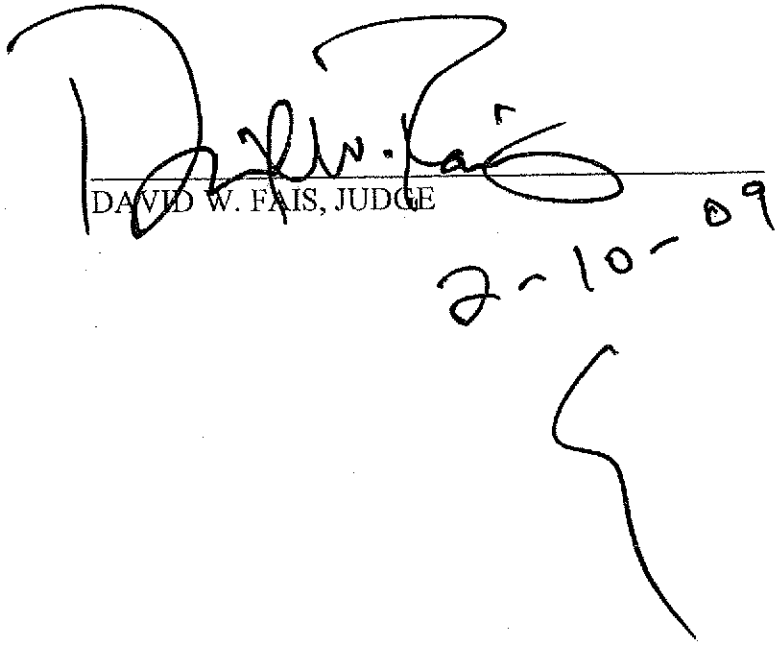
For all of these reasons, it is hereby ORDERED that a preliminary injunction issue on the following terms:

(A) The freeze order entered by this Court on April 10, 2008, as modified on April 24 and 30, 2008, May 9, 2008 and June 25, 2008, shall remain in full force and effect until further order of this Court. As such, Defendants State of Ohio, the Treasurer, the Ohio Attorney General, Director Alvin D. Jackson, the Ohio Department of Health, all of Defendants' officials, agents and representatives, and anyone acting in concert with them or on their behalf are hereby enjoined from enforcing, implementing, or otherwise acting on any provision of H.B. 544, or the repealed portions of Amended S.B. 192, relating to the monies in the Endowment Fund or the Legacy contract until the Court enters final judgment following trial on the merits. All actions, orders, directives, instructions or other state actions that purport to enforce or take any action relating to, or in reliance on, those provisions of H.B. 544 and Amended S.B. 192 are hereby rendered void, ineffective and enjoined until final judgment is entered following the trial on the merits.

(B) All assets, investments, funds, proceeds, monies or other amounts that are in the Endowment Fund shall remain in the Endowment Fund in the Treasurer's custody and shall not be moved, expended, disbursed, appropriated, and/or transferred until further order of this Court. If additional monies from the Endowment Fund are necessary to continue to fund tobacco prevention, control, or cessation programs in Ohio during the pendency of this case, the Foundation or any other party may apply to the Court for limited relief from this preliminary injunction for those purposes.

(C) No bond shall be required.

IT IS SO ORDERED.



DAVID W. FAIS, JUDGE

2-10-09

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C
Baldwin's Ohio Revised Code Annotated Currentness
Constitution of the State of Ohio (Refs & Annos)
Article II. Legislative (Refs & Annos)
→ O Const II Sec. 28 Retroactive laws; laws impairing obligation of contracts

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

CREDIT(S)

(1851 constitutional convention, adopted eff. 9-1-1851)

Current through 2009 File 9 of the 128th GA (2009-2010), apv. by 9/22/09 and filed with the Secretary of State by 9/22/09.

END OF DOCUMENT

U.S. Constitution - Article 1 Section 10

Article 1 - The Legislative Branch
Section 10 - Powers Prohibited of States

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

(123rd General Assembly)
(Amended Substitute Senate Bill Number 192)

AN ACT

To amend sections 102.02, 107.03, 107.031, and 126.02 and to enact sections 126.022, 183.01, 183.02, 183.021, 183.03 to 183.33, and 5145.32 of the Revised Code to provide for the distribution of money received by the state pursuant to the Tobacco Master Settlement Agreement, to impose prohibitions concerning smoking and tobacco use in certain state correctional institutions, and to make capital and operating appropriations for programs funded with Master Settlement Agreement revenue for the biennium ending June 30, 2002.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 102.02, 107.03, 107.031, and 126.02 be amended and sections 126.022, 183.01, 183.02, 183.021, 183.03, 183.04, 183.05, 183.06, 183.07, 183.08, 183.09, 183.10, 183.11, 183.12, 183.13, 183.14, 183.15, 183.16, 183.17, 183.18, 183.19, 183.20, 183.21, 183.22, 183.23, 183.24, 183.25, 183.26, 183.27, 183.28, 183.29, 183.30, 183.31, 183.32, 183.33, and 5145.32 of the Revised Code be enacted to read as follows:

Sec. 102.02. (A) Except as otherwise provided in division (H) of this section, every person who is elected to or is a candidate for a state, county, or city office, or the office of member of the United States congress, and every person who is appointed to fill a vacancy for an unexpired term in such an elective office; all members of the state board of education; the director, assistant directors, deputy directors, division chiefs, or persons of equivalent rank of any administrative department of the state; the president or other chief administrative officer of every state institution of higher education as defined in section 3345.011 of the Revised Code; the chief executive officer of each state retirement system; all members of the board of commissioners on grievances and discipline of the supreme court and the ethics commission created under section 102.05 of the Revised

Code; every business manager, treasurer, or superintendent of a city, local, exempted village, joint vocational, or cooperative education school district or an educational service center; every person who is elected to or is a candidate for the office of member of a board of education of a city, local, exempted village, joint vocational, or cooperative education school district or of a governing board of an educational service center that has a total student count of twelve thousand or more as most recently determined by the department of education pursuant to section 3317.03 of the Revised Code; every person who is appointed to the board of education of a municipal school district pursuant to division (B) or (F) of section 3311.71 of the Revised Code; all members of the board of directors of a sanitary district established under Chapter 6115. of the Revised Code and organized wholly for the purpose of providing a water supply for domestic, municipal, and public use that includes two municipal corporations in two counties; every public official or employee who is paid a salary or wage in accordance with schedule C of section 124.15 or schedule E-2 of section 124.152 of the Revised Code; MEMBERS OF THE BOARD OF TRUSTEES AND THE EXECUTIVE DIRECTOR OF THE TOBACCO USE PREVENTION AND CONTROL FOUNDATION; MEMBERS OF THE BOARD OF TRUSTEES AND THE EXECUTIVE DIRECTOR OF THE SOUTHERN OHIO AGRICULTURAL AND COMMUNITY DEVELOPMENT FOUNDATION; MEMBERS AND THE EXECUTIVE DIRECTOR OF THE BIOMEDICAL RESEARCH AND TECHNOLOGY TRANSFER COMMISSION; and every other public official or employee who is designated by the appropriate ethics commission pursuant to division (B) of this section shall file with the appropriate ethics commission on a form prescribed by the commission, a statement disclosing all of the following:

(1) The name of the person filing the statement and each member of the person's immediate family and all names under which the person or members of the person's immediate family do business;

(2)(a) Subject to divisions (A)(2)(b) and (c) of this section and except as otherwise provided in section 102.022 of the Revised Code, identification of every source of income, other than income from a legislative agent identified in division (A)(2)(b) of this section, received during the preceding calendar year, in the person's own name or by any other person for the person's use or benefit, by the person filing the statement, and a brief description of the nature of the services for which the income was received. If the person filing the statement is a member of the general assembly, the statement shall identify the amount of every source of income received in accordance with the following ranges of amounts: zero or more, but less than one thousand dollars; one thousand dollars or more, but less than ten thousand dollars; ten thousand dollars or more, but less than twenty-five thousand dollars; twenty-five thousand dollars or more, but less than fifty thousand dollars; fifty thousand dollars or more, but less than one hundred thousand dollars; and one hundred thousand dollars or more. Division (A)(2)(a) of this section shall not be construed to require a person filing the statement who derives income from a business or profession to disclose the individual items of income that constitute the gross income of that business

or profession, except for those individual items of income that are attributable to the person's or, if the income is shared with the person, the partner's, solicitation of services or goods or performance, arrangement, or facilitation of services or provision of goods on behalf of the business or profession of clients, including corporate clients, who are legislative agents as defined in section 101.70 of the Revised Code. A person who files the statement under this section shall disclose the identity of and the amount of income received from a person who the public official or employee knows or has reason to know is doing or seeking to do business of any kind with the public official's or employee's agency.

(b) If the person filing the statement is a member of the general assembly, the statement shall identify every source of income and the amount of that income that was received from a legislative agent, as defined in section 101.70 of the Revised Code, during the preceding calendar year, in the person's own name or by any other person for the person's use or benefit, by the person filing the statement, and a brief description of the nature of the services for which the income was received. Division (A)(2)(b) of this section requires the disclosure of clients of attorneys or persons licensed under section 4732.12 of the Revised Code, or patients of persons certified under section 4731.14 of the Revised Code, if those clients or patients are legislative agents. Division (A)(2)(b) of this section requires a person filing the statement who derives income from a business or profession to disclose those individual items of income that constitute the gross income of that business or profession that are received from legislative agents.

(c) Except as otherwise provided in division (A)(2)(c) of this section, division (A)(2)(a) of this section applies to attorneys, physicians, and other persons who engage in the practice of a profession and who, pursuant to a section of the Revised Code, the common law of this state, a code of ethics applicable to the profession, or otherwise, generally are required not to reveal, disclose, or use confidences of clients, patients, or other recipients of professional services except under specified circumstances or generally are required to maintain those types of confidences as privileged communications except under specified circumstances. Division (A)(2)(a) of this section does not require an attorney, physician, or other professional subject to a confidentiality requirement as described in division (A)(2)(c) of this section to disclose the name, other identity, or address of a client, patient, or other recipient of professional services if the disclosure would threaten the client, patient, or other recipient of professional services, would reveal details of the subject matter for which legal, medical, or professional advice or other services were sought, or would reveal an otherwise privileged communication involving the client, patient, or other recipient of professional services. Division (A)(2)(a) of this section does not require an attorney, physician, or other professional subject to a confidentiality requirement as described in division (A)(2)(c) of this section to disclose in the brief description of the nature of services required by division (A)(2)(a) of this section any information pertaining to specific professional services rendered for a client, patient, or other recipient of professional services that would reveal details of the subject matter for

which legal, medical, or professional advice was sought or would reveal an otherwise privileged communication involving the client, patient, or other recipient of professional services.

(3) The name of every corporation on file with the secretary of state that is incorporated in this state or holds a certificate of compliance authorizing it to do business in this state, trust, business trust, partnership, or association that transacts business in this state in which the person filing the statement or any other person for the person's use and benefit had during the preceding calendar year an investment of over one thousand dollars at fair market value as of the thirty-first day of December of the preceding calendar year, or the date of disposition, whichever is earlier, or in which the person holds any office or has a fiduciary relationship, and a description of the nature of the investment, office, or relationship. Division (A)(3) of this section does not require disclosure of the name of any bank, savings and loan association, credit union, or building and loan association with which the person filing the statement has a deposit or a withdrawable share account.

(4) All fee simple and leasehold interests to which the person filing the statement holds legal title to or a beneficial interest in real property located within the state, excluding the person's residence and property used primarily for personal recreation;

(5) The names of all persons residing or transacting business in the state to whom the person filing the statement owes, in the person's own name or in the name of any other person, more than one thousand dollars. Division (A)(5) of this section shall not be construed to require the disclosure of debts owed by the person resulting from the ordinary conduct of a business or profession or debts on the person's residence or real property used primarily for personal recreation, except that the superintendent of financial institutions shall disclose the names of all state-chartered savings and loan associations and of all service corporations subject to regulation under division (E)(2) of section 1151.34 of the Revised Code to whom the superintendent in the superintendent's own name or in the name of any other person owes any money, and that the superintendent and any deputy superintendent of banks shall disclose the names of all state-chartered banks and all bank subsidiary corporations subject to regulation under section 1109.44 of the Revised Code to whom the superintendent or deputy superintendent owes any money.

(6) The names of all persons residing or transacting business in the state, other than a depository excluded under division (A)(3) of this section, who owe more than one thousand dollars to the person filing the statement, either in the person's own name or to any person for the person's use or benefit. Division (A)(6) of this section shall not be construed to require the disclosure of clients of attorneys or persons licensed under section 4732.12 or 4732.15 of the Revised Code, or patients of persons certified under section 4731.14 of the Revised Code, nor the disclosure of debts owed to the person resulting from the ordinary conduct of a business or profession.

(7) Except as otherwise provided in section 102.022 of the Revised Code, the source of each gift of over seventy-five dollars, or of each gift of

over twenty-five dollars received by a member of the general assembly from a legislative agent, received by the person in the person's own name or by any other person for the person's use or benefit during the preceding calendar year, except gifts received by will or by virtue of section 2105.06 of the Revised Code, or received from spouses, parents, grandparents, children, grandchildren, siblings, nephews, nieces, uncles, aunts, brothers-in-law, sisters-in-law, sons-in-law, daughters-in-law, fathers-in-law, mothers-in-law, or any person to whom the person filing the statement stands in loco parentis, or received by way of distribution from any inter vivos or testamentary trust established by a spouse or by an ancestor;

(8) Except as otherwise provided in section 102.022 of the Revised Code, identification of the source and amount of every payment of expenses incurred for travel to destinations inside or outside this state that is received by the person in the person's own name or by any other person for the person's use or benefit and that is incurred in connection with the person's official duties except for expenses for travel to meetings or conventions of a national or state organization to which either house of the general assembly, any legislative agency, a state institution of higher education as defined in section 3345.031 of the Revised Code, any other state agency, or any political subdivision or any office or agency of a political subdivision pays membership dues;

(9) Except as otherwise provided in section 102.022 of the Revised Code, identification of the source of payment of expenses for meals and other food and beverages, other than for meals and other food and beverages provided at a meeting at which the person participated in a panel, seminar, or speaking engagement or at a meeting or convention of a national or state organization to which either house of the general assembly, any legislative agency, a state institution of higher education as defined in section 3345.031 of the Revised Code, any other state agency, or any political subdivision or any office or agency of a political subdivision pays membership dues, that are incurred in connection with the person's official duties and that exceed one hundred dollars aggregated per calendar year;

(10) If the financial disclosure statement is filed by a public official or employee described in division (B)(2) of section 101.73 of the Revised Code or division (B)(2) of section 121.63 of the Revised Code who receives a statement from a legislative agent, executive agency lobbyist, or employer that contains the information described in division (F)(2) of section 101.73 of the Revised Code or division (G)(2) of section 121.63 of the Revised Code, all of the nondisputed information contained in the statement delivered to that public official or employee by the legislative agent, executive agency lobbyist, or employer under division (F)(2) of section 101.73 or (G)(2) of section 121.63 of the Revised Code. As used in division (A)(10) of this section, legislative agent, executive agency lobbyist, and employer have the same meanings as in sections 101.70 and 121.60 of the Revised Code.

A person may file a statement required by this section in person or by mail. A person who is a candidate for elective office shall file the statement no later than the thirtieth day before the primary, special, or general

election at which the candidacy is to be voted on, whichever election occurs soonest, except that a person who is a write-in candidate shall file the statement no later than the twentieth day before the earliest election at which the person's candidacy is to be voted on. A person who holds elective office shall file the statement on or before the fifteenth day of April of each year unless the person is a candidate for office. A person who is appointed to fill a vacancy for an unexpired term in an elective office shall file the statement within fifteen days after the person qualifies for office. Other persons shall file an annual statement on or before the fifteenth day of April or, if appointed or employed after that date, within ninety days after appointment or employment. No person shall be required to file with the appropriate ethics commission more than one statement or pay more than one filing fee for any one calendar year.

The appropriate ethics commission, for good cause, may extend for a reasonable time the deadline for filing a disclosure statement under this section.

A statement filed under this section is subject to public inspection at locations designated by the appropriate ethics commission except as otherwise provided in this section.

(B) The Ohio ethics commission, the joint legislative ethics committee, and the board of commissioners on grievances and discipline of the supreme court, using the rule-making procedures of Chapter 119. of the Revised Code, may require any class of public officials or employees under its jurisdiction and not specifically excluded by this section whose positions involve a substantial and material exercise of administrative discretion in the formulation of public policy, expenditure of public funds, enforcement of laws and rules of the state or a county or city, or the execution of other public trusts, to file an annual statement on or before the fifteenth day of April under division (A) of this section. The appropriate ethics commission shall send the public officials or employees written notice of the requirement by the fifteenth day of February of each year the filing is required unless the public official or employee is appointed after that date, in which case the notice shall be sent within thirty days after appointment, and the filing shall be made not later than ninety days after appointment.

~~Disclosure~~ EXCEPT FOR DISCLOSURE STATEMENTS FILED BY MEMBERS OF THE BOARD OF TRUSTEES AND THE EXECUTIVE DIRECTOR OF THE TOBACCO USE PREVENTION AND CONTROL FOUNDATION, MEMBERS OF THE BOARD OF TRUSTEES AND THE EXECUTIVE DIRECTOR OF THE SOUTHERN OHIO AGRICULTURAL AND COMMUNITY DEVELOPMENT FOUNDATION, AND MEMBERS AND THE EXECUTIVE DIRECTOR OF THE BIOMEDICAL RESEARCH AND TECHNOLOGY TRANSFER COMMISSION, DISCLOSURE statements filed under this division with the Ohio ethics commission by members of boards, commissions, or bureaus of the state for which no compensation is received other than reasonable and necessary expenses shall be kept confidential. Disclosure statements filed with the Ohio ethics commission under division (A) of this section by business managers, treasurers, and superintendents of city, local, exempted village, joint vocational, or cooperative education

school districts or educational service centers shall be kept confidential, except that any person conducting an audit of any such school district pursuant to section 115.56 or Chapter 117. of the Revised Code may examine the disclosure statement of any business manager, treasurer, or superintendent of that school district or educational service center. The Ohio ethics commission shall examine each disclosure statement required to be kept confidential to determine whether a potential conflict of interest exists for the person who filed the disclosure statement. A potential conflict of interest exists if the private interests of the person, as indicated by the person's disclosure statement, might interfere with the public interests the person is required to serve in the exercise of the person's authority and duties in the person's office or position of employment. If the commission determines that a potential conflict of interest exists, it shall notify the person who filed the disclosure statement and shall make the portions of the disclosure statement that indicate a potential conflict of interest subject to public inspection in the same manner as is provided for other disclosure statements. Any portion of the disclosure statement that the commission determines does not indicate a potential conflict of interest shall be kept confidential by the commission and shall not be made subject to public inspection, except as is necessary for the enforcement of Chapters 102. and 2921. of the Revised Code and except as otherwise provided in this division.

(C) No person shall knowingly fail to file, on or before the applicable filing deadline established under this section, a statement that is required by this section.

(D) No person shall knowingly file a false statement that is required to be filed under this section.

(E)(1) Except as provided in divisions (E)(2) and (3) of this section, on and after March 2, 1994, the statement required by division (A) or (B) of this section shall be accompanied by a filing fee of twenty-five dollars.

(2) The statement required by division (A) of this section shall be accompanied by a filing fee to be paid by the person who is elected or appointed to or is a candidate for any of the following offices:

For state office, except member of state board of education	$50
For office of member of United States congress or member of general assembly	$25
For county office	$25
For city office	$10
For office of member of state board of education	$10
For office of member of city, local, exempted village, or cooperative education board of education or educational service center governing board	$ 5
For position of business manager, treasurer, or superintendent of city, local, exempted village, joint vocational, or cooperative education school district or educational service center	$ 5

(3) No judge of a court of record or candidate for judge of such a court, and no referee or magistrate serving a court of record, shall be required to pay the fee required under division (E)(1) or (2) or (F) of this section.

(4) For any public official who is appointed to a nonelective office of the state and for any employee who holds a nonelective position in a public agency of the state, the state agency that is the primary employer of the state official or employee shall pay the fee required under division (E)(1) or (F) of this section.

(F) If a statement required to be filed under this section is not filed by the date on which it is required to be filed, the appropriate ethics commission shall assess the person required to file the statement a late filing fee equal to one-half of the applicable filing fee for each day the statement is not filed, except that the total amount of the late filing fee shall not exceed one hundred dollars.

(G)(1) The appropriate ethics commission other than the Ohio ethics commission shall deposit all fees it receives under divisions (E) and (F) of this section into the general revenue fund of the state.

(2) The Ohio ethics commission shall deposit all receipts, including, but not limited to, fees it receives under divisions (E) and (F) of this section and all moneys it receives from settlements under division (G) of section 102.06 of the Revised Code, into the Ohio ethics commission fund, which is hereby created in the state treasury. All moneys credited to the fund shall be used solely for expenses related to the operation and statutory functions of the commission.

(H) Division (A) of this section does not apply to a person elected or appointed to the office of precinct, ward, or district committee member under Chapter 3517. of the Revised Code; a presidential elector; a delegate to a national convention; village or township officials and employees; any physician or psychiatrist who is paid a salary or wage in accordance with schedule C of section 124.15 or schedule E-2 of section 124.152 of the Revised Code and whose primary duties do not require the exercise of administrative discretion; or any member of a board, commission, or bureau of any county or city who receives less than one thousand dollars per year for serving in that position.

Sec. 107.03. The governor shall submit to the general assembly, not later than four weeks after its organization, a state budget containing a complete financial plan for the ensuing fiscal biennium, ~~except that~~ EXCLUDING ITEMS OF REVENUE AND EXPENDITURE DESCRIBED IN SECTION 126.022 OF THE REVISED CODE . HOWEVER, in years of a new governor's inauguration, the budget shall be submitted not later than the fifteenth day of March. In years of a new governor's inauguration, only the new governor shall submit a budget to the general assembly. In addition to other things required by law, the governor's budget shall contain:

(A) A general budget summary by function and agency setting forth the proposed total expenses from each and all funds and the anticipated resources for meeting such expenses; such resources to include any available balances in the several funds at the beginning of the biennium and a classification by totals of all revenue receipts estimated to accrue during the biennium under existing law and proposed legislation.

(B) A detailed statement showing the amounts recommended to be appropriated from each fund for each fiscal year of the biennium for current expenses, including, but not limited to, personal services, supplies and materials, equipment, subsidies and revenue distribution, merchandise for resale, transfers, and nonexpense disbursements, obligations, interest on debt, and retirement of debt, and for the biennium for capital outlay, to the respective departments, offices, institutions, as defined in section 121.01 of the Revised Code, and all other public purposes; and, in comparative form, the actual expenses by source of funds during each fiscal year of the previous two bienniums for each such purpose. No alterations shall be made in the requests for the legislative and judicial branches of the state filed with the director of budget and management under section 126.02 of the Revised Code. If any amount of federal money is recommended to be appropriated or has been expended for a purpose for which state money also is recommended to be appropriated or has been expended, the amounts of federal money and state money involved shall be separately identified.

(C) A detailed estimate of the revenue receipts in each fund from each source under existing laws during each year of the biennium; and, in comparative form, actual revenue receipts in each fund from each source for each year of the two previous bienniums;

(D) The estimated cash balance in each fund at the beginning of the biennium covered by the budget; the estimated liabilities outstanding against each such balance; and the estimated net balance remaining and available for new appropriations;

(E) A detailed estimate of the additional revenue receipts in each fund from each source under proposed legislation, if enacted, during each year of the biennium;

(F) A description of each tax expenditure; a detailed estimate of the amount of revenues not available to the general revenue fund under existing laws during each fiscal year of the biennium covered by the budget due to the operation of each tax expenditure; and, in comparative form, the amount of revenue not available to the general revenue fund during each fiscal year of the immediately preceding biennium due to the operation of each tax expenditure. The report prepared by the department of taxation pursuant to section 5703.48 of the Revised Code shall be submitted to the general assembly as an appendix to the governor's budget. As used in this division, "tax expenditure" has the same meaning as in section 5703.48 of the Revised Code.

Sec. 107.031. Until the first committee appointed under division (C) of section 3317.012 of the Revised Code to reexamine the cost of an adequate education makes its report to the office of budget and management and the general assembly, the governor shall ensure that among the various budget recommendations made by the governor and the director of budget and management to the general assembly each biennium there are recommendations for appropriations to the Ohio school facilities commission, aggregating not less than three hundred million dollars per fiscal year, EXCLUDING RECOMMENDATIONS FOR APPROPRIATIONS FROM THE EDUCATION FACILITIES TRUST FUND, CREATED IN SECTION 183.26 OF THE REVISED CODE, for constructing, acquiring, replacing, reconstructing, or adding to classroom facilities, as such term is defined in section 3318.01 of the Revised Code.

Sec. 126.02. The director of budget and management shall prepare and submit to the governor, biennially, not later than the first day of January preceding the convening of the general assembly, state budget estimates of revenues and expenditures for each state fund and budget estimates for each state agency, EXCEPT SUCH ESTIMATES AS ARE REQUIRED UNDER SECTION 126.22 OF THE REVISED CODE. The budget estimates for each state agency for which direct appropriations are proposed shall include the following details:

(A) Estimates of the operating budget;

(B) Estimates of the subsidy appropriations necessary, delineated by a distinct subsidy program;

(C) Estimates for special purposes, delineated by a distinct special purpose program;

(D) Estimates of appropriations necessary from each fund in reasonable detail to allow for adequate planning and oversight of programs and activities.

In the preparation of state revenue and expenditure estimates, the director of budget and management shall, not later than the fifteenth day of September in the year preceding the first regular session of the general assembly, distribute to all affected state agencies the forms necessary for the preparation of budget requests, which shall be in the form prescribed by the director in consultation with the legislative budget office of the legislative service commission to procure information concerning the revenues and expenditures for the preceding and current bienniums, an estimate of the revenues and expenditures of the current fiscal year, and an estimate of the revenues and proposed expenditures for the respective agencies for the two succeeding fiscal years for which appropriations have to be made. Each such agency shall, not later than the first day of November, file with the director its estimate of revenues and proposed expenditures for the succeeding biennium.

Each such agency shall, not later than the first day of December, file with the ~~chairmen~~ CHAIRPERSON of the finance committees of the senate and house of representatives and the legislative budget office a duplicate copy of such budget request.

The budget request shall be accompanied by a statement in writing giving facts and explanation of reasons for the items requested. The director and the legislative budget office may make further inquiry and investigation as to any item desired. The director may approve, disapprove, or alter the requests, excepting those for the legislative and judicial branches of the state. The requests as revised by ~~him~~ THE

DIRECTOR constitute the state budget estimates of revenues and expenditures which the director is required to submit to the governor.

Sec. 126.022. NOT LATER THAN FOUR WEEKS AFTER THE GENERAL ASSEMBLY CONVENES IN EACH EVEN-NUMBERED YEAR, THE DIRECTOR OF BUDGET AND MANAGEMENT SHALL PREPARE AND RECOMMEND TO THE GENERAL ASSEMBLY, SUBJECT TO THE CONCURRENCE OF THE GOVERNOR, ESTIMATES OF REVENUES FROM, OR DERIVED FROM, PAYMENTS TO THE STATE UNDER THE TOBACCO MASTER SETTLEMENT AGREEMENT AND EXPENDITURES OF SUCH REVENUES FOR THE BIENNIUM BEGINNING ON THE FOLLOWING FIRST DAY OF JULY. EACH STATE AGENCY AFFECTED BY SUCH REVENUES OR EXPENDITURES SHALL SUBMIT TO THE DIRECTOR OF BUDGET AND MANAGEMENT ANY RELATED INFORMATION THE DIRECTOR REQUIRES, IN SUCH FORM AND AT SUCH TIMES AS THE DIRECTOR PRESCRIBES.

Sec. 183.01. AS USED IN THIS CHAPTER:

(A) "TOBACCO MASTER SETTLEMENT AGREEMENT" MEANS THE SETTLEMENT AGREEMENT (AND RELATED DOCUMENTS) ENTERED INTO ON NOVEMBER 23, 1998 BY THE STATE AND LEADING UNITED STATES TOBACCO PRODUCT MANUFACTURERS.

(B) "NET AMOUNTS CREDITED TO THE TOBACCO MASTER SETTLEMENT AGREEMENT FUND" MEANS ALL AMOUNTS CREDITED TO THE TOBACCO MASTER SETTLEMENT AGREEMENT FUND DURING A FISCAL YEAR, MINUS ALL AMOUNTS REQUIRED TO BE TRANSFERRED UNDER SECTION 183.02 OF THE REVISED CODE TO THE EDUCATION FACILITIES TRUST FUND, THE EDUCATION FACILITIES ENDOWMENT FUND, AND THE INCOME TAX REDUCTION FUND DURING THE FISCAL YEAR. IN ADDITION, IN FISCAL YEAR 2000, "NET AMOUNTS CREDITED TO THE TOBACCO MASTER SETTLEMENT AGREEMENT FUND" DOES NOT INCLUDE AMOUNTS CREDITED TO THE TOBACCO USE PREVENTION AND CESSATION TRUST FUND, LAW ENFORCEMENT IMPROVEMENTS TRUST FUND, AND SOUTHERN OHIO AGRICULTURAL AND COMMUNITY DEVELOPMENT TRUST FUND FROM THE FIRST PAYMENT RECEIVED THAT YEAR.

(C) "SOUTHERN OHIO" INCLUDES ANY COUNTY IN THIS STATE WHERE TOBACCO HAS TRADITIONALLY BEEN GROWN.

Sec. 183.02. THIS SECTION'S REFERENCES TO YEARS MEAN STATE FISCAL YEARS.

ALL PAYMENTS RECEIVED BY THE STATE PURSUANT TO THE TOBACCO MASTER SETTLEMENT AGREEMENT SHALL BE DEPOSITED INTO THE STATE TREASURY TO THE CREDIT OF THE TOBACCO MASTER SETTLEMENT AGREEMENT FUND, WHICH IS HEREBY CREATED. ALL INVESTMENT EARNINGS

OF THE FUND SHALL ALSO BE CREDITED TO THE FUND. EXCEPT AS PROVIDED IN DIVISION (I) OF THIS SECTION, PAYMENTS AND INTEREST CREDITED TO THE FUND SHALL BE TRANSFERRED BY THE DIRECTOR OF BUDGET AND MANAGEMENT AS FOLLOWS:

(A) OF THE FIRST PAYMENT CREDITED TO THE TOBACCO MASTER SETTLEMENT AGREEMENT FUND IN 2000 AND THE NET AMOUNTS CREDITED TO THE FUND ANNUALLY FROM 2000 TO 2006 AND IN 2012, THE FOLLOWING AMOUNT OR PERCENTAGE SHALL BE TRANSFERRED TO THE TOBACCO USE PREVENTION AND CESSATION TRUST FUND, CREATED IN SECTION 183.03 OF THE REVISED CODE:

YEAR	AMOUNT OR PERCENTAGE
2000 (FIRST PAYMENT CREDITED)	$104,855,222.85
2000 (NET AMOUNT CREDITED)	70.30%
2001	62.84
2002	61.41
2003	63.24
2004	66.65
2005	66.24
2006	65.97
2012	56.01

(B) OF THE FIRST PAYMENT CREDITED TO THE TOBACCO MASTER SETTLEMENT AGREEMENT FUND IN 2000 AND THE NET AMOUNTS CREDITED TO THE FUND ANNUALLY IN 2000 AND 2001, THE FOLLOWING AMOUNT OR PERCENTAGE SHALL BE TRANSFERRED TO THE LAW ENFORCEMENT IMPROVEMENTS TRUST FUND, CREATED IN SECTION 183.10 OF THE REVISED CODE:

YEAR	AMOUNT OR PERCENTAGE
2000 (FIRST PAYMENT CREDITED)	$10,000,000
2000 (NET AMOUNT CREDITED)	5.41%
2001	2.32

(C) OF THE FIRST PAYMENT CREDITED TO THE TOBACCO MASTER SETTLEMENT AGREEMENT FUND IN 2000 AND THE NET AMOUNTS CREDITED TO THE FUND ANNUALLY FROM 2000 TO 2011, THE FOLLOWING PERCENTAGES SHALL BE TRANSFERRED TO THE SOUTHERN OHIO AGRICULTURAL AND COMMUNITY DEVELOPMENT TRUST FUND, CREATED IN SECTION 183.11 OF THE REVISED CODE:

YEAR	PERCENTAGE
2000 (FIRST PAYMENT	

CREDITED)	5.00%
2000 (NET AMOUNT CREDITED)	8.73
2001	8.12
2002	9.18
2003	8.91
2004	7.84
2005	7.79
2006	7.76
2007	17.39
2008 THROUGH 2011	17.25

(D) THE FOLLOWING PERCENTAGES OF THE NET AMOUNTS CREDITED TO THE TOBACCO MASTER SETTLEMENT AGREEMENT FUND ANNUALLY SHALL BE TRANSFERRED TO OHIO'S PUBLIC HEALTH PRIORITIES TRUST FUND, CREATED IN SECTION 183.18 OF THE REVISED CODE:

YEAR	PERCENTAGE
2000	5.41
2001	6.68
2002	6.79
2003	6.90
2004	7.82
2005	8.18
2006	8.56
2007	19.83
2008	19.66
2009	20.48
2010	21.30
2011	22.12
2012	10.47

(E) THE FOLLOWING PERCENTAGES OF THE NET AMOUNTS CREDITED TO THE TOBACCO MASTER SETTLEMENT AGREEMENT FUND ANNUALLY SHALL BE TRANSFERRED TO THE BIOMEDICAL RESEARCH AND TECHNOLOGY TRANSFER TRUST FUND, CREATED IN SECTION 183.19 OF THE REVISED CODE:

YEAR	PERCENTAGE
2000	2.71
2001	14.03
2002	13.29
2003	12.73
2004	13.78
2005	14.31
2006	14.66
2007	49.57
2008 TO 2011	45.06
2012	18.77

(F) OF THE AMOUNTS CREDITED TO THE TOBACCO MASTER SETTLEMENT AGREEMENT FUND ANNUALLY, THE FOLLOWING AMOUNTS SHALL BE TRANSFERRED TO THE EDUCATION FACILITIES TRUST FUND, CREATED IN SECTION 183.26 OF THE REVISED CODE:

YEAR	AMOUNT
2000	$133,062,504.95
2001	128,938,732.73
2002	185,804,475.78
2003	180,561,673.11
2004	122,778,219.49
2005	121,389,325.80
2006	120,463,396.67
2007	246,389,369.01
2008 TO 2011	267,531,291.85
2012	110,954,545.28

(G) OF THE AMOUNTS CREDITED TO THE TOBACCO MASTER SETTLEMENT AGREEMENT FUND ANNUALLY, FROM 2000 TO 2012 FIVE MILLION DOLLARS PER YEAR SHALL BE TRANSFERRED TO THE EDUCATION FACILITIES ENDOWMENT FUND, CREATED IN SECTION 183.27 OF THE REVISED CODE. FROM 2013 TO 2025, THE FOLLOWING PERCENTAGES OF THE AMOUNTS CREDITED TO THE TOBACCO MASTER SETTLEMENT AGREEMENT FUND ANNUALLY SHALL BE TRANSFERRED TO THE ENDOWMENT FUND:

YEAR	PERCENTAGE
2013	30.22
2014	33.36
2015 TO 2025	40.90

(H) THE FOLLOWING PERCENTAGES OF THE NET AMOUNTS CREDITED TO THE TOBACCO MASTER SETTLEMENT AGREEMENT FUND ANNUALLY SHALL BE TRANSFERRED TO THE EDUCATION TECHNOLOGY TRUST FUND, CREATED IN SECTION 183.28 OF THE REVISED CODE:

YEAR	PERCENTAGE
2000	7.44
2001	6.01
2002	9.33
2003	8.22
2004	3.91
2005	3.48
2006	3.05
2007	13.21
2008	18.03
2009	17.21
2010	16.39
2011	15.57
2012	14.75

(I) IF IN ANY YEAR FROM 2001 TO 2012 THE PAYMENTS AND INTEREST CREDITED TO THE TOBACCO MASTER SETTLEMENT AGREEMENT FUND DURING THE YEAR AMOUNT TO LESS THAN THE AMOUNTS REQUIRED TO BE TRANSFERRED TO THE EDUCATION FACILITIES TRUST FUND AND THE EDUCATION FACILITIES ENDOWMENT FUND THAT YEAR, THE DIRECTOR OF BUDGET AND MANAGEMENT SHALL MAKE NONE OF THE TRANSFERS REQUIRED BY DIVISIONS (A) TO (H) OF THIS SECTION.

(J) IF IN ANY YEAR FROM 2000 TO 2025 THE PAYMENTS CREDITED TO THE TOBACCO MASTER SETTLEMENT AGREEMENT FUND DURING THE YEAR EXCEED THE FOLLOWING AMOUNTS, THE DIRECTOR OF BUDGET AND MANAGEMENT SHALL TRANSFER THE EXCESS TO THE INCOME TAX REDUCTION FUND, CREATED IN SECTION 131.44 OF THE REVISED CODE:

YEAR	AMOUNT
2000	$443,892,767.51
2001	348,780,049.22
2002	418,783,038.09
2003	422,746,368.61
2004	352,827,184.57
2005	352.827,184.57
2006	352,827,184.57
2007	352,827,184.57
2008 TO 2017	383,779,323.15
2018 TO 2025	403,202,282.16

Sec. 183.021. (A) NO MONEY FROM THE TOBACCO MASTER SETTLEMENT AGREEMENT FUND SHALL BE EXPENDED TO DO ANY OF THE FOLLOWING:

(1) HIRE AN EXECUTIVE AGENCY LOBBYIST, AS DEFINED UNDER SECTION 121.60 OF THE REVISED CODE, OR A LEGISLATIVE AGENT, AS DEFINED UNDER SECTION 101.70 OF THE REVISED CODE;

(2) SUPPORT OR OPPOSE CANDIDATES, BALLOT QUESTIONS, REFERENDUMS, OR BALLOT INITIATIVES.

(B) NOTHING IN THIS SECTION PROHIBITS ANY OF THE FOLLOWING FROM ADVOCATING ON BEHALF OF THE SPECIFIC OBJECTIVES OF A PROGRAM FUNDED UNDER THIS CHAPTER:

(1) THE MEMBERS OF THE BOARD OF TRUSTEES, EXECUTIVE DIRECTOR, OR EMPLOYEES OF THE TOBACCO USE PREVENTION AND CONTROL FOUNDATION;

(2) THE MEMBERS OF THE BOARD OF TRUSTEES, EXECUTIVE DIRECTOR, OR EMPLOYEES OF THE SOUTHERN OHIO AGRICULTURAL AND COMMUNITY DEVELOPMENT FOUNDATION;

(3) THE MEMBERS, EXECUTIVE DIRECTOR, OR EMPLOYEES OF THE BIOMEDICAL RESEARCH AND TECHNOLOGY TRANSFER COMMISSION.

Sec. 183.03. THE TOBACCO USE PREVENTION AND CESSATION TRUST FUND IS HEREBY CREATED IN THE STATE TREASURY. MONEY CREDITED TO THE FUND SHALL BE USED AS PROVIDED IN SECTIONS 183.04 TO 183.10 OF THE REVISED CODE. ALL INVESTMENT EARNINGS OF THE FUND SHALL BE CREDITED TO THE FUND.

Sec. 183.04. THERE IS HEREBY CREATED THE TOBACCO USE PREVENTION AND CONTROL FOUNDATION, THE GENERAL MANAGEMENT OF WHICH IS VESTED IN A BOARD OF TRUSTEES OF TWENTY MEMBERS AS FOLLOWS:

(A) EIGHT MEMBERS WHO ARE HEALTH PROFESSIONALS, HEALTH RESEARCHERS, OR REPRESENTATIVES OF HEALTH ORGANIZATIONS. TWO OF THESE MEMBERS SHALL BE APPOINTED BY THE GOVERNOR, TWO BY THE SPEAKER OF THE HOUSE OF REPRESENTATIVES, ONE BY THE MINORITY LEADER OF THE HOUSE OF REPRESENTATIVES, TWO BY THE PRESIDENT OF THE SENATE, AND ONE BY THE MINORITY LEADER OF THE SENATE.

(B) TWO MEMBERS, ONE OF WHOM HAS EXPERIENCE IN FINANCIAL PLANNING AND ACCOUNTING AND ONE OF WHOM HAS EXPERIENCE IN MEDIA AND MASS MARKETING, WHO SHALL BE APPOINTED BY THE GOVERNOR;

(C) ONE MEMBER, WHO SHALL BE APPOINTED BY THE GOVERNOR FROM A LIST OF AT LEAST THREE INDIVIDUALS RECOMMENDED BY THE AMERICAN CANCER SOCIETY;

(D) ONE MEMBER, WHO SHALL BE APPOINTED BY THE GOVERNOR FROM A LIST OF AT LEAST THREE INDIVIDUALS RECOMMENDED BY THE AMERICAN HEART ASSOCIATION;

(E) ONE MEMBER, WHO SHALL BE APPOINTED BY THE GOVERNOR FROM A LIST OF AT LEAST THREE INDIVIDUALS RECOMMENDED BY THE AMERICAN LUNG ASSOCIATION;

(F) ONE MEMBER, WHO SHALL BE APPOINTED BY THE GOVERNOR FROM A LIST OF AT LEAST THREE INDIVIDUALS RECOMMENDED BY THE ASSOCIATION OF HOSPITALS AND HEALTH SYSTEMS;

(G) ONE MEMBER, WHO SHALL BE APPOINTED BY THE GOVERNOR FROM A LIST OF AT LEAST THREE INDIVIDUALS RECOMMENDED BY THE OHIO STATE MEDICAL ASSOCIATION;

(H) ONE MEMBER, WHO SHALL BE APPOINTED BY THE GOVERNOR FROM A LIST OF AT LEAST THREE INDIVIDUALS RECOMMENDED BY THE ASSOCIATION OF OHIO HEALTH COMMISSIONERS;

(I) ONE MEMBER, WHO SHALL BE APPOINTED BY THE GOVERNOR FROM A LIST OF AT LEAST THREE INDIVIDUALS RECOMMENDED BY THE OHIO DENTAL ASSOCIATION;

(J) THE DIRECTOR OF HEALTH, EXECUTIVE DIRECTOR OF THE COMMISSION ON MINORITY HEALTH, AND ATTORNEY GENERAL, WHO SHALL SERVE AS EX OFFICIO MEMBERS.

THE APPOINTMENTS OF THE GOVERNOR SHALL BE WITH THE ADVICE AND CONSENT OF THE SENATE.

TERMS OF OFFICE FOR THE MEMBERS APPOINTED BY THE GOVERNOR, PRESIDENT, SPEAKER, AND MINORITY LEADERS SHALL BE FOR FIVE YEARS. EACH MEMBER SHALL HOLD OFFICE FROM THE DATE OF APPOINTMENT UNTIL THE END OF THE TERM FOR WHICH THE MEMBER WAS APPOINTED. ANY MEMBER APPOINTED TO FILL A VACANCY OCCURRING PRIOR TO THE EXPIRATION OF THE TERM FOR WHICH THE MEMBER'S PREDECESSOR WAS APPOINTED SHALL HOLD OFFICE FOR THE REMAINDER OF THAT TERM. ANY MEMBER SHALL CONTINUE IN OFFICE SUBSEQUENT TO THE EXPIRATION DATE OF THE MEMBER'S TERM UNTIL THE MEMBER'S SUCCESSOR TAKES OFFICE, OR UNTIL A PERIOD OF SIXTY DAYS HAS ELAPSED, WHICHEVER OCCURS FIRST. A VACANCY IN AN UNEXPIRED TERM SHALL BE FILLED IN THE SAME MANNER AS THE ORIGINAL APPOINTMENT. THE GOVERNOR MAY REMOVE ANY MEMBER FOR MALFEASANCE, MISFEASANCE, OR NONFEASANCE AFTER A HEARING IN ACCORDANCE WITH CHAPTER 119. OF THE REVISED CODE.

THE MEMBERS OF THE BOARD SHALL SERVE WITHOUT COMPENSATION BUT SHALL RECEIVE THEIR REASONABLE

AND NECESSARY EXPENSES INCURRED IN THE CONDUCT OF FOUNDATION BUSINESS.

SECTION 101.84 OF THE REVISED CODE DOES NOT APPLY TO THE FOUNDATION.

Sec. 183.05. THE BOARD OF TRUSTEES OF THE TOBACCO USE PREVENTION AND CONTROL FOUNDATION SHALL SELECT A CHAIRPERSON FROM AMONG ITS MEMBERS AND SHALL MEET ONCE DURING EACH QUARTER OR AT SUCH OTHER TIMES AS THE BOARD DECIDES. A MAJORITY OF THE MEMBERS OF THE BOARD CONSTITUTES A QUORUM, AND NO ACTION SHALL BE TAKEN WITHOUT THE AFFIRMATIVE VOTE OF A MAJORITY OF THE MEMBERS.

Sec. 183.06. THE BOARD OF TRUSTEES OF THE TOBACCO USE PREVENTION AND CONTROL FOUNDATION SHALL APPOINT AND SET THE COMPENSATION OF AN EXECUTIVE DIRECTOR AND OTHER EMPLOYEES NEEDED TO CARRY OUT THE DUTIES OF THE FOUNDATION. BEFORE ENTERING UPON THE DISCHARGE OF THE DUTIES OF OFFICE, THE EXECUTIVE DIRECTOR SHALL GIVE A BOND TO THE STATE, TO BE APPROVED BY THE GOVERNOR, CONDITIONED FOR THE FAITHFUL PERFORMANCE OF THE DUTIES OF OFFICE. THE EXECUTIVE DIRECTOR AND THE OTHER EMPLOYEES OF THE FOUNDATION ARE STATE EMPLOYEES AND SERVE IN THE UNCLASSIFIED SERVICE.

Sec. 183.07. THE TOBACCO USE PREVENTION AND CONTROL FOUNDATION SHALL PREPARE A PLAN TO REDUCE TOBACCO USE BY OHIOANS, WITH EMPHASIS ON REDUCING THE USE OF TOBACCO BY YOUTH, MINORITY AND REGIONAL POPULATIONS, PREGNANT WOMEN, AND OTHERS WHO MAY BE DISPROPORTIONATELY AFFECTED BY THE USE OF TOBACCO. THE PLAN SHALL COVER A PERIOD OF AT LEAST FIVE YEARS AND BE UPDATED ANNUALLY. AT A MINIMUM, THE PLAN SHALL CONTAIN BASELINE DATA FOR TOBACCO USE BY OHIOANS AND ESTABLISH OUTCOME OBJECTIVES FOR REDUCING TOBACCO USE BY OHIOANS DURING THE PERIOD COVERED BY THE PLAN. THE PLAN MAY PROVIDE FOR PERIODIC SURVEYS TO MEASURE TOBACCO USE AND BEHAVIOR TOWARD TOBACCO USE BY OHIOANS. COPIES OF THE PLAN SHALL BE AVAILABLE TO THE PUBLIC.

THE PLAN MAY ALSO DESCRIBE YOUTH TOBACCO CONSUMPTION PREVENTION PROGRAMS TO BE ELIGIBLE FOR CONSIDERATION FOR GRANTS FROM THE FOUNDATION AND MAY SET FORTH THE CRITERIA BY WHICH APPLICATIONS FOR GRANTS FOR SUCH PROGRAMS WILL BE CONSIDERED BY THE FOUNDATION. PROGRAMS ELIGIBLE FOR CONSIDERATION MAY INCLUDE:

(A) MEDIA CAMPAIGNS DIRECTED TO YOUTH TO PREVENT UNDERAGE TOBACCO CONSUMPTION;

(B) SCHOOL-BASED EDUCATION PROGRAMS TO PREVENT YOUTH TOBACCO CONSUMPTION;

(C) COMMUNITY-BASED YOUTH PROGRAMS INVOLVING YOUTH TOBACCO CONSUMPTION PREVENTION THROUGH GENERAL YOUTH DEVELOPMENT;

(D) RETAILER EDUCATION AND COMPLIANCE EFFORTS TO PREVENT YOUTH TOBACCO CONSUMPTION;

(E) MENTORING PROGRAMS DESIGNED TO PREVENT OR REDUCE TOBACCO USE BY STUDENTS.

PURSUANT TO THE PLAN, THE FOUNDATION SHALL CARRY OUT, OR PROVIDE FUNDING FOR PRIVATE OR PUBLIC AGENCIES TO CARRY OUT, RESEARCH AND PROGRAMS RELATED TO TOBACCO USE PREVENTION AND CESSATION. THE FOUNDATION SHALL ESTABLISH AN OBJECTIVE PROCESS TO DETERMINE WHICH RESEARCH AND PROGRAM PROPOSALS TO FUND. WHEN APPROPRIATE, PROPOSALS FOR RESEARCH SHALL BE PEER-REVIEWED. NO PROGRAM SHALL BE CARRIED OUT OR FUNDED BY THE FOUNDATION UNLESS THERE IS RESEARCH THAT INDICATES THAT THE PROGRAM IS LIKELY TO ACHIEVE THE RESULTS DESIRED. ALL RESEARCH AND PROGRAMS FUNDED BY THE FOUNDATION SHALL BE GOAL-ORIENTED AND INDEPENDENTLY AND OBJECTIVELY EVALUATED ANNUALLY ON WHETHER IT IS MEETING ITS GOALS. THE FOUNDATION SHALL CONTRACT FOR SUCH EVALUATIONS AND FOR THE ANNUAL EVALUATION REQUIRED BY SECTION 183.09 OF THE REVISED CODE AND SHALL ADOPT RULES UNDER CHAPTER 119. OF THE REVISED CODE REGARDING CONFLICTS OF INTEREST IN THE RESEARCH AND PROGRAMS IT FUNDS.

THE FOUNDATION SHALL ENDEAVOR TO COORDINATE ITS RESEARCH AND PROGRAMS WITH THE EFFORTS OF OTHER AGENCIES OF THIS STATE TO REDUCE TOBACCO USE BY OHIOANS. ANY STATE AGENCY THAT CONDUCTS A SURVEY THAT MEASURES TOBACCO USE OR BEHAVIOR TOWARD TOBACCO USE BY OHIOANS SHALL SHARE THE RESULTS OF THE SURVEY WITH THE FOUNDATION.

Sec. 183.08. (A) THERE IS HEREBY CREATED THE TOBACCO USE PREVENTION AND CONTROL ENDOWMENT FUND, WHICH SHALL BE IN THE CUSTODY OF THE TREASURER OF STATE BUT SHALL NOT BE A PART OF THE STATE TREASURY. THE ENDOWMENT FUND SHALL CONSIST OF AMOUNTS APPROPRIATED FROM THE TOBACCO USE PREVENTION AND CESSATION TRUST FUND, AS WELL AS GRANTS AND DONATIONS MADE TO THE TOBACCO USE PREVENTION AND CONTROL FOUNDATION AND INVESTMENT EARNINGS OF THE FUND. THE ENDOWMENT FUND SHALL BE USED BY THE FOUNDATION TO CARRY OUT ITS DUTIES.

THE FOUNDATION IS THE TRUSTEE OF THE ENDOWMENT FUND. DISBURSEMENTS FROM THE FUND SHALL BE

PAID BY THE TREASURER OF STATE ONLY UPON INSTRUMENTS DULY AUTHORIZED BY THE BOARD OF TRUSTEES OF THE FOUNDATION. AT THE REQUEST OF THE FOUNDATION, THE TREASURER OF STATE SHALL SELECT AND CONTRACT WITH ONE OR MORE INVESTMENT MANAGERS TO INVEST ALL MONEY CREDITED TO THE FUND THAT IS NOT CURRENTLY NEEDED FOR CARRYING OUT THE FUNCTIONS OF THE FOUNDATION. THE ELIGIBLE LIST OF INVESTMENTS SHALL BE THE SAME AS FOR THE PUBLIC EMPLOYEES RETIREMENT SYSTEM UNDER SECTION 145.11 OF THE REVISED CODE. ALL INVESTMENTS SHALL BE SUBJECT TO THE SAME LIMITATIONS AND REQUIREMENTS AS THE RETIREMENT SYSTEM UNDER THAT SECTION AND SECTIONS 145.112 AND 145.113 OF THE REVISED CODE.

(B) THE FOUNDATION SHALL BE SELF-SUSTAINING AND SHOULD NOT EXPECT TO RECEIVE FUNDING FROM THE STATE BEYOND THE AMOUNTS APPROPRIATED TO IT FROM THE TOBACCO USE PREVENTION AND CESSATION TRUST FUND.

Sec. 183.09. THE FISCAL YEAR OF THE TOBACCO USE PREVENTION AND CONTROL FOUNDATION SHALL BE THE SAME AS THE FISCAL YEAR OF THE STATE.

WITHIN NINETY DAYS AFTER THE END OF EACH FISCAL YEAR, THE FOUNDATION SHALL SUBMIT TO THE GOVERNOR AND THE GENERAL ASSEMBLY BOTH OF THE FOLLOWING:

(A) A REPORT OF THE ACTIVITIES OF THE FOUNDATION DURING THE PRECEDING FISCAL YEAR AND AN INDEPENDENT AND OBJECTIVE EVALUATION OF THE PROGRESS BEING MADE BY THE FOUNDATION IN REDUCING TOBACCO USE BY OHIOANS;

(B) A FINANCIAL REPORT OF THE FOUNDATION FOR THE PRECEDING FISCAL YEAR, WHICH SHALL INCLUDE BOTH:

(1) INFORMATION ON THE AMOUNT AND PERCENTAGE OF OVERHEAD AND ADMINISTRATIVE EXPENDITURES COMPARED TO PROGRAMMATIC EXPENDITURES;

(2) AN INDEPENDENT AUDITOR'S REPORT ON THE GENERAL PURPOSE FINANCIAL STATEMENTS OF THE FOUNDATION. SUCH FINANCIAL STATEMENTS SHALL BE PREPARED IN CONFORMITY WITH GENERALLY ACCEPTED ACCOUNTING PRINCIPLES PRESCRIBED FOR GOVERNMENTAL ENTITIES.

Sec. 183.10. THE LAW ENFORCEMENT IMPROVEMENTS TRUST FUND IS HEREBY CREATED IN THE STATE TREASURY. MONEY CREDITED TO THE FUND SHALL BE USED BY THE ATTORNEY GENERAL TO MAINTAIN, UPGRADE, AND MODERNIZE THE LAW ENFORCEMENT TRAINING AND LABORATORY FACILITIES OF THE OFFICE OF THE ATTORNEY GENERAL. ALL INVESTMENT EARNINGS OF THE FUND SHALL BE CREDITED TO THE FUND.

Sec. 183.11. THE SOUTHERN OHIO AGRICULTURAL AND COMMUNITY DEVELOPMENT TRUST FUND IS HEREBY CREATED IN THE STATE TREASURY. MONEY CREDITED TO THE FUND SHALL BE USED AS PROVIDED IN SECTIONS 183.12 TO 183.17 OF THE REVISED CODE. ALL INVESTMENT EARNINGS OF THE FUND SHALL BE CREDITED TO THE FUND.

Sec. 183.12. THERE IS HEREBY CREATED THE SOUTHERN OHIO AGRICULTURAL AND COMMUNITY DEVELOPMENT FOUNDATION, THE GENERAL MANAGEMENT OF WHICH IS VESTED IN A BOARD OF TRUSTEES OF TWELVE MEMBERS AS FOLLOWS:

(A) THE DIRECTOR OF AGRICULTURE, DIRECTOR OF DEVELOPMENT, EXECUTIVE DIRECTOR OF THE OHIO RURAL DEVELOPMENT PARTNERSHIP, AND DIRECTOR OF THE OHIO STATE UNIVERSITY EXTENSION, WHO SHALL SERVE AS EX OFFICIO OFFICERS;

(B) TWO RESIDENTS OF MAJOR TOBACCO-PRODUCING COUNTIES WITH EXPERIENCE IN LOCAL AGRICULTURAL ECONOMIC DEVELOPMENT OR COMMUNITY DEVELOPMENT APPOINTED BY THE GOVERNOR;

(C) THREE ACTIVE FARMERS FROM MAJOR TOBACCO-PRODUCING COUNTIES, WHO SHALL BE APPOINTED BY THE GOVERNOR, TWO OF WHOM SHALL BE APPOINTED FROM A LIST OF AT LEAST FOUR INDIVIDUALS RECOMMENDED BY THE OHIO FARM BUREAU AND ONE OF WHOM SHALL BE APPOINTED FROM A LIST OF AT LEAST TWO INDIVIDUALS RECOMMENDED BY THE FARMERS' UNION;

(D) THREE ACTIVE TOBACCO FARMERS FROM MAJOR TOBACCO-PRODUCING COUNTIES, WHO SHALL BE APPOINTED BY THE GOVERNOR FROM A LIST OF AT LEAST SIX INDIVIDUALS RECOMMENDED BY THE OHIO TOBACCO GROWERS ASSOCIATION.

THE APPOINTMENTS OF THE GOVERNOR SHALL BE WITH THE ADVICE AND CONSENT OF THE SENATE.

TERMS OF OFFICE FOR THE MEMBERS APPOINTED BY THE GOVERNOR SHALL BE FOR FIVE YEARS. EACH SUCH MEMBER SHALL HOLD OFFICE FROM THE DATE OF APPOINTMENT UNTIL THE END OF THE TERM FOR WHICH THE MEMBER WAS APPOINTED. ANY MEMBER APPOINTED BY THE GOVERNOR TO FILL A VACANCY OCCURRING PRIOR TO THE EXPIRATION OF THE TERM FOR WHICH THE MEMBER'S PREDECESSOR WAS APPOINTED SHALL HOLD OFFICE FOR THE REMAINDER OF SUCH TERM. ANY MEMBER APPOINTED BY THE GOVERNOR SHALL CONTINUE IN OFFICE SUBSEQUENT TO THE EXPIRATION DATE OF THE MEMBER'S TERM UNTIL THE MEMBER'S SUCCESSOR TAKES OFFICE, OR UNTIL A PERIOD OF SIXTY DAYS HAS ELAPSED, WHICHEVER OCCURS FIRST. THE GOVERNOR MAY REMOVE ANY MEMBER APPOINTED BY THE GOVERNOR FOR MALFEASANCE, MISFEASANCE, OR NONFEASANCE AFTER A HEARING IN ACCORDANCE WITH CHAPTER 119. OF THE REVISED CODE.

A VACANCY ON THE BOARD SHALL BE FILLED IN THE SAME MANNER AS THE ORIGINAL APPOINTMENT.

THE MEMBERS OF THE BOARD SHALL SERVE WITHOUT COMPENSATION BUT SHALL RECEIVE THEIR REASONABLE AND NECESSARY EXPENSES INCURRED IN THE CONDUCT OF FOUNDATION BUSINESS.

SECTION 101.84 OF THE REVISED CODE DOES NOT APPLY TO THE FOUNDATION.

AS USED IN THIS SECTION, "MAJOR TOBACCO-PRODUCING COUNTIES" MEANS ANY OF THE COUNTIES, RANKED IN DESCENDING ORDER OF POUNDS PRODUCED, WHERE NINETY-FIVE PER CENT OF THE 1998 BURLEY TOBACCO QUOTA FOR THE STATE WAS PRODUCED.

Sec. 183.13. THE BOARD OF TRUSTEES OF THE SOUTHERN OHIO AGRICULTURAL AND COMMUNITY DEVELOPMENT FOUNDATION SHALL SELECT A CHAIRPERSON FROM AMONG ITS MEMBERS AND MEET ONCE DURING EACH QUARTER OR AT SUCH OTHER TIMES AS THE BOARD DECIDES. A MAJORITY OF THE VOTING MEMBERS OF THE BOARD CONSTITUTES A QUORUM, AND NO ACTION SHALL BE TAKEN WITHOUT THE AFFIRMATIVE VOTE OF A MAJORITY OF THE VOTING MEMBERS.

Sec. 183.14. THE BOARD OF TRUSTEES OF THE SOUTHERN OHIO AGRICULTURAL AND COMMUNITY DEVELOPMENT FOUNDATION SHALL APPOINT AND SET THE COMPENSATION OF AN EXECUTIVE DIRECTOR AND OTHER EMPLOYEES NEEDED TO CARRY OUT THE DUTIES OF THE FOUNDATION. BEFORE ENTERING UPON THE DISCHARGE OF THE DUTIES OF OFFICE, THE EXECUTIVE DIRECTOR SHALL GIVE A BOND TO THE STATE, TO BE APPROVED BY THE GOVERNOR, CONDITIONED FOR THE FAITHFUL PERFORMANCE OF THE DUTIES OF OFFICE. THE EXECUTIVE DIRECTOR AND THE OTHER EMPLOYEES OF THE FOUNDATION ARE STATE EMPLOYEES AND SERVE IN THE UNCLASSIFIED SERVICE.

Sec. 183.15. THE SOUTHERN OHIO AGRICULTURAL AND COMMUNITY DEVELOPMENT FOUNDATION SHALL ENDEAVOR TO REPLACE THE PRODUCTION OF TOBACCO IN SOUTHERN OHIO WITH THE PRODUCTION OF OTHER AGRICULTURAL PRODUCTS AND TO MITIGATE THE ADVERSE ECONOMIC IMPACT OF REDUCED TOBACCO PRODUCTION IN THE REGION BY PREPARING, IMPLEMENTING, AND KEEPING CURRENT A PLAN TO DEVELOP MEANS FOR TOBACCO GROWERS TO GROW OTHER AGRICULTURAL PRODUCTS VOLUNTARILY, WHICH MAY INCLUDE ANY OF THE FOLLOWING:

(A) INCREASING THE VARIETY, QUANTITY, AND VALUE OF AGRICULTURAL PRODUCTS OTHER THAN TOBACCO THAT

ARE PRODUCED IN THOSE PARTS OF THIS STATE WHERE TOBACCO HAS TRADITIONALLY BEEN GROWN;

(B) PRESERVING AGRICULTURAL LAND AND SOILS IN THOSE PARTS OF THIS STATE WHERE TOBACCO HAS TRADITIONALLY BEEN GROWN;

(C) MAKING STRATEGIC INVESTMENTS IN COMMUNITIES THAT WILL BE AFFECTED BY THE REDUCTION IN THE DEMAND FOR TOBACCO;

(D) PROVIDING EDUCATION AND TRAINING ASSISTANCE TO TOBACCO GROWERS TO HELP THEM MAKE THE TRANSITION OUT OF TOBACCO PRODUCTION.

COPIES OF THE PLAN SHALL BE MADE AVAILABLE TO THE PUBLIC.

THE FOUNDATION SHALL MAKE GRANTS OR LOANS TO INDIVIDUALS, PUBLIC AGENCIES, OR PRIVATELY OWNED COMPANIES TO CARRY OUT THE PLAN. THE FOUNDATION SHALL ALSO ADOPT RULES UNDER CHAPTER 119. OF THE REVISED CODE REGARDING CONFLICTS OF INTEREST IN THE MAKING OF GRANTS OR LOANS.

Sec. 183.16. THERE IS HEREBY CREATED THE SOUTHERN OHIO AGRICULTURAL AND COMMUNITY DEVELOPMENT FOUNDATION ENDOWMENT FUND, WHICH SHALL BE IN THE CUSTODY OF THE TREASURER OF STATE BUT SHALL NOT BE A PART OF THE STATE TREASURY. THE ENDOWMENT FUND SHALL CONSIST OF AMOUNTS APPROPRIATED FROM THE SOUTHERN OHIO AGRICULTURAL AND COMMUNITY DEVELOPMENT TRUST FUND, AS WELL AS GRANTS AND DONATIONS MADE TO THE SOUTHERN OHIO AGRICULTURAL AND COMMUNITY DEVELOPMENT FOUNDATION AND INVESTMENT EARNINGS OF THE FUND. THE ENDOWMENT FUND SHALL BE USED BY THE FOUNDATION TO CARRY OUT ITS DUTIES.

THE FOUNDATION IS THE TRUSTEE OF THE ENDOWMENT FUND. DISBURSEMENTS FROM THE FUND SHALL BE PAID BY THE TREASURER OF STATE ONLY UPON INSTRUMENTS DULY AUTHORIZED BY THE BOARD OF TRUSTEES OF THE FOUNDATION. AT THE REQUEST OF THE FOUNDATION, THE TREASURER OF STATE SHALL SELECT AND CONTRACT WITH ONE OR MORE INVESTMENT MANAGERS TO INVEST ALL MONEY CREDITED TO THE FUND THAT IS NOT CURRENTLY NEEDED FOR CARRYING OUT THE FUNCTIONS OF THE FOUNDATION. THE ELIGIBLE LIST OF INVESTMENTS SHALL BE THE SAME AS FOR THE PUBLIC EMPLOYEES RETIREMENT SYSTEM UNDER SECTION 145.11 OF THE REVISED CODE. ALL INVESTMENTS SHALL BE SUBJECT TO THE SAME LIMITATIONS AND REQUIREMENTS AS THE RETIREMENT SYSTEM UNDER THAT SECTION AND SECTIONS 145.112 AND 145.113 OF THE REVISED CODE.

NO MONEY FROM THE SOUTHERN OHIO AGRICULTURAL AND COMMUNITY DEVELOPMENT FOUNDATION ENDOWMENT FUND SHALL BE USED FOR THE DIRECT PRODUCTION COSTS OF GROWING TOBACCO.

Sec. 183.17. THE FISCAL YEAR OF THE SOUTHERN OHIO AGRICULTURAL AND COMMUNITY DEVELOPMENT FOUNDATION SHALL BE THE SAME AS THE FISCAL YEAR OF THE STATE.

WITHIN NINETY DAYS AFTER THE END OF EACH FISCAL YEAR, THE FOUNDATION SHALL SUBMIT TO THE GOVERNOR AND THE GENERAL ASSEMBLY BOTH OF THE FOLLOWING:

(A) A REPORT OF THE ACTIVITIES OF THE FOUNDATION DURING THE PRECEDING FISCAL YEAR. THE REPORT SHALL ALSO CONTAIN AN INDEPENDENT EVALUATION OF THE PROGRESS BEING MADE BY THE FOUNDATION IN CARRYING OUT ITS DUTIES.

(B) A FINANCIAL REPORT OF THE FOUNDATION FOR THE PRECEDING YEAR, WHICH SHALL INCLUDE BOTH:

(1) INFORMATION ON THE AMOUNT AND PERCENTAGE OF OVERHEAD AND ADMINISTRATIVE EXPENDITURES COMPARED TO PROGRAMMATIC EXPENDITURES;

(2) AN INDEPENDENT AUDITOR'S REPORT ON THE GENERAL PURPOSE FINANCIAL STATEMENTS OF THE FOUNDATION. SUCH FINANCIAL STATEMENTS SHALL BE PREPARED IN CONFORMITY WITH GENERALLY ACCEPTED ACCOUNTING PRINCIPLES PRESCRIBED FOR GOVERNMENTAL ENTITIES.

ON OR BEFORE JULY 1, 2010, THE FOUNDATION SHALL REPORT TO THE GOVERNOR AND THE GENERAL ASSEMBLY ON THE PROGRESS THAT THE FOUNDATION HAS MADE IN REPLACING THE PRODUCTION OF TOBACCO IN SOUTHERN OHIO WITH THE PRODUCTION OF OTHER AGRICULTURAL PRODUCTS AND IN MITIGATING THE ADVERSE ECONOMIC IMPACT OF REDUCED TOBACCO PRODUCTION IN THE REGION. IF THE FOUNDATION CONCLUDES THAT A NEED FOR ADDITIONAL FUNDING STILL EXISTS, THE FOUNDATION MAY REQUEST THAT PROVISION BE MADE FOR A PORTION OF THE PAYMENTS CREDITED TO THE TOBACCO MASTER SETTLEMENT AGREEMENT FUND TO CONTINUE TO BE TRANSFERRED TO THE SOUTHERN OHIO AGRICULTURAL AND COMMUNITY DEVELOPMENT TRUST FUND.

Sec. 183.18. OHIO'S PUBLIC HEALTH PRIORITIES TRUST FUND IS HEREBY CREATED IN THE STATE TREASURY. MONEY CREDITED TO THE FUND SHALL BE USED FOR THE FOLLOWING PURPOSES:

(A) MINORITY HEALTH PROGRAMS, ON WHICH NOT LESS THAN TWENTY-FIVE PER CENT OF THE ANNUAL APPROPRIATIONS FROM THE TRUST FUND SHALL BE EXPENDED;

(B) ENFORCING SECTION 2927.02 OF THE REVISED CODE;

(C) ALCOHOL AND DRUG ABUSE PREVENTION PROGRAMS, INCLUDING PROGRAMS FOR ADULT AND JUVENILE

OFFENDERS IN STATE INSTITUTIONS AND AFTERCARE PROGRAMS;

(D) A NON-ENTITLEMENT PROGRAM FUNDED THROUGH THE DEPARTMENT OF HEALTH TO PROVIDE EMERGENCY ASSISTANCE CONSISTING OF MEDICATION, OXYGEN, OR BOTH TO SENIORS WHOSE HEALTH HAS BEEN ADVERSELY AFFECTED BY TOBACCO USE AND WHOSE INCOME DOES NOT EXCEED ONE HUNDRED PER CENT OF THE FEDERAL POVERTY GUIDELINES, ON WHICH FIVE PER CENT OF THE ANNUAL APPROPRIATIONS FROM THE TRUST FUND SHALL BE EXPENDED. HOWEVER, IF FEDERAL FUNDING BECOMES AVAILABLE FOR THIS PURPOSE, THE DEPARTMENT SHALL UTILIZE THE FEDERAL FUNDING AND THE APPROPRIATIONS FROM THE TRUST FUND SHALL BE USED FOR THE OTHER PURPOSES AUTHORIZED BY THIS SECTION. IF THE FEDERAL PROGRAM REQUIRES SENIORS DESCRIBED BY THIS DIVISION TO PAY A PREMIUM OR COPAYMENT TO OBTAIN MEDICATION OR OXYGEN, THE DIRECTOR OF HEALTH SHALL RECOMMEND TO THE GENERAL ASSEMBLY WHETHER THIS DIVISION'S SET-ASIDE OF FIVE PER CENT OF THE APPROPRIATIONS FROM THE TRUST FUND SHOULD BE USED TO PAY SUCH PREMIUMS OR COPAYMENTS. AS USED IN THIS DIVISION, "FEDERAL POVERTY GUIDELINES" HAS THE SAME MEANING AS IN SECTION 5101.46 OF THE REVISED CODE.

(E) PARTIAL REIMBURSEMENT, ON A COUNTY BASIS, OF HOSPITALS, FREE MEDICAL CLINICS, AND SIMILAR ORGANIZATIONS OR PROGRAMS THAT PROVIDE FREE, UNCOMPENSATED CARE TO THE GENERAL PUBLIC, AND OF COUNTIES THAT PAY PRIVATE ENTITIES TO PROVIDE SUCH CARE USING REVENUE FROM A PROPERTY TAX LEVIED AT LEAST IN PART FOR THAT PURPOSE.

ALL INVESTMENT EARNINGS OF THE FUND SHALL BE CREDITED TO THE FUND.

Sec. 183.19. THE BIOMEDICAL RESEARCH AND TECHNOLOGY TRANSFER TRUST FUND IS HEREBY CREATED IN THE STATE TREASURY. MONEY CREDITED TO THE FUND SHALL BE USED AS PROVIDED IN SECTIONS 183.20 TO 183.25 OF THE REVISED CODE. ALL INVESTMENT EARNINGS OF THE FUND SHALL BE CREDITED TO THE FUND.

Sec. 183.20. THERE IS HEREBY CREATED THE BIOMEDICAL RESEARCH AND TECHNOLOGY TRANSFER COMMISSION WITHIN THE OHIO BOARD OF REGENTS. THE COMMISSION SHALL CONSIST OF TWENTY-FIVE MEMBERS AS FOLLOWS:

(A) THE CHANCELLOR OF THE BOARD, DIRECTOR OF DEVELOPMENT, DIRECTOR OF HEALTH, AND EXECUTIVE DIRECTOR OF THE COMMISSION ON MINORITY HEALTH, WHO SHALL SERVE AS EX OFFICIO MEMBERS;

(B) THE DIRECTOR OF BUDGET AND MANAGEMENT, WHO SHALL SERVE AS AN EX OFFICIO MEMBER, OR THE DIRECTOR'S DESIGNEE;

(C) TWELVE MEMBERS, WHO SHALL NOT BE OR REPRESENT POTENTIAL RECIPIENTS OF GRANTS FROM THE COMMISSION, APPOINTED AS FOLLOWS:

(1) SIX MEMBERS, APPOINTED BY THE GOVERNOR, AT LEAST TWO OF WHOM ARE EXPERTS IN COMMERCIALIZING THE RESULTS OF BIOMEDICAL RESEARCH;

(2) TWO MEMBERS APPOINTED BY THE SPEAKER OF THE HOUSE OF REPRESENTATIVES;

(3) ONE MEMBER APPOINTED BY THE MINORITY LEADER OF THE HOUSE OF REPRESENTATIVES;

(4) TWO MEMBERS APPOINTED BY THE PRESIDENT OF THE SENATE;

(5) ONE MEMBER APPOINTED BY THE MINORITY LEADER OF THE SENATE.

(D) EIGHT NONVOTING MEMBERS APPOINTED BY THE GOVERNOR, REPRESENTING OHIO'S BIOMEDICAL RESEARCH INSTITUTIONS.

BEFORE MAKING THEIR APPOINTMENTS, THE GOVERNOR, SPEAKER, PRESIDENT, AND MINORITY LEADERS SHALL SOLICIT, FROM THE STATE'S MEDICAL COLLEGES, DENTAL COLLEGES, AND MEDICAL RESEARCH INSTITUTIONS, THE NATIONAL INSTITUTES OF HEALTH, AND OTHER SOURCES FAMILIAR WITH EXPERTS IN THE FIELD OF BIOMEDICAL RESEARCH AND IN COMMERCIALIZING THE RESULTS OF SUCH RESEARCH, RECOMMENDATIONS AS TO WHOM TO APPOINT.

THE APPOINTMENTS OF THE GOVERNOR SHALL BE WITH THE ADVICE AND CONSENT OF THE SENATE.

TERMS OF OFFICE FOR THE MEMBERS APPOINTED BY THE GOVERNOR, PRESIDENT, SPEAKER, AND MINORITY LEADERS SHALL BE FOR FIVE YEARS. EACH MEMBER SHALL HOLD OFFICE FROM THE DATE OF APPOINTMENT UNTIL THE END OF THE TERM FOR WHICH THE MEMBER WAS APPOINTED. ANY MEMBER APPOINTED TO FILL A VACANCY OCCURRING PRIOR TO THE EXPIRATION OF THE TERM FOR WHICH THE MEMBER'S PREDECESSOR WAS APPOINTED SHALL HOLD OFFICE FOR THE REMAINDER OF SUCH TERM. ANY MEMBER SHALL CONTINUE IN OFFICE SUBSEQUENT TO THE EXPIRATION DATE OF THE MEMBER'S TERM UNTIL THE MEMBER'S SUCCESSOR TAKES OFFICE, OR UNTIL A PERIOD OF SIXTY DAYS HAS ELAPSED, WHICHEVER OCCURS FIRST. A VACANCY IN AN UNEXPIRED TERM SHALL BE FILLED IN THE SAME MANNER AS THE ORIGINAL APPOINTMENT. THE GOVERNOR MAY REMOVE ANY MEMBER FOR MALFEASANCE, MISFEASANCE, OR NONFEASANCE AFTER A HEARING IN ACCORDANCE WITH CHAPTER 119. OF THE REVISED CODE.

THE MEMBERS OF THE COMMISSION SHALL SERVE WITHOUT COMPENSATION BUT SHALL RECEIVE THEIR REASONABLE AND NECESSARY EXPENSES INCURRED IN THE CONDUCT OF COMMISSION BUSINESS.

SECTION 101.84 OF THE REVISED CODE DOES NOT APPLY TO THE COMMISSION.

Sec. 183.21. THE BIOMEDICAL RESEARCH AND TECHNOLOGY TRANSFER COMMISSION SHALL MEET ONCE DURING EACH QUARTER OR AT SUCH OTHER TIMES AS THE BOARD DECIDES. A MAJORITY OF THE MEMBERS OF THE COMMISSION CONSTITUTES A QUORUM, AND NO ACTION SHALL BE TAKEN WITHOUT THE AFFIRMATIVE VOTE OF A MAJORITY OF THE MEMBERS. THE GOVERNOR SHALL APPOINT THE CHAIRPERSON OF THE COMMISSION FROM AMONG ITS MEMBERS, AND THE CHAIRPERSON SHALL SERVE IN THAT ROLE AT THE PLEASURE OF THE GOVERNOR.

Sec. 183.22. THE BIOMEDICAL RESEARCH AND TECHNOLOGY TRANSFER COMMISSION SHALL APPOINT AND SET THE COMPENSATION OF AN EXECUTIVE DIRECTOR AND OTHER EMPLOYEES NEEDED TO CARRY OUT THE DUTIES OF THE COMMISSION. BEFORE ENTERING UPON THE DISCHARGE OF THE DUTIES OF OFFICE, THE EXECUTIVE DIRECTOR SHALL GIVE A BOND TO THE STATE, TO BE APPROVED BY THE GOVERNOR, CONDITIONED FOR THE FAITHFUL PERFORMANCE OF THE DUTIES OF OFFICE. THE EXECUTIVE DIRECTOR AND THE OTHER EMPLOYEES OF THE COMMISSION ARE STATE EMPLOYEES AND SERVE IN THE UNCLASSIFIED SERVICE.

Sec. 183.23. THE BOARD OF REGENTS SHALL PROVIDE OFFICE SPACE AND FACILITIES FOR THE BIOMEDICAL RESEARCH AND TECHNOLOGY TRANSFER COMMISSION. ANY ADMINISTRATIVE COSTS ASSOCIATED WITH THE OPERATION OF THE COMMISSION SHALL BE PAID FROM AMOUNTS APPROPRIATED FROM THE BIOMEDICAL RESEARCH AND TECHNOLOGY TRANSFER TRUST FUND, CREATED BY SECTION 183.19 OF THE REVISED CODE.

Sec. 183.24. THE BIOMEDICAL RESEARCH AND TECHNOLOGY TRANSFER COMMISSION SHALL PERIODICALLY MAKE STRATEGIC ASSESSMENTS OF THE TYPES OF STATE INVESTMENTS IN BIOMEDICAL RESEARCH AND BIOTECHNOLOGY IN THIS STATE THAT WOULD BE LIKELY TO CREATE JOBS AND BUSINESS OPPORTUNITIES AND PRODUCE THE MOST BENEFICIAL LONG-TERM IMPROVEMENTS TO THE PUBLIC HEALTH OF OHIOANS. ONE AREA OF FOCUS FOR THE COMMISSION SHALL BE BIOMEDICAL RESEARCH AND BIOTECHNOLOGY INITIATIVES THAT ADDRESS TOBACCO-RELATED ILLNESSES. THE ASSESSMENTS SHALL BE AVAILABLE TO THE PUBLIC AND SHALL BE USED BY THE COMMISSION TO GUIDE ITS DECISIONS ON AWARDING GRANTS. THE COMMISSION SHALL ESTABLISH A COMPETITIVE PROCESS FOR THE AWARD OF GRANTS THAT IS DESIGNED TO FUND THE MOST MERITORIOUS PROPOSALS AND, WHEN APPROPRIATE, PROVIDE FOR PEER REVIEW OF PROPOSALS. THE COMMISSION MAY MAKE GRANTS TO INDIVIDUALS, PUBLIC AGENCIES, PRIVATE COMPANIES OR ORGANIZATIONS, OR JOINT VENTURES FOR ANY OF A BROAD RANGE OF ACTIVITIES RELATED TO BIOMEDICAL RESEARCH AND TECHNOLOGY TRANSFER. PRIORITY SHALL BE GIVEN TO PROPOSALS THAT WOULD LEVERAGE ADDITIONAL PRIVATE AND PUBLIC FUNDING RESOURCES. THE COMMISSION SHALL ADOPT RULES UNDER CHAPTER 119. OF THE REVISED CODE REGARDING CONFLICTS OF INTEREST IN THE AWARDING OF GRANTS.

WHEN APPROPRIATE, THE COMMISSION SHALL COORDINATE ITS ACTIVITIES WITH THOSE OF THE TOBACCO USE PREVENTION AND CONTROL FOUNDATION.

Sec. 183.25. WITHIN NINETY DAYS AFTER THE END OF EACH FISCAL YEAR, THE BIOMEDICAL RESEARCH AND TECHNOLOGY TRANSFER COMMISSION SHALL SUBMIT TO THE GOVERNOR AND THE GENERAL ASSEMBLY A REPORT OF THE ACTIVITIES OF THE COMMISSION DURING THE PRECEDING FISCAL YEAR.

Sec. 183.26. THE EDUCATION FACILITIES TRUST FUND IS HEREBY CREATED IN THE STATE TREASURY. MONEY CREDITED TO THE FUND SHALL BE USED TO PAY COSTS OF, OR TO PROVIDE THE STATE'S SHARE OF THE COSTS OF, CONSTRUCTING, RENOVATING, OR REPAIRING PRIMARY AND SECONDARY SCHOOLS. ALL INVESTMENT EARNINGS OF THE FUND SHALL BE CREDITED TO THE FUND.

Sec. 183.27. THE EDUCATION FACILITIES ENDOWMENT FUND IS HEREBY CREATED IN THE STATE TREASURY. IT IS THE INTENT OF THE GENERAL ASSEMBLY TO MAINTAIN THE FUND AS A PERMANENT SOURCE OF REVENUE FOR CONSTRUCTING, RENOVATING, OR REPAIRING PRIMARY AND SECONDARY SCHOOLS IN THIS STATE. AT THE BEGINNING OF EACH QUARTER, ALL INVESTMENT EARNINGS OF THE ENDOWMENT FUND EARNED DURING THE IMMEDIATELY PRECEDING QUARTER SHALL BE CREDITED TO THE EDUCATION FACILITIES TRUST FUND.

Sec. 183.28. THE EDUCATION TECHNOLOGY TRUST FUND IS HEREBY CREATED IN THE STATE TREASURY. MONEY CREDITED TO THE FUND SHALL BE USED TO PAY COSTS OF NEW AND INNOVATIVE TECHNOLOGY FOR PRIMARY AND SECONDARY EDUCATION, INCLUDING CHARTERED NONPUBLIC SCHOOLS, AND HIGHER EDUCATION, INCLUDING STATE INSTITUTIONS OF HIGHER EDUCATION AND PRIVATE NONPROFIT INSTITUTIONS OF HIGHER EDUCATION HOLDING CERTIFICATES OF AUTHORIZATION UNDER SECTION 1713.02 OF THE REVISED CODE. ALL INVESTMENT EARNINGS OF THE FUND SHALL BE CREDITED TO THE FUND.

Sec. 183.29. THE TREASURER OF STATE SHALL, EXCEPT FOR ANY PETTY CASH FUNDS, KEEP ALL MONEY RECEIVED FROM TOBACCO MASTER SETTLEMENT AGREEMENT PAYMENTS OR FROM DISTRIBUTIONS UNDER THIS CHAPTER THAT IS NEEDED TO MEET CURRENT DEMANDS FOR THE MONEY UNDER THIS CHAPTER, IN PUBLIC DEPOSITORIES OF THE ACTIVE DEPOSITS OF PUBLIC MONEYS OF THE STATE, AS SUCH TERMS ARE USED IN CHAPTER 135. OF THE REVISED CODE.

Sec. 183.30. (A) NO MORE THAN FIVE PER CENT OF THE TOTAL EXPENDITURES OF THE TOBACCO USE PREVENTION AND CONTROL FOUNDATION IN A FISCAL YEAR SHALL BE FOR ADMINISTRATIVE EXPENSES OF THE FOUNDATION.

(B) NO MORE THAN FIVE PER CENT OF THE TOTAL EXPENDITURES OF THE SOUTHERN OHIO AGRICULTURAL AND COMMUNITY DEVELOPMENT FOUNDATION IN A FISCAL YEAR SHALL BE FOR ADMINISTRATIVE EXPENSES OF THE FOUNDATION.

(C) NO MORE THAN FIVE PER CENT OF THE TOTAL EXPENDITURES OF THE BIOMEDICAL RESEARCH AND TECHNOLOGY TRANSFER COMMISSION IN A FISCAL YEAR SHALL BE FOR ADMINISTRATIVE EXPENSES OF THE COMMISSION.

Sec. 183.31. (A) A PUBLIC OR PRIVATE AGENCY THAT RECEIVES FUNDING FROM THE TOBACCO USE PREVENTION AND CONTROL FOUNDATION SHALL EXPEND NO MORE THAN TEN PER CENT OF THAT FUNDING ON ADMINISTRATIVE EXPENSES.

(B) AN INDIVIDUAL, PUBLIC AGENCY, OR PRIVATELY OWNED COMPANY THAT RECEIVES A GRANT OR LOAN FROM THE SOUTHERN OHIO AGRICULTURAL AND COMMUNITY DEVELOPMENT FOUNDATION SHALL EXPEND NO MORE THAN TEN PER CENT OF THAT GRANT OR LOAN ON ADMINISTRATIVE EXPENSES.

(C) AN INDIVIDUAL, PUBLIC AGENCY, PRIVATE COMPANY OR ORGANIZATION, OR JOINT VENTURE THAT RECEIVES A GRANT FROM THE BIOMEDICAL RESEARCH AND TECHNOLOGY TRANSFER COMMISSION SHALL EXPEND NO MORE THAN TEN PER CENT OF THAT GRANT ON ADMINISTRATIVE EXPENSES.

Sec. 183.32. IN JANUARY EVERY SIX YEARS BEGINNING IN 2012, THE PRESIDENT OF THE SENATE SHALL APPOINT THREE SENATORS AND THE SPEAKER OF THE HOUSE OF REPRESENTATIVES SHALL APPOINT THREE MEMBERS OF THE HOUSE OF REPRESENTATIVES TO A COMMITTEE TO REEXAMINE THE USE OF TOBACCO MASTER SETTLEMENT AGREEMENT FUNDS. NO MORE THAN TWO MEMBERS APPOINTED BY THE PRESIDENT SHALL BE FROM THE SAME POLITICAL PARTY AS THE PRESIDENT, AND NO MORE THAN TWO MEMBERS

APPOINTED BY THE SPEAKER SHALL BE FROM THE SAME POLITICAL PARTY AS THE SPEAKER.

THE COMMITTEE SHALL DETERMINE IF THIS CHAPTER'S DISTRIBUTION AND USES OF REVENUE RECEIVED UNDER THE TOBACCO MASTER SETTLEMENT AGREEMENT ADEQUATELY REFLECT THE STATE'S PRIORITIES. WITHIN NINE MONTHS OF ITS FORMATION, THE COMMITTEE SHALL REPORT TO THE GENERAL ASSEMBLY ANY CHANGES IT RECOMMENDS BE MADE TO THE DISTRIBUTION AND USES. THE COMMITTEE SHALL CEASE TO EXIST AFTER MAKING ITS REPORT.

Sec. 183.33. NO MONEY SHALL BE APPROPRIATED OR TRANSFERRED FROM THE GENERAL REVENUE FUND TO THE TOBACCO MASTER SETTLEMENT AGREEMENT FUND, TOBACCO USE PREVENTION AND CESSATION TRUST FUND, TOBACCO USE PREVENTION AND CONTROL ENDOWMENT FUND, LAW ENFORCEMENT IMPROVEMENTS TRUST FUND, SOUTHERN OHIO AGRICULTURAL AND COMMUNITY DEVELOPMENT TRUST FUND, SOUTHERN OHIO AGRICULTURAL AND COMMUNITY DEVELOPMENT FOUNDATION ENDOWMENT FUND, OHIO'S PUBLIC HEALTH PRIORITIES TRUST FUND, BIOMEDICAL RESEARCH AND TECHNOLOGY TRANSFER TRUST FUND, EDUCATION FACILITIES TRUST FUND, EDUCATION FACILITIES ENDOWMENT FUND, OR EDUCATION TECHNOLOGY TRUST FUND. IN ADDITION, NO MONEY SHALL BE OTHERWISE APPROPRIATED OR TRANSFERRED FROM THE GENERAL REVENUE FUND FOR THE USE OF THE TOBACCO USE PREVENTION AND CONTROL FOUNDATION OR THE SOUTHERN OHIO AGRICULTURAL AND COMMUNITY DEVELOPMENT FOUNDATION.

Sec. 5145.32. (A) AS USED IN THIS SECTION:

(1) "SMOKE" MEANS TO BURN ANY SUBSTANCE CONTAINING TOBACCO, INCLUDING, BUT NOT LIMITED TO, A LIGHTED CIGARETTE, CIGAR, OR PIPE.

(2) "STATE CORRECTIONAL INSTITUTION" HAS THE SAME MEANING AS IN SECTION 2967.01 OF THE REVISED CODE AND INCLUDES A PRISON THAT IS PRIVATELY OPERATED AND MANAGED PURSUANT TO A CONTRACT THE DEPARTMENT OF REHABILITATION AND CORRECTION ENTERS INTO UNDER SECTION 9.06 OF THE REVISED CODE.

(3) "USE TOBACCO" MEANS TO CHEW OR MAINTAIN ANY SUBSTANCE CONTAINING TOBACCO, INCLUDING SMOKELESS TOBACCO, IN THE MOUTH TO DERIVE THE EFFECTS OF TOBACCO.

(B) NO PERSON SHALL SMOKE, USE, OR POSSESS TOBACCO OR HAVE TOBACCO UNDER THE PERSON'S CONTROL ON ANY PROPERTY UNDER THE CONTROL OF THE CORRECTIONS MEDICAL CENTER IN COLUMBUS OR THE OHIO STATE PENITENTIARY IN YOUNGSTOWN.

(C) NO PERSON SHALL SMOKE OR USE TOBACCO IN A BUILDING OF THE NORTH COAST CORRECTIONAL TREATMENT FACILITY IN GRAFTON, LAKE ERIE CORRECTIONAL INSTITUTION, TOLEDO CORRECTIONAL INSTITUTION, HOCKING CORRECTIONAL FACILITY, OAKWOOD CORRECTIONAL FACILITY, NORTHEAST PRE-RELEASE CENTER, FRANKLIN PRE-RELEASE CENTER, OR MONTGOMERY EDUCATION PRE-RELEASE CENTER.

(D)(1) THE DIRECTOR OF REHABILITATION AND CORRECTION SHALL DESIGNATE AT LEAST ONE TOBACCO-FREE HOUSING AREA WITHIN EACH STATE CORRECTIONAL INSTITUTION THAT IS NOT IDENTIFIED IN DIVISION (B) OR (C) OF THIS SECTION.

(2) NO PERSON SHALL SMOKE OR USE TOBACCO IN AN AREA DESIGNATED BY THE DIRECTOR UNDER DIVISION (D)(1) OF THIS SECTION.

(E) A VIOLATION OF DIVISION (B), (C), OR (D)(2) OF THIS SECTION IS NOT A CRIMINAL OFFENSE. THE DEPARTMENT OF REHABILITATION AND CORRECTION SHALL ADOPT RULES THAT ESTABLISH PROCEDURES FOR THE ENFORCEMENT OF THOSE DIVISIONS AND THAT ESTABLISH DISCIPLINARY MEASURES FOR A VIOLATION OF THOSE DIVISIONS.

(F) THE DEPARTMENT MAY DESIGNATE LOCATIONS AT WHICH IT IS PERMISSIBLE TO SMOKE OR USE TOBACCO OUTSIDE OF A BUILDING OF AN INSTITUTION IDENTIFIED IN DIVISION (C) OF THIS SECTION.

(G) THE DEPARTMENT SHALL PROVIDE SMOKING AND TOBACCO USAGE CESSATION PROGRAMS FOR PRISONERS AT ALL STATE CORRECTIONAL INSTITUTIONS, SUBJECT TO AVAILABLE FUNDING.

(H) THE DIRECTOR SHALL REVIEW THE PRACTICALITY OF ELIMINATING ACCESS TO SMOKING OR TOBACCO USAGE IN SPECIALIZED UNITS TO WHICH THIS SECTION'S PROHIBITIONS DO NOT OTHERWISE APPLY.

SECTION 2. That existing sections 102.02, 107.03, 107.031, and 126.02 of the Revised Code are hereby repealed.

SECTION 3. Except as otherwise provided, all items in this act are hereby appropriated as designated out of any moneys in the state treasury to the credit of the designated fund, which are not otherwise appropriated. For all appropriations made in this section, those in the first column are for fiscal year 2001 and those in the second column are for fiscal year 2002.

Section 4. AGR DEPARTMENT OF AGRICULTURE

Tobacco Master Settlement Agreement Fund Group

K87 700-502	Southern Ohio Agriculture and Community Development Foundation	$ 22,189,403	$ 17,445,115
TOTAL TSF Tobacco Master Settlement Agreement Fund Group		$ 22,189,403	$ 17,445,115
TOTAL ALL BUDGET FUND GROUPS		$ 22,189,403	$ 17,445,115

Southern Ohio Agriculture and Community Development Foundation

The foregoing appropriation item 700-502, Southern Ohio Agriculture and Community Development Foundation, shall be used in accordance with sections 183.02 and 183.11 to 183.17 of the Revised Code. The Director of Agriculture shall disburse moneys appropriated in this appropriation item to the Southern Ohio Agricultural and Community Development Foundation Endowment Fund created by section 183.16 of the Revised Code to be used by the Southern Ohio Agricultural and Community Development Foundation to carry out its duties.

Section 5. CEB CONTROLLING BOARD

Tobacco Master Settlement Agreement Fund Group

S87 911-405	Education Technology Trust Fund	$ 13,758,794	$ 12,911,963
TOTAL TSF Tobacco Master Settlement Agreement Fund Group		$ 13,758,794	$ 12,911,963
TOTAL ALL BUDGET FUND GROUPS		$ 13,758,794	$ 12,911,963

Education Technology Trust Fund

The Controlling Board may transfer to any appropriate state agency portions of appropriation item 911-405, Education Technology Trust Fund, upon receipt of an approved plan submitted by the Director of Budget and Management.

Section 6. DOH DEPARTMENT OF HEALTH

Tobacco Master Settlement Agreement Fund Group

H87 440-502	Tobacco Use Prevention and Control Foundation	$ 234,861,033	$ 135,006,283
L87 440-403	Ohio's Public Health Priorities Trust Fund	$ 10,004,715	$ 14,351,400
TOTAL TSF Tobacco Master Settlement Agreement Fund Group		$ 244,865,748	$ 149,357,683
TOTAL ALL BUDGET FUND GROUPS		$ 244,865,748	$ 149,357,683

Tobacco Use Prevention and Control Foundation

The foregoing appropriation item 440-502, Tobacco Use Prevention and Control Foundation, shall be used in accordance with sections 183.02 to 183.09 of the Revised Code. The Director of Health shall disburse moneys appropriated in this appropriation item to the Tobacco Use Prevention and Control Endowment Fund created by section 183.08 of the Revised Code to be used by the Tobacco Use Prevention and Control Foundation to carry out its duties.

Ohio's Public Health Priorities Trust Fund

The Director of Budget and Management shall establish a plan for the use of appropriation item 440-403, Ohio's Public Health Priorities Trust Fund, for any of the purposes authorized by section 183.18 of the Revised Code. In preparing the plan, which shall be subject to approval by the

Controlling Board, the Director of Budget and Management shall consult with the Director of Rehabilitation and Correction, the Director of Health, the Director of Alcohol and Drug Addiction Services, the Attorney General, and the Executive Director of the Commission on Minority Health.

Upon approval of the plan by the Controlling Board, the Director of Budget and Management may transfer to any appropriate state agency portions of appropriation item 440-403, Ohio's Public Health Priorities Trust Fund, for any of the purposes authorized by section 183.18 of the Revised Code and the amounts transferred are hereby appropriated.

Section 7. BOR BOARD OF REGENTS

Tobacco Master Settlement Agreement Fund Group

M87 235-405	Biomedical Research and Technology Transfer Commission	$ 5,011,604	$	30,142,237
TOTAL TSF Tobacco Master Settlement Agreement Fund Group		$ 5,011,604	$	30,142,237
TOTAL ALL BUDGET FUND GROUPS		$ 5,011,604	$	30,142,237

SECTION 8. All items set forth in this section are hereby appropriated out of any moneys in the state treasury to the credit of the Education Facilities Trust Fund (Fund N87) that are not otherwise appropriated.

		Appropriations
	SFC SCHOOL FACILITIES COMMISSION	
CAP-780	Classroom Facilities Assistance Program	$ 462,805,714
Total School Facilities Commission		$ 462,805,714
TOTAL Education Facilities Trust Fund		$ 462,805,714

SECTION 9. All items set forth in this section are hereby appropriated out of any moneys in the state treasury to the credit of the Law Enforcement Improvements Trust Fund (Fund J87) that are not otherwise appropriated.

		Appropriations
	AGO ATTORNEY GENERAL	
CAP-716	Lab and Training Facility Improvements	$ 2,000,000
TOTAL	Attorney General	$ 2,000,000
TOTAL	Law Enforcement Improvements Trust Fund	$ 2,000,000

SECTION 10. Sections 8 and 9 of this act shall remain in full force and effect commencing on July 1, 2000, and terminating on June 30, 2002, for the purpose of drawing money from the state treasury in payment of liabilities lawfully incurred thereunder, and on June 30, 2002, and not before, the moneys appropriated thereby shall lapse into the funds from which they are severally appropriated.

The appropriations made in Sections 8 and 9 of this act are subject to all provisions of the capital appropriations bill governing the 2000-2002 biennium that are generally applicable to such appropriations. Expenditures from appropriations contained in Sections 8 and 9 shall be accounted for as though made in the capital appropriations bill governing the 2000-2002 biennium.

SECTION 11. **Personal Service Expenses**

Unless otherwise prohibited by law, each appropriation in this act from which personal service expenses are paid shall bear the employer's share of public employees' retirement, workers' compensation, disabled workers' relief, and all group insurance programs; the costs of centralized accounting, centralized payroll processing, and related personnel reports and services; the cost of the Office of Collective Bargaining; the cost of the Personnel Board of Review; the cost of the Employee Assistance Program; the cost of the Equal Opportunity Center; the costs of interagency information management infrastructure; and the cost of administering the state employee merit system as required by section 124.07 of the Revised Code. Such costs shall be determined in conformity with appropriate sections of law and paid in accordance with procedures specified by the Office of Budget and Management.

SECTION 12. The Tobacco Master Settlement Agreement Fund created by section 183.02 of the Revised Code is the same as Fund 087, the Tobacco Master Settlement Agreement Fund created by the Controlling Board in March 1999.

SECTION 13. The Governor, President and Minority Leader of the Senate, and Speaker and Minority Leader of the House of Representatives shall make their initial appointments to the board of trustees of the Tobacco Use Prevention and Control Foundation within 90 days after the effective date of this section. Notwithstanding section 183.04 of the Revised Code:

(A) The Governor shall appoint one member under division (A) of that section to an initial term ending one year after the effective date of this section and one to an initial term ending three years after the effective date of this section; the President shall appoint one member to an initial term ending three years after the effective date of this section and one to an initial term ending five years after the effective date of this section; the Minority Leader of the Senate shall appoint one member to an initial term ending four years after the effective date of this section; the Speaker shall appoint one member to an initial term ending two years after the effective date of this section and one to an initial term ending four years after the effective date of this section; and the Minority Leader of the House of Representatives shall appoint one member to an initial term ending three years after the effective date of this section.

(B) The Governor shall appoint one member under division (B) of that section to an initial term ending two years after the effective date of this section and the other member to an initial term ending four years after the effective date of this section.

(C) The Governor shall appoint the five members under divisions (C) to (G) of that section to initial terms of office ending one, two, three, four, and five years after the effective date of this section.

(D) The Governor shall appoint the members under divisions (H) and (I) of that section to initial terms ending five years after the effective date of this section.

(E) Thereafter, terms of office shall be for five years as provided in section 183.04 of the Revised Code.

SECTION 14. The Governor shall make the initial appointments to the board of trustees of the Southern Ohio Agricultural and Community Development Foundation within 90 days after the effective date of this section. Notwithstanding section 183.12 of the Revised Code:

(A) The Governor shall appoint one member under divisions (B) and (C) of that section to an initial term ending one year after the effective date of this section, one to an initial term ending two years after the effective date of this section, one to an initial term ending three years after the effective date of this section, one to an initial term ending four years after the effective date of this section, and one to an initial term ending five years after the effective date of this section.

(B) The Governor shall appoint one member under division (D) of that section to an initial term ending two years after the effective date of this section, one to an initial term ending three years after the effective date of this section, and one to an initial term ending four years after the effective date of this section.

(C) Thereafter, terms of office of these members shall be for five years as provided in section 183.12 of the Revised Code.

SECTION 15. The Governor, President and Minority Leader of the Senate, and Speaker and Minority Leader of the House of Representatives shall make their initial appointments to the Biomedical Research and Technology Transfer Commission within 90 days after the effective date of this section. Notwithstanding section 183.20 of the Revised Code:

(A) The Governor shall appoint one member under division (C)(1) of that section to an initial term ending one year after the effective date of this section, one to an initial term ending two years after the effective date of this section, one to an initial term ending three years after the effective date of this section, one to an initial term ending four years after the effective date of this section, and two to initial terms ending five years after the effective date of this section.

(B) The Speaker of the House of Representatives shall appoint one member under division (C)(2) of that section to an initial term ending one year after the effective date of this section and one member to an initial term ending five years after the effective date of this section.

(C) The Minority Leader of the House of Representatives shall appoint one member under division (C)(3) of that section to an initial term ending four years after the effective date of this section.

(D) The President of the Senate shall appoint one member of the Commission under division (C)(4) of that section to an initial term ending one year after the effective date of this section and the other member to an initial term ending four years after the effective date of this section.

(E) The Minority Leader of the Senate shall appoint one member under division (C)(5) of that section to an initial term ending three years after the effective date of this section.

(F) Thereafter, terms of office shall be for five years as provided in section 183.20 of the Revised Code.

SECTION 16. The Legislative Budget Office of the Legislative Service Commission shall study issues concerning the availability of prescription drugs for low-income elderly Ohioans who suffer from tobacco-related illnesses. The Legislative Budget Office shall submit to the General Assembly a report on its study within one year of the effective date of this section. The report shall provide information on all of the following:

(A) What public and private resources and methods currently are used by low-income elderly Ohioans to obtain prescription drugs? The study shall examine the role of Medicaid, including PASSPORT; Medicare; other federal programs; private health insurance; and health clinics and hospitals.

(B) What are pertinent issues concerning prescription drug cost, usage, and research and development? The study shall examine average annual drug costs per person, average annual costs per prescription, and trends for these two averages. The study also shall present information on drugs with the highest volume usage and drugs with the highest cost.

(C) How do physician practices affect prescription drug cost and availability?

(D) How do managed care practices affect prescription drug cost and availability?

(E) What are other states doing in this regard, and how do the other states pay for it?

The report shall not include recommendations for legislative action.

SECTION 17. While respecting the right of each General Assembly to evaluate independently the budgetary priorities of the state and while acknowledging that the economic conditions, educational needs, and tax burdens of the people of the state will inevitably change, the 123rd General Assembly of the state of Ohio earnestly requests future General Assemblies, when they consider how to spend and invest money credited to the Tobacco Master Settlement Agreement Fund after fiscal year 2012, to give due regard to the thoughtful and creative recommendations of the fifteen-member bipartisan Governor's Tobacco Task Force in 1999. These recommendations, which were developed in the course of seventeen meetings that the Task Force conducted to hear public testimony and to discuss the allocation of tobacco settlement payments, were that the following percentages of the total revenue received by the state through fiscal year 2025 under the Tobacco Master Settlement Agreement should be allocated as follows: fourteen and eight-tenths per cent to tobacco use prevention and cessation programs, ten and one-tenth per cent to other public health priorities, seventeen and eight-tenths per cent to investments in biomed-

ical research and technology transfer, forty-four and seven-tenths per cent to rebuilding and renovating primary and secondary schools, ten per cent to education technologies, two-tenths of one per cent to law enforcement improvements, and two and three-tenths per cent to assisting tobacco farmers and their communities.

SECTION 18. (A) The Tobacco Oversight Accountability Panel is hereby created. The committee shall consist of the Director of Budget and Management or the Director's designee, three members of the House of Representatives appointed by the Speaker of the House of Representatives, no more than two of whom shall belong to the same political party as the Speaker, and three members of the Senate appointed by the President of the Senate, no more than two of whom shall belong to the same political party as the President.

(B) The Panel shall develop appropriate achievement benchmarks for each of the following:

(1) The Tobacco Use Prevention and Cessation Trust Fund;

(2) The Law Enforcement Improvements Trust Fund;

(3) The Southern Ohio Agricultural and Community Development Trust Fund;

(4) Ohio's Public Health Priorities Trust Fund;

(5) The Biomedical Research and Technology Transfer Trust Fund;

(6) The Education Facilities Trust Fund;

(7) The Education Technology Trust Fund.

(C) On or before December 31, 2000, the Panel shall submit a report describing the achievement benchmarks developed under division (B) of this section to the Governor, the General Assembly, and the chairpersons and ranking minority members of the finance committees of the Senate and House of Representatives. Upon submitting the report, the panel shall cease to exist.

SECTION 19. Notwithstanding section 183.13 of the Revised Code, the Director of Agriculture shall call and preside over the organizational meeting of the board of trustees of the Southern Ohio Agricultural and Community Development Foundation.

SECTION 20. Except as otherwise specifically provided in this act, the codified and uncodified sections of law contained in this act, and the items of law of which the codified and uncodified sections of law contained in this act are composed, are subject to the referendum. Therefore, under Ohio Constitution, Article II, Section 1c and section 1.471 of the Revised Code, the codified and uncodified sections of law contained in this act, and the items of law of which the codified and uncodified sections of law contained in this act are composed, take effect on the ninety-first day after this act is filed with the Secretary of State. If, however, a referendum petition is filed against any such codified or uncodified section of law contained in this act, or against any item of law of which any such codified or uncodified section of law contained in this act is composed, the codified or uncodified section of law, or item of law, unless rejected at the referendum, takes effect at the earliest time permitted by law.

SECTION 21. This section and Sections 3 to 11 of this act are not subject to the referendum. Therefore, under Ohio Constitution, Article II, Section 1d and section 1.471 of the Revised Code, this section and Sections 3 to 11 of this act go into immediate effect when this act becomes law.

John Davidson

Speaker _____ *of the House of Representatives.*

Richard H. Finan

President _____ *of the Senate.*

Passed February 16, 2000

March 32

Approved April 3, 2000

Bob Taft

Governor.

The section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

Robert M. Shapiro

Director, Legislative Service Commission.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 3rd day of March, A. D. 2000.

Jennette Bradley

Secretary of State.

File No. 132 Effective Date March 3, 2000; certain sections effective 6/2/00

(123rd General Assembly)
(Senate Bill Number 198)

AN ACT

To amend sections 1541.99, 3709.085, 3745.01, 6111.04, and 6117.51 and to repeal section 1541.21 of the Revised Code to abolish special sanitary districts.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 1541.99, 3709.085, 3745.01, 6111.04, an 6117.51 of the Revised Code be amended to read as follows:

Sec. 1541.99. ~~(A)~~ Whoever violates sections 1541.09 to ~~1541.21, inclu sive,~~ 1541.20 of the Revised Code~~,~~ or any rules ~~and regulations~~ of th division of parks and recreation shall be fined not less than ten nor mor than one hundred dollars.

Sec. 3709.085. (A) The board of health of a city or general healt district may enter into a contract with any political subdivision or othe governmental agency to obtain or provide all or part of any services including, but not limited to, enforcement services, for the purposes c Chapter 3704. of the Revised Code, the rules adopted and orders mad pursuant thereto, or any other ordinances or rules for the prevention control, and abatement of air pollution.

(B)(1) As used in division (B)(2) of this section:

(a) "Semipublic disposal system" means a disposal system that treat the sanitary sewage discharged from publicly or privately owned building or places of assemblage, entertainment, recreation, education, correction hospitalization, housing, or employment, but does not include a disposa system that treats sewage in amounts of more than twenty-five thousan gallons per day; a disposal system for the treatment of sewage that i exempt from the requirements of section 6111.04 of the Revised Cod pursuant to division (F) of that section; or a disposal system for th treatment of industrial waste.

(b) Terms defined in section 6111.01 of the Revised Code have th same meanings as in that section.

(2) The board of health of a city or general health district may ente into a contract with the environmental protection agency to conduct o behalf of the agency inspection or enforcement services, for the purpose of Chapter 6111. ~~and section 1541.21~~ of the Revised Code and rules adopt ed thereunder, ~~for the disposal or treatment of sewage from single family~~

(127th General Assembly)
(Substitute House Bill Number 544)

AN ACT

To amend sections 102.02, 183.021, 183.30, 183.33, and 2151.87; to enact sections 3701.84 and 3701.841; to repeal sections 183.03, 183.04, 183.05, 183.06, 183.061, 183.07, 183.08, 183.09, and 183.10 of the Revised Code; to repeal Section 3 of Am. S.B. 192 of the 127th General Assembly, to repeal Section 4 of S.B. 209 of the 127th General Assembly, and to repeal Section 205.10 of Sub. S.B. 321 of the 126th General Assembly to abolish the Tobacco Use Prevention and Control Foundation and transfer certain powers of the Foundation to the Department of Health, to make an appropriation, and to declare an emergency.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 102.02, 183.021, 183.30, 183.33, and 2151.87 be amended and sections 3701.84 and 3701.841 of the Revised Code be enacted to read as follows:

Sec. 102.02. (A) Except as otherwise provided in division (H) of this section, all of the following shall file with the appropriate ethics commission the disclosure statement described in this division on a form prescribed by the appropriate commission: every person who is elected to or is a candidate for a state, county, or city office and every person who is appointed to fill a vacancy for an unexpired term in such an elective office; all members of the state board of education; the director, assistant directors, deputy directors, division chiefs, or persons of equivalent rank of any administrative department of the state; the president or other chief administrative officer of every state institution of higher education as defined in section 3345.011 of the Revised Code; the executive director and the members of the capitol square review and advisory board appointed or employed pursuant to section 105.41 of the Revised Code; the chief executive officer and the members of the board of each state retirement system; each employee of a

Intervening Plaintiff's Hearing Exhibit 9

state retirement board who is a state retirement system investment officer licensed pursuant to section 1707.163 of the Revised Code; the members of the Ohio retirement study council appointed pursuant to division (C) of section 171.01 of the Revised Code; employees of the Ohio retirement study council, other than employees who perform purely administrative or clerical functions; the administrator of workers' compensation and each member of the bureau of workers' compensation board of directors; the bureau of workers' compensation director of investments; the chief investment officer of the bureau of workers' compensation; the director appointed by the workers' compensation council; all members of the board of commissioners on grievances and discipline of the supreme court and the ethics commission created under section 102.05 of the Revised Code; every business manager, treasurer, or superintendent of a city, local, exempted village, joint vocational, or cooperative education school district or an educational service center; every person who is elected to or is a candidate for the office of member of a board of education of a city, local, exempted village, joint vocational, or cooperative education school district or of a governing board of an educational service center that has a total student count of twelve thousand or more as most recently determined by the department of education pursuant to section 3317.03 of the Revised Code; every person who is appointed to the board of education of a municipal school district pursuant to division (B) or (F) of section 3311.71 of the Revised Code; all members of the board of directors of a sanitary district that is established under Chapter 6115. of the Revised Code and organized wholly for the purpose of providing a water supply for domestic, municipal, and public use, and that includes two municipal corporations in two counties; every public official or employee who is paid a salary or wage in accordance with schedule C of section 124.15 or schedule E-2 of section 124.152 of the Revised Code; ~~members of the board of trustees and the executive director of the tobacco use prevention and control foundation;~~ members of the board of trustees and the executive director of the southern Ohio agricultural and community development foundation; and every other public official or employee who is designated by the appropriate ethics commission pursuant to division (B) of this section.

The disclosure statement shall include all of the following:

(1) The name of the person filing the statement and each member of the person's immediate family and all names under which the person or members of the person's immediate family do business;

(2)(a) Subject to divisions (A)(2)(b) and (c) of this section and except as otherwise provided in section 102.022 of the Revised Code, identification of

every source of income, other than income from a legislative agent identified in division (A)(2)(b) of this section, received during the preceding calendar year, in the person's own name or by any other person for the person's use or benefit, by the person filing the statement, and a brief description of the nature of the services for which the income was received. If the person filing the statement is a member of the general assembly, the statement shall identify the amount of every source of income received in accordance with the following ranges of amounts: zero or more, but less than one thousand dollars; one thousand dollars or more, but less than ten thousand dollars; ten thousand dollars or more, but less than twenty-five thousand dollars; twenty-five thousand dollars or more, but less than fifty thousand dollars; fifty thousand dollars or more, but less than one hundred thousand dollars; and one hundred thousand dollars or more. Division (A)(2)(a) of this section shall not be construed to require a person filing the statement who derives income from a business or profession to disclose the individual items of income that constitute the gross income of that business or profession, except for those individual items of income that are attributable to the person's or, if the income is shared with the person, the partner's, solicitation of services or goods or performance, arrangement, or facilitation of services or provision of goods on behalf of the business or profession of clients, including corporate clients, who are legislative agents. A person who files the statement under this section shall disclose the identity of and the amount of income received from a person who the public official or employee knows or has reason to know is doing or seeking to do business of any kind with the public official's or employee's agency.

(b) If the person filing the statement is a member of the general assembly, the statement shall identify every source of income and the amount of that income that was received from a legislative agent during the preceding calendar year, in the person's own name or by any other person for the person's use or benefit, by the person filing the statement, and a brief description of the nature of the services for which the income was received. Division (A)(2)(b) of this section requires the disclosure of clients of attorneys or persons licensed under section 4732.12 of the Revised Code, or patients of persons certified under section 4731.14 of the Revised Code, if those clients or patients are legislative agents. Division (A)(2)(b) of this section requires a person filing the statement who derives income from a business or profession to disclose those individual items of income that constitute the gross income of that business or profession that are received from legislative agents.

(c) Except as otherwise provided in division (A)(2)(c) of this section,

division (A)(2)(a) of this section applies to attorneys, physicians, and other persons who engage in the practice of a profession and who, pursuant to a section of the Revised Code, the common law of this state, a code of ethics applicable to the profession, or otherwise, generally are required not to reveal, disclose, or use confidences of clients, patients, or other recipients of professional services except under specified circumstances or generally are required to maintain those types of confidences as privileged communications except under specified circumstances. Division (A)(2)(a) of this section does not require an attorney, physician, or other professional subject to a confidentiality requirement as described in division (A)(2)(c) of this section to disclose the name, other identity, or address of a client, patient, or other recipient of professional services if the disclosure would threaten the client, patient, or other recipient of professional services, would reveal details of the subject matter for which legal, medical, or professional advice or other services were sought, or would reveal an otherwise privileged communication involving the client, patient, or other recipient of professional services. Division (A)(2)(a) of this section does not require an attorney, physician, or other professional subject to a confidentiality requirement as described in division (A)(2)(c) of this section to disclose in the brief description of the nature of services required by division (A)(2)(a) of this section any information pertaining to specific professional services rendered for a client, patient, or other recipient of professional services that would reveal details of the subject matter for which legal, medical, or professional advice was sought or would reveal an otherwise privileged communication involving the client, patient, or other recipient of professional services.

(3) The name of every corporation on file with the secretary of state that is incorporated in this state or holds a certificate of compliance authorizing it to do business in this state, trust, business trust, partnership, or association that transacts business in this state in which the person filing the statement or any other person for the person's use and benefit had during the preceding calendar year an investment of over one thousand dollars at fair market value as of the thirty-first day of December of the preceding calendar year, or the date of disposition, whichever is earlier, or in which the person holds any office or has a fiduciary relationship, and a description of the nature of the investment, office, or relationship. Division (A)(3) of this section does not require disclosure of the name of any bank, savings and loan association, credit union, or building and loan association with which the person filing the statement has a deposit or a withdrawable share account.

(4) All fee simple and leasehold interests to which the person filing the

statement holds legal title to or a beneficial interest in real property located within the state, excluding the person's residence and property used primarily for personal recreation;

(5) The names of all persons residing or transacting business in the state to whom the person filing the statement owes, in the person's own name or in the name of any other person, more than one thousand dollars. Division (A)(5) of this section shall not be construed to require the disclosure of debts owed by the person resulting from the ordinary conduct of a business or profession or debts on the person's residence or real property used primarily for personal recreation, except that the superintendent of financial institutions shall disclose the names of all state-chartered savings and loan associations and of all service corporations subject to regulation under division (E)(2) of section 1151.34 of the Revised Code to whom the superintendent in the superintendent's own name or in the name of any other person owes any money, and that the superintendent and any deputy superintendent of banks shall disclose the names of all state-chartered banks and all bank subsidiary corporations subject to regulation under section 1109.44 of the Revised Code to whom the superintendent or deputy superintendent owes any money.

(6) The names of all persons residing or transacting business in the state, other than a depository excluded under division (A)(3) of this section, who owe more than one thousand dollars to the person filing the statement, either in the person's own name or to any person for the person's use or benefit. Division (A)(6) of this section shall not be construed to require the disclosure of clients of attorneys or persons licensed under section 4732.12 or 4732.15 of the Revised Code, or patients of persons certified under section 4731.14 of the Revised Code, nor the disclosure of debts owed to the person resulting from the ordinary conduct of a business or profession.

(7) Except as otherwise provided in section 102.022 of the Revised Code, the source of each gift of over seventy-five dollars, or of each gift of over twenty-five dollars received by a member of the general assembly from a legislative agent, received by the person in the person's own name or by any other person for the person's use or benefit during the preceding calendar year, except gifts received by will or by virtue of section 2105.06 of the Revised Code, or received from spouses, parents, grandparents, children, grandchildren, siblings, nephews, nieces, uncles, aunts, brothers-in-law, sisters-in-law, sons-in-law, daughters-in-law, fathers-in-law, mothers-in-law, or any person to whom the person filing the statement stands in loco parentis, or received by way of distribution from any inter vivos or testamentary trust established by a spouse or by an

ancestor;

(8) Except as otherwise provided in section 102.022 of the Revised Code, identification of the source and amount of every payment of expenses incurred for travel to destinations inside or outside this state that is received by the person in the person's own name or by any other person for the person's use or benefit and that is incurred in connection with the person's official duties, except for expenses for travel to meetings or conventions of a national or state organization to which any state agency, including, but not limited to, any legislative agency or state institution of higher education as defined in section 3345.011 of the Revised Code, pays membership dues, or any political subdivision or any office or agency of a political subdivision pays membership dues;

(9) Except as otherwise provided in section 102.022 of the Revised Code, identification of the source of payment of expenses for meals and other food and beverages, other than for meals and other food and beverages provided at a meeting at which the person participated in a panel, seminar, or speaking engagement or at a meeting or convention of a national or state organization to which any state agency, including, but not limited to, any legislative agency or state institution of higher education as defined in section 3345.011 of the Revised Code, pays membership dues, or any political subdivision or any office or agency of a political subdivision pays membership dues, that are incurred in connection with the person's official duties and that exceed one hundred dollars aggregated per calendar year;

(10) If the disclosure statement is filed by a public official or employee described in division (B)(2) of section 101.73 of the Revised Code or division (B)(2) of section 121.63 of the Revised Code who receives a statement from a legislative agent, executive agency lobbyist, or employer that contains the information described in division (F)(2) of section 101.73 of the Revised Code or division (G)(2) of section 121.63 of the Revised Code, all of the nondisputed information contained in the statement delivered to that public official or employee by the legislative agent, executive agency lobbyist, or employer under division (F)(2) of section 101.73 or (G)(2) of section 121.63 of the Revised Code.

A person may file a statement required by this section in person or by mail. A person who is a candidate for elective office shall file the statement no later than the thirtieth day before the primary, special, or general election at which the candidacy is to be voted on, whichever election occurs soonest, except that a person who is a write-in candidate shall file the statement no later than the twentieth day before the earliest election at which the person's candidacy is to be voted on. A person who holds elective office shall file the

statement on or before the fifteenth day of April of each year unless the person is a candidate for office. A person who is appointed to fill a vacancy for an unexpired term in an elective office shall file the statement within fifteen days after the person qualifies for office. Other persons shall file an annual statement on or before the fifteenth day of April or, if appointed or employed after that date, within ninety days after appointment or employment. No person shall be required to file with the appropriate ethics commission more than one statement or pay more than one filing fee for any one calendar year.

The appropriate ethics commission, for good cause, may extend for a reasonable time the deadline for filing a statement under this section.

A statement filed under this section is subject to public inspection at locations designated by the appropriate ethics commission except as otherwise provided in this section.

(B) The Ohio ethics commission, the joint legislative ethics committee, and the board of commissioners on grievances and discipline of the supreme court, using the rule-making procedures of Chapter 119. of the Revised Code, may require any class of public officials or employees under its jurisdiction and not specifically excluded by this section whose positions involve a substantial and material exercise of administrative discretion in the formulation of public policy, expenditure of public funds, enforcement of laws and rules of the state or a county or city, or the execution of other public trusts, to file an annual statement on or before the fifteenth day of April under division (A) of this section. The appropriate ethics commission shall send the public officials or employees written notice of the requirement by the fifteenth day of February of each year the filing is required unless the public official or employee is appointed after that date, in which case the notice shall be sent within thirty days after appointment, and the filing shall be made not later than ninety days after appointment.

Except for disclosure statements filed by ~~members of the board of trustees and the executive director of the tobacco use prevention and control foundation and~~ members of the board of trustees and the executive director of the southern Ohio agricultural and community development foundation, disclosure statements filed under this division with the Ohio ethics commission by members of boards, commissions, or bureaus of the state for which no compensation is received other than reasonable and necessary expenses shall be kept confidential. Disclosure statements filed with the Ohio ethics commission under division (A) of this section by business managers, treasurers, and superintendents of city, local, exempted village, joint vocational, or cooperative education school districts or educational

service centers shall be kept confidential, except that any person conducting an audit of any such school district or educational service center pursuant to section 115.56 or Chapter 117. of the Revised Code may examine the disclosure statement of any business manager, treasurer, or superintendent of that school district or educational service center. The Ohio ethics commission shall examine each disclosure statement required to be kept confidential to determine whether a potential conflict of interest exists for the person who filed the disclosure statement. A potential conflict of interest exists if the private interests of the person, as indicated by the person's disclosure statement, might interfere with the public interests the person is required to serve in the exercise of the person's authority and duties in the person's office or position of employment. If the commission determines that a potential conflict of interest exists, it shall notify the person who filed the disclosure statement and shall make the portions of the disclosure statement that indicate a potential conflict of interest subject to public inspection in the same manner as is provided for other disclosure statements. Any portion of the disclosure statement that the commission determines does not indicate a potential conflict of interest shall be kept confidential by the commission and shall not be made subject to public inspection, except as is necessary for the enforcement of Chapters 102. and 2921. of the Revised Code and except as otherwise provided in this division.

(C) No person shall knowingly fail to file, on or before the applicable filing deadline established under this section, a statement that is required by this section.

(D) No person shall knowingly file a false statement that is required to be filed under this section.

(E)(1) Except as provided in divisions (E)(2) and (3) of this section, the statement required by division (A) or (B) of this section shall be accompanied by a filing fee of forty dollars.

(2) The statement required by division (A) of this section shall be accompanied by the following filing fee to be paid by the person who is elected or appointed to, or is a candidate for, any of the following offices:

For state office, except member of the state board of education	$65
For office of member of general assembly	$40
For county office	$40
For city office	$25
For office of member of the state board of education	$25
For office of member of a city, local,	

exempted village, or cooperative education board of education or educational service center governing board	$20
For position of business manager, treasurer, or superintendent of a city, local, exempted village, joint vocational, or cooperative education school district or educational service center	$20

(3) No judge of a court of record or candidate for judge of a court of record, and no referee or magistrate serving a court of record, shall be required to pay the fee required under division (E)(1) or (2) or (F) of this section.

(4) For any public official who is appointed to a nonelective office of the state and for any employee who holds a nonelective position in a public agency of the state, the state agency that is the primary employer of the state official or employee shall pay the fee required under division (E)(1) or (F) of this section.

(F) If a statement required to be filed under this section is not filed by the date on which it is required to be filed, the appropriate ethics commission shall assess the person required to file the statement a late filing fee of ten dollars for each day the statement is not filed, except that the total amount of the late filing fee shall not exceed two hundred fifty dollars.

(G)(1) The appropriate ethics commission other than the Ohio ethics commission shall deposit all fees it receives under divisions (E) and (F) of this section into the general revenue fund of the state.

(2) The Ohio ethics commission shall deposit all receipts, including, but not limited to, fees it receives under divisions (E) and (F) of this section and all moneys it receives from settlements under division (G) of section 102.06 of the Revised Code, into the Ohio ethics commission fund, which is hereby created in the state treasury. All moneys credited to the fund shall be used solely for expenses related to the operation and statutory functions of the commission.

(H) Division (A) of this section does not apply to a person elected or appointed to the office of precinct, ward, or district committee member under Chapter 3517. of the Revised Code; a presidential elector; a delegate to a national convention; village or township officials and employees; any physician or psychiatrist who is paid a salary or wage in accordance with schedule C of section 124.15 or schedule E-2 of section 124.152 of the

Revised Code and whose primary duties do not require the exercise of administrative discretion; or any member of a board, commission, or bureau of any county or city who receives less than one thousand dollars per year for serving in that position.

Sec. 183.021. (A) No money from the tobacco master settlement agreement fund, as that fund existed prior to the repeal of section 183.02 of the Revised Code by H.B. 119 of the 127th general assembly, shall be expended to do any of the following:

(1) Hire an executive agency lobbyist, as defined under section 121.60 of the Revised Code, or a legislative agent, as defined under section 101.70 of the Revised Code;.

(2) Support or oppose candidates, ballot questions, referendums, or ballot initiatives.

(B) Nothing in this section prohibits ~~any~~ either of the following from advocating on behalf of the specific objectives of a program funded under this chapter:

~~(1) The members of the board of trustees, executive director, or employees of the tobacco use prevention and control foundation;~~

~~(2)~~ The members of the board of trustees, executive director, or employees of the southern Ohio agricultural and community development foundation;

~~(3)~~(2) The members or employees of the third frontier commission or the members of the third frontier advisory board.

Sec. 183.30. (A) ~~Except as provided in division (D) of this section, no more than five per cent of the total disbursements, encumbrances, and obligations of the tobacco use prevention and control foundation in a fiscal year shall be for administrative expenses of the foundation in the same fiscal year.~~

~~(B)~~ Except as provided in division ~~(D)~~(C) of this section, no more than five per cent of the total disbursements, encumbrances, and obligations of the southern Ohio agricultural and community development foundation in a fiscal year shall be for administrative expenses of the foundation in the same fiscal year.

~~(C)~~(B) Except as provided in division ~~(D)~~(C) of this section, no more than five per cent of the total disbursements, encumbrances, and obligations of the biomedical research and technology transfer trust fund in a fiscal year shall be for expenses relating to the administration of the trust fund by the third frontier commission in the same fiscal year.

~~(D)~~(C) This section's five per cent limitation on administrative expenses does not apply to any fiscal year for which the controlling board approves a

spending plan that the foundation or commission submits to the board.

Sec. 183.33. No money shall be appropriated or transferred from the general revenue fund to the ~~tobacco use prevention and cessation trust fund, tobacco use prevention and control endowment fund,~~ law enforcement improvements trust fund, southern Ohio agricultural and community development trust fund, southern Ohio agricultural and community development foundation endowment fund, Ohio's public health priorities trust fund, biomedical research and technology transfer trust fund, education facilities trust fund, or education technology trust fund. ~~In addition, no money shall be otherwise appropriated or transferred from the general revenue fund for the use of the tobacco use prevention and control foundation.~~

Sec. 2151.87. (A) As used in this section:

(1) "Cigarette" and "tobacco product" have the same meanings as in section 2927.02 of the Revised Code.

(2) "Youth smoking education program" means a private or public agency program that is related to tobacco use, prevention, and cessation, that is carried out or funded by the ~~tobacco use prevention and control foundation~~ department of health pursuant to section ~~183.07~~ 3701.84 of the Revised Code, that utilizes educational methods focusing on the negative health effects of smoking and using tobacco products, and that is not more than twelve hours in duration.

(B) No child shall do any of the following unless accompanied by a parent, spouse who is eighteen years of age or older, or legal guardian of the child:

(1) Use, consume, or possess cigarettes, other tobacco products, or papers used to roll cigarettes;

(2) Purchase or attempt to purchase cigarettes, other tobacco products, or papers used to roll cigarettes;

(3) Order, pay for, or share the cost of cigarettes, other tobacco products, or papers used to roll cigarettes;

(4) Except as provided in division (E) of this section, accept or receive cigarettes, other tobacco products, or papers used to roll cigarettes.

(C) No child shall knowingly furnish false information concerning that child's name, age, or other identification for the purpose of obtaining cigarettes, other tobacco products, or papers used to roll cigarettes.

(D) A juvenile court shall not adjudicate a child a delinquent or unruly child for a violation of division (B)(1), (2), (3), or (4) or (C) of this section.

(E)(1) It is not a violation of division (B)(4) of this section for a child to accept or receive cigarettes, other tobacco products, or papers used to roll

cigarettes if the child is required to do so in the performance of the child's duties as an employee of that child's employer and the child's acceptance or receipt of cigarettes, other tobacco products, or papers used to roll cigarettes occurs exclusively within the scope of the child's employment.

(2) It is not a violation of division (B)(1), (2), (3), or (4) of this section if the child possesses, purchases or attempts to purchase, orders, pays for, shares the cost of, or accepts or receives cigarettes, other tobacco products, or papers used to roll cigarettes while participating in an inspection or compliance check conducted by a federal, state, local, or corporate entity at a location at which cigarettes, other tobacco products, or papers used to roll cigarettes are sold or distributed.

(3) It is not a violation of division (B)(1) or (4) of this section for a child to accept, receive, use, consume, or possess cigarettes, other tobacco products, or papers used to roll cigarettes while participating in a research protocol if all of the following apply:

(a) The parent, guardian, or legal custodian of the child has consented in writing to the child participating in the research protocol.

(b) An institutional human subjects protection review board, or an equivalent entity, has approved the research protocol.

(c) The child is participating in the research protocol at the facility or location specified in the research protocol.

(F) If a juvenile court finds that a child violated division (B)(1), (2), (3), or (4) or (C) of this section, the court may do either or both of the following:

(1) Require the child to attend a youth smoking education program or other smoking treatment program approved by the court, if one is available;

(2) Impose a fine of not more than one hundred dollars.

(G) If a child disobeys a juvenile court order issued pursuant to division (F) of this section, the court may do any or all of the following:

(1) Increase the fine imposed upon the child under division (F)(2) of this section;

(2) Require the child to perform not more than twenty hours of community service;

(3) Suspend for a period of thirty days the temporary instruction permit, probationary driver's license, or driver's license issued to the child.

(H) A child alleged or found to have violated division (B) or (C) of this section shall not be detained under any provision of this chapter or any other provision of the Revised Code.

Sec. 3701.84. The department of health may prepare a plan to reduce tobacco use by Ohioans, with emphasis on reducing the use of tobacco by youth, minority and regional populations, pregnant women, and others who

may be disproportionately affected by the use of tobacco. The plan may provide for periodic surveys to measure tobacco use and behavior toward tobacco use by Ohioans. If the department prepares a plan, copies of the plan shall be available to the public.

The plan may also describe youth tobacco consumption prevention programs to be eligible for consideration for grants from the department and may set forth the criteria by which applications for grants for such programs will be considered by the department. Programs eligible for consideration may include:

(A) Media campaigns directed to youth to prevent underage tobacco consumption;

(B) School-based education programs to prevent youth tobacco consumption;

(C) Community-based youth programs involving youth tobacco consumption prevention through general youth development;

(D) Retailer education and compliance efforts to prevent youth tobacco consumption;

(E) Mentoring programs designed to prevent or reduce tobacco use by students.

Pursuant to the plan, the department may carry out, or provide funding for private or public agencies to carry out, research and programs related to tobacco use prevention and cessation. If the department provides such funding, the department shall establish an objective process to determine which research and program proposals to fund. When appropriate, proposals for research shall be peer-reviewed. No program shall be carried out or funded by the department unless there is research that indicates that the program is likely to achieve the results desired. All research and programs funded by the department shall be goal-oriented and independently and objectively evaluated annually on whether it is meeting its goals. The department shall contract for such evaluations and shall adopt rules under Chapter 119. of the Revised Code regarding conflicts of interest in the research and programs it funds.

The department shall endeavor to coordinate its research and programs with the efforts of other agencies of this state to reduce tobacco use by Ohioans. Any state agency that conducts a survey that measures tobacco use or behavior toward tobacco use by Ohioans shall share the results of the survey with the department.

The department may adopt rules under Chapter 119. of the Revised Code as necessary to implement this section.

Sec. 3701.841. The tobacco use prevention fund is hereby created in the

state treasury. The fund shall consist of money deposited by the treasurer of state into the fund from the liquidation, pursuant to Sub. H.B. 544 of the 127th general assembly, of the former tobacco use prevention and control endowment fund and any gifts, grants, or donations received by the director of health for the purposes of the tobacco use prevention fund. All investment earnings of the fund shall be credited to the fund. The treasurer, in consultation with the director, may invest moneys in the fund in accordance with section 135.143 of the Revised Code. Moneys in the fund shall be used to pay outstanding expenses of the former tobacco use prevention and control foundation at the discretion of the director of health pursuant to Sub. H.B. 544 of the 127th general assembly and shall be used in accordance with section 3701.84 of the Revised Code.

SECTION 2. That existing sections 102.02, 183.021, 183.30, 183.33, and 2151.87 and sections 183.03, 183.04, 183.05, 183.06, 183.061, 183.07, 183.08, 183.09, and 183.10 of the Revised Code are hereby repealed.

SECTION 3. Upon the effective date of this section, the Tobacco Use Prevention and Control Foundation is abolished.

No validation, cure, right, privilege, remedy, obligation, or liability is lost or impaired by reason of the abolition of the Foundation and any such matter shall be administered by the Department of Health. No action or proceeding pending on the effective date of this act is affected by the abolition of the Foundation, and all such matters shall be prosecuted or defended in the name of the Department or the Director of Health. In all such actions and proceedings, the Department or the Director, upon application to the court, shall be substituted as a party.

SECTION 4. Notwithstanding any provision of law to the contrary, on the effective date of this section, the Treasurer of State shall liquidate the Tobacco Use Prevention and Control Foundation Endowment Fund created by section 183.08 of the Revised Code in a prudent manner. The Treasurer of State shall deposit into the state treasury to the credit of the Tobacco Use Prevention Fund (Fund 5BX0), which is created in section 3701.841 of the Revised Code, the lesser of $40 million or 14.8 per cent of the proceeds from liquidation. The Treasurer of State shall deposit the remaining proceeds from liquidation into the state treasury to the credit of the Jobs Fund (Fund 5Z30), which is hereby created.

SECTION 5. All items in this act are hereby appropriated as designated out of any moneys in the state treasury to the credit of the Tobacco Use Prevention Fund (Fund 5BX0). For all appropriations made in this act, those in the first column are for fiscal year 2008 and those in the second column are for fiscal year 2009. The appropriations made in this act are in addition to any other appropriations made for the FY 2008 - FY 2009 biennium.

DOH DEPARTMENT OF HEALTH

			Appropriations	
Tobacco Use Prevention Fund				
5BX0 440656	Tobacco Use Prevention	$ 40,000,000	$	0
TOTAL SSR State Special Revenue		$ 40,000,000	$	0
TOTAL ALL BUDGET FUND GROUPS		$ 40,000,000	$	0

TOBACCO USE PREVENTION

The foregoing appropriation item 440656, Tobacco Use Prevention, may be used at the Director of Health's discretion to pay outstanding expenses of the Tobacco Use Prevention and Control Foundation. Any remaining funds may be used by the Director of Health to carry out functions specified in section 3701.84 of the Revised Code.

An amount equal to the unexpended, unencumbered portion of the foregoing appropriation item 440656, Tobacco Use Prevention, at the end of fiscal year 2008 is hereby reappropriated to the Department of Health for the same purpose for fiscal year 2009.

Within the limits set forth in this act, the Director of Budget and Management shall establish accounts indicating the source and amount of funds for each appropriation made in this act, and shall determine the form and manner in which appropriation accounts shall be maintained. Expenditures from appropriations contained in this act shall be accounted for as though made in Am. Sub. H.B. 119 of the 127th General Assembly.

The appropriations made in this act are subject to all provisions of Am. Sub. H.B. 119 of the 127th General Assembly that are generally applicable to such appropriations.

SECTION 6. By December 31, 2008, the Director of Health shall submit to the Governor, Speaker of the House of Representatives, President of the Senate, and the chairs and ranking minority members of the standing committees of the Senate and House of Representatives with primary responsibility for health legislation, a plan regarding management of the remaining moneys in the Tobacco Use Prevention Fund (Fund 5BX0). The plan may include a strategy for maintaining a portion of the fund for

investment and expending the earned income thereby creating a long-term source of funding for tobacco use prevention and cessation.

SECTION 7. On the effective date of this section, or as soon thereafter as possible, the Director of Budget and Management shall transfer the cash balance in the Tobacco Use Prevention and Control Operating Expenses Fund (Fund 5M80), to the Tobacco Use Prevention Fund (Fund 5BX0). Upon completion of the transfer, the Tobacco Use Prevention and Control Operating Expenses Fund (Fund 5M80) is abolished. The Director shall cancel any existing encumbrances against appropriation item 940601, Operating Expenses, and reestablish them against appropriation item 440656, Tobacco Use Prevention. The amounts of the reestablished encumbrances are hereby appropriated.

SECTION 8. That Section 3 of Am. S.B. 192 of the 127th General Assembly is hereby repealed.

SECTION 9. That Section 4 of Sub. S.B. 209 of the 127th General Assembly is hereby repealed.

SECTION 10. That Section 205.10 of Sub. S.B. 321 of the 126th General Assembly is hereby repealed.

SECTION 11. This act is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, and safety. The reason for such necessity is to use state funds in a manner that allows the Department of Health to promote a reduction in tobacco use and to increase employment and job security. Therefore, this act shall go into immediate effect.

Sub. H. B. No. 544 127th G.A.

Joe A. Hustead

Speaker _____ *of the House of Representatives.*

Bill Harris

President _____ *of the Senate.*

Passed May 6, 20 08

Approved May 6, 20 08

Ted Strickland

Governor.