To: **Members of the Ohio House Higher Education and Career Readiness Committee**

From: **Joanne Florino, Adam Meyerson Distinguished Fellow in Philanthropic Excellence, Philanthropy Roundtable**

Re: **Philanthropy Roundtable Proponent Testimony for Senate Bill 135**

Date: **December 7, 2021**

Good afternoon Chairman Lanese, Vice Chairman Young, Ranking Member Ingram, and members of the committee:

My name is Joanne Florino. I live in Ithaca, New York and I work at the Philanthropy Roundtable. I am here today as a proponent of Senate Bill 135 and will be speaking to the bill's provisions regarding the enforcement of endowment agreements.

Founded in 1991, the Philanthropy Roundtable's mission is to foster excellence in philanthropy, protect philanthropic freedom, and help donors advance liberty, opportunity, and personal responsibility. Today, The Philanthropy Roundtable has around 600 active members consisting of wealth creators, private foundations, community foundations, and family foundations nationwide, including right here in Ohio.

Private giving to colleges and universities totaled $49.5 billion in 2020 and this sector attracts a significant portion of our nation's philanthropic support. Generous alumni and others have allowed 19 universities—both private and public—to build up endowments of over $5 billion each.

But higher education is also one of the most challenging sectors for benefactors. Even if you are careful, college and university administrators and development officers may ignore, creatively interpret, disregard, or directly violate your agreements. Adding to the threat of non-compliance is that fact that grants to colleges and universities are often directed to an institution's endowment to be expended in perpetuity.

One of the most publicized donor-university skirmishes is the dispute between Princeton University and the Robertson family. In 1961, Marie and Charles Robertson granted to Princeton A&P stock worth $35 million to endow a supporting organization (the Robertson Foundation) whose purpose was to educate graduate students specifically "for careers in government service." The endowment's value mushroomed to $930 million by 2007, by which time it was being used for general funding for most of the graduate programs in what was then the Woodrow Wilson School of Public and International Affairs. The Robertsons' children concluded that Princeton was not suit. fulfilling the terms of the endowment and filed suit. A forensic audit of the Robertson Foundation accounts revealed that Princeton had in fact misused more than $100 million in earmarked funds.

After spending nearly $90 million combined on legal fees without even going to trial, the Robertson heirs and the university reached a settlement in 2009 in which Princeton agreed to return $100 million, a portion of which was to cover legal costs. That constitutes the largest award on behalf of donor

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intent in history, but the balance of funds in the original supporting organization was left for Princeton to spend however it chose. Nonetheless, the lead plaintiff in the suit, William Robertson, issued a statement calling the settlement "a message to nonprofit organizations of all kinds throughout our country that donors expect them to abide by the terms of the designated gifts or suffer the consequences."

At the Philanthropy Roundtable I and others counsel donors frequently about grantmaking in higher education. We believe that the nation needs wise philanthropists who invest judiciously in this area. But we do advise that higher education donors consistently exercise great care to do three essential things:

- be careful to include all instructions about the use of their grant in writing to avoid miscommunication
- ensure that key administrators and faculty are on board with their intentions so that the shared obligations are obvious to all involved parties and are also clear for future faculty and administrators
- respect academic freedom.

The endowment agreement signed by both Michael Moritz and Ohio State University makes clear that the donor did all these things. Yet we are here today because—despite William Robertson's hopes—there are no consequences for OSU's failure to abide by its commitments other than perhaps some bad publicity, and no recourse for the students who might have benefited from the donor's generosity.

I can assure you that such instances are not rare. The Moritz case is not a "one-off" incident. And while this bill before you now focuses only on Ohio institutions of higher education, we have seen similar issues arise in hospitals, human service organizations, museums, and other charities across the country. In addition to the Robertson case in New Jersey mentioned earlier, here are a few other examples:

In 1922, Albert Barnes created a trust called the Barnes Foundation in Merion, Pennsylvania, to hold his personal art collection. His indenture clearly required that the art was to be displayed in a specific building he had constructed and was never to be moved or sold. No fees were ever to be charged for viewing the art. Yet in 2004—53 years after his death—a court approved the movement of his collection to a fashionable and costly museum in Philadelphia that would be open to the public for a fee. This was exactly what Barnes had dreaded and it remains one of the most egregious violations of a donor's instructions.

In Massachusetts in January 2009, the trustees of Brandeis University voted to close its Rose Art Museum and sell its art in response to the economic downturn. This occurred despite the institution's commitment to its original donors to maintain the museum in perpetuity. The decision caused a firestorm of protest and an announcement by the state's attorney general that he intended to review each piece of art for donor restrictions. Brandeis went ahead with the museum closure, leading several museum trustees to file a lawsuit seeking an injunction to prevent the sale of any artwork and the spending of any of the museum's endowment funds. In March 2010, the

university's trustees reversed their decision to close the museum, and in June 2011 the lawsuit was finally settled.

In 2010, a donor made an endowment agreement with St. John's University in Collegeville, Minnesota, to create a summer fellowship for students to complete a substantive research paper on corporate-business ethics. But while he received occasional thank-you notes from scholarship recipients, the college provided him no information on the research conducted. When he demanded to see the papers that had been produced, he was shocked to see that most of them had failed to address his specified topic. He went to court producing papers on such topics as "wonderment in the classroom." One lawsuit exhibit was a scholarship recipient's five-page paper explaining why he couldn't complete the assignment. The donor ultimately lost his case, but not on its merits. The March 2019 ruling of the U.S District Court of Minnesota stated that he had no standing to sue because the endowment was an "institutional fund" governed by the laws of the state and only the state's attorney general had standing in such matters.

In 2013 an Oklahoma jury awarded Garth Brooks—yes that Garth Brooks--$1 million in a lawsuit he filed against Integris Canadian Valley Regional Hospital in 2009. The award included not only the return of his original $500,000 donation, but also another $500,000 in punitive damages. Brooks testified that he had made his donation as part of a 2005 agreement with the hospital to name some portion of a planned women's center for his mother, but then the women's center was never built. Although his testimony was disputed by the hospital, the jury was apparently persuaded by the argument made by the attorney representing Brooks that one party had kept its promise and one party had not.

In 2016, Westminster College in Fulton, Missouri, petitioned a court for access to $12.6 million in restricted general endowment grants to fund its general operating budget, in violation of the donors' original wishes for those grants. During the hearing, it came to light that Westminster's president had already withdrawn restricted endowment funds without a court order and was in fact asking to access more money to repay the $6.3 million spent without authorization. Although the court grudgingly granted the college's petition, it mandated a full payback-with-interest schedule, a policy that required approval from the college's Board of Trustees to access endowment funds, and the submission of Westminster's annual independent audit statements to the state attorney general's office through the end of the 2019 fiscal year.

These cases I've mentioned involve amounts ranging from what may have been relatively small donations to between $20 billion and $30 billion—the latter being the value of Albert Barnes' art collection when it was moved to Philadelphia. They all demonstrate that honoring the terms and restrictions of these financial transfers is a matter of great importance, and that both state attorneys general and state courts can be integral to the resolution of conflicts in this area.

I work with a wide variety of charitable donors on these matters, and Senate Bill 135 would benefit and encourage philanthropy in three important ways:

- Legal Standing - If an endowment benefactor discovers that a beneficiary who signed an endowment agreement is failing to honor its terms, he or she can notify the attorney general, and—if the attorney general fails to resolve the issue within 6 months—can file a complaint. This guarantees the right of donors to enforce the commitments made to them by a charitable institution.
- Appointment of a Legal Representative – This provides an additional safeguard to prevent breaches of endowment agreements. I can say without hesitation that the donors I counsel would welcome the ability to name a legal representative who would be able to enforce

these agreements when the original donor is no longer able to do so. The argument that this option would inhibit donors' willingness to give to Ohio charities is simply wrong. It would have the exact opposite effect by providing them with the assurance that representatives of their own choosing will monitor and enforce the commitments that were made to them by the charitable institutions they funded.

- Remedies – The remedies provided in the bill are more restorative than punitive. None of them provide any personal benefit to the original donor or that donor's legal representative; the funds involved can be used only for charitable purposes. And all of them seek to honor the benefactor's intentions and the corresponding commitments made by the beneficiary institution.

With these provisions in place, donors will be far more inclined to give generously of their resources than they will be without the safeguards this bill offers.

I want to thank Senator Cirino for recognizing the importance of this issue and for taking the time to speak with me several months ago. And I want to thank all of you very much for your time and attention this morning. I am happy to take any questions you may have.