Before the Ohio House,
Higher Education and Career Readiness Committee
Outline of Statement of David Marburger
in support of Senate Bill 135—endowment provisions

(December 7, 2021)

I am David Marburger. I live in Lakewood, Ohio. I support the provisions of Senate Bill 135 that address endowments.

I am a practicing attorney and a retired partner of the law firm of Baker Hostetler.

Since 2017, I have represented the Moritz family. Mike Moritz was one of my partners at Baker Hostetler.

I appeared before a similar committee in the Senate, so I am not repeating that testimony today.

I am testifying today at no fee to my clients.

Primer: How Sub. S.B. 135 works

1. How the legislation applies to 3 basic ways that charitable institutions receive funds from benefactors.

Consider 3 basic ways that charitable institutions receive funds or other property from benefactors.

A. Transfer of property under benefactor's will—bequests.

A charitable institution may receive money or other property under a benefactor's will after the benefactor dies.

Those are "charitable bequests."

The institution typically made no commitment to the benefactor in exchange for the bequest.

This legislation would not give anyone a right to enforce the terms of a typical charitable bequest.

B. Condition imposed unilaterally by benefactor.

Consider a charitable institution holding a fundraiser, the centerpiece of which is a lecture by a well-known author.

The institution seeks a donation from those who seek admission.

You write a check to the institution for $1,000. You hand it to the people at the door who are accepting checks like yours.

You put a notation on the check that says: "To be used only for COVID research."

The person at the door accepts your check on behalf of the charitable institution, and gives you a receipt.

Or, you deliver valuable paintings to a university with a letter saying that you are transferring ownership of the paintings to the university, but only for their display in the university's clinic for abused children.

This legislation does not apply to scenarios like that.

If the institution used that $1,000 for something *other than* COVID research, this legislation gives you no recourse.

C. Endowment agreements.

A benefactor and an institution each sign a written document.

In that document, the benefactor commits to transfer to the institution $1 million within a specified number of days or months after signing.

In the same document, the institution commits to invest the $1 million as an endowment that will last forever, and to spend the investment earnings only for COVID research.

Those are reciprocal commitments: If you transfer the $1 million, I'll invest it and spend the earnings only for COVID research.

This legislation applies to those agreements.

If the institution violates its signed written commitment, the benefactor may proceed in court to enforce the institution's commitment—under circumstances specified in the legislation.

2. Who can sue under the law today?

A. Charitable institutions sue benefactors.

Charitable institutions can—and do—sue benefactors when benefactors violate their commitments to transfer property to the institutions.

B. Can benefactors sue institutions?

Institutions insist that, if they violate their commitments to benefactors, benefactors have no right to enforce the institutions' commitments.

In my view, it is *un*settled in Ohio whether benefactors can enforce their own endowment agreements.

But this legislation would settle the law.

3. Misleading the benefactors today: institutions make commitments to benefactors, not to the attorney general.

When a charitable institution makes commitments in an endowment agreement—it is making those commitments to you, the benefactor.

It is not making a commitment to the attorney general. The attorney general does not sign your agreement with the institution.

When the institution makes its signed commitment to you in exchange for your commitment to transfer your property to the institution, the institution implicitly represents to you that you have some recourse if the institution violates what it promised to do.

But charitable institutions make those commitments to you believing that you can do nothing if they violate their commitments.

This legislation rightfully corrects that misleading practice.

4. S.B. 135: Who is eligible to sue to enforce an institution's violated commitment.

A. Children, descendants of the benefactor? No.

This legislation does not empower any children or descendants of the benefactor to sue to enforce a violated endowment agreement.

The legislation does empower children or descendants to apply to the probate court to reopen a benefactor's estate—but not to sue.

Applying to reopen the estate does not afford a right to sue.

Under this legislation, only someone appointed by the court to serve as administrator of the estate is authorized to sue.

B. How many persons are eligible to sue? One.

This legislation does not allow more than one person to be eligible to sue at any given time.

Either the benefactor can sue, or the benefactor's "legal representative" can sue.
The benefactor's "legal representative" can be only 1 person:

• a single person designated in the endowment agreement to act in place of the benefactor;

• the administrator of the benefactor's estate;

• the benefactor's surviving spouse, but only if the benefactor's estate is closed;

• as between a surviving spouse & the person designated in the endowment agreement, only the person designated in the endowment agreement has the right to enforce;

• as between the administrator of the estate (whether reopened or not) & the person designated in the endowment agreement, only the person designated in the endowment agreement has the right to enforce;

• as between the administrator of the estate and the surviving spouse, only administrator of the estate has the right to enforce.

5. **Remedies listed in S.B. 135.**

   A. **The law today: institutions can seek court order redirecting endowed funds to another charitable purpose or for a different charitable use—R.C 1715.55.**

Suppose that a charitable institution committed to restrict its spending of endowed funds to provide scholarships to students studying the classics—Latin and Greek.

Under section 1715.55(C)of Ohio's version of the Uniform Prudent Management of Institutional Funds Act, the institution can apply for a court order to modify that restriction—or to modify the purpose of the endowment.

The charitable institution need not notify the benefactor, or join the benefactor in the application, or obtain the benefactor's consent.

The charitable institution must join the attorney general because the attorney general represents the interest of the general public. The general public is the beneficiary of every endowment agreement and every charitable gift.

Test to modify: Under R.C. 1715.55(C), the restriction or the purpose of the endowment must be:

• impracticable

• wasteful

• impossible to achieve

• unlawful

Modified purpose or use of endowed funds: Modified use or purpose of an endowment is to achieve a purpose or use that is very close to the purpose or use as expressed in the endowment agreement. R.C. 1715.55(C).

Cy pres (sigh-pray): French for "as near as possible."

• R.C. 1715.55 is a statutory version of a doctrine recognized at common law called cy pres.

• Cy pres allows a court to redirect the funds of the endowment to a different charitable purpose different than the one expressed in the endowment agreement—including diverting the endowment to a different charitable institution.

B. The law today: attorney general can seek court order to modify endowment's purpose & restrictions on use of endowed funds.

Cy pres: The attorney general has the authority to seek a court order under *cy pres*—to divert endowed funds to a charitable purpose different from the purpose expressed in the endowment agreement.

Or attorney general can seek a settlement with the institution to do the same thing.

Attorney general's right to invoke *cy pres* is at common law, not in Ohio's version of the Uniform Prudent Management of Institutional Funds Act.

C. The remedies listed in S.B. 135.

i. Same remedies that institution & atty gen'l already have.

Every remedy listed in Sub. S.B. 135 is already available today to the charitable institution and to the attorney general.

But, today, the institution and the attorney general can seek those remedies without including the benefactor.

ii. S.B. 135 does not dispense with requirements for each remedy.

In division (H), S.B. 135 lists 11 remedies that the court can order if a benefactor sues to enforce an endowment agreement.

Each remedy listed has specific requirements that have to be satisfied for the court to grant that remedy.

Those requirements are recognized at common law or by Ohio statutes, such as the Declaratory Judgment Act.

S.B. 135 only collects the remedies into one place. It does not dispense with the conditions that the court must find to order any particular remedy.

iii. Benefactor cannot seek a remedy unilaterally—must join attorney general & the institution.

Under S.B. 135, no benefactor can seek any of the listed remedies without joining the charitable institution and the attorney general in the benefactor's complaint filed with the court.

Questions raised about Sub. S.B. 135

1. Retroactive v. prospective.

Every state that has adopted the Uniform Prudent Management of Institutional Funds Act—including Ohio—has nearly verbatim-identical provisions that address whether & how the Act applies to existing endowments.

Ohio's version is an uncodified section of House Bill 522.

House Bill 522 enacted the Uniform Prudent Management of Institutional Funds Act in Ohio. House Bill 522 says that the Act applies only to:

• endowments established after June 1, 2009, *and*

• endowments existing on June 1, 2009, "but only with respect to decisions made or actions taken on or after that date."

Copy of Ohio's section and, as an example, a copy of Michigan's section accompany this outline.

2. Suits by benefactors in other states.

A. Iowa—benefactor can sue and win atty fees.

Iowa's version of the Uniform Prudent Management of Institutional Funds Act allows benefactors to sue to enforce endowment agreements AND, if the benefactor wins, the court may award *costs and attorneys' fees* to the benefactor if the institution was grossly negligent. I.C.A. § 540A.106.

Iowa's version took effect in July, 2008.

Suits under Iowa's law: Since July, 2008, only one suit under Iowa's Act has reached any appellate court in Iowa.

Cole College filed that suit to remove restrictions on its use of valuable paintings received from a family foundation.

The issue: whether the gift letter accompanying the donated paintings required Coe College to keep them permanently, or whether Coe College had a right to sell the paintings.

Iowa Supreme Court ruled that Coe College had to keep the paintings permanently.

- Matter of Coe College, 935 N.W.2d 581 (2019).

B. All states—suits by benefactors.

Nationwide, from 2005 to the present: total of 6 suits by benefactors reached an appellate court of any state.

3 suits allowed the benefactor to proceed.

- Tennessee: Tenn. Div., United Daughters of Confederacy v. Vanderbilt Univ. (Tenn. App. 2005)
- Michigan: Le Gassick v. Univ. of Mich. Regents (Mich. App. 2019)
- New Jersey: Adler v. Save (N.J. App. 2013)

---

3 suits ruled that the benefactor did not have standing to proceed.

- Utah: Siebach v. Brigham Young Univ. (Utah App. 2015)
- Pennsylvania: In re Found. for Anglican Christian Tradition (Pa. Cmmwlth 2014)
- Missouri: Hardt v. Vitae Found., Inc. (Mo. App. 2009)

3. Interest of the Attorney General in enforcement v. interest of benefactor.

A. Interest of the Attorney General.

The beneficiary of every charitable contribution is the public at large.

When a charitable institution violates a commitment in an endowment agreement, the violation may adversely affect the benefit that the public was supposed to receive through the endowment.

People comprising the public are ever-changing, indefinite, uncertain, numerous.

The legal interests of members of the public are indistinguishable, undifferentiated from one another.

If the attorney general sues to enforce an endowment agreement, the attorney general is representing the public's interest.

The attorney general can resolve the rights of thousands of members of the public in a single lawsuit.

So, no single member of the public can sue to enforce the public's interest under an endowment agreement.

Only the attorney general can represent members of the public who claim that an institution has violated the terms of an endowment agreement.

Example: If enforcing the terms of a charitable bequest in a will, the attorney general does not claim to be representing the interest of the benefactor's estate. The attorney general claims to be representing the interests of the public in receiving the benefits of the bequest.

A chief interest of the attorney general in overseeing charitable institutions is to ensure that charitable funds serve charitable purposes, and are not diverted to enrich private interests.

B. The attorney general's interest is <u>not</u> always identical to the benefactor's interest.

i. Benefactor's interest in enforcing can be a higher priority than the attorney general's interest.

Example: University commits in an endowment agreement to spend an endowment's earnings solely to fund scholarships for art majors, but it uses some of those earnings to fund scholarships for music majors.

While deviating from the endowment agreement, University is still using the endowed funds for an educational charitable purpose.

And the purpose is student scholarships—a charitable purpose very similar to the terms of the endowment agreement.

The interest in enforcing the terms of the endowment agreement may be a higher priority for the benefactor than for the attorney general—which has fraudulent charitable solicitations to combat across the state.

ii. Names specified by an endowment agreement.

Example: University commits in an endowment agreement to name endowed scholarships after the benefactor's father, who was a student there.

30 years later, University changes the name of the scholarships to be the Neil Armstrong scholarships.

The interest in enforcing that naming commitment is likely to be a much higher priority for the benefactor than for the attorney general.

In fact, the name change has no adverse effect on the public interest, so the attorney general is highly unlikely to consume official time and attorney resources to addressing University's violation of endowment agreement.

-0-