Before the Ohio Senate, Workforce & Higher Education Committee

Statement of David Marburger in support of Senate Bill 135
May 19, 2021

Good afternoon Chairman Johnson, Vice Chair Cirino, Ranking Member Williams, and members of the committee.

I am David Marburger. I live in Lakewood, Ohio. I support Senate Bill 135.

I am a retired partner of the law firm of Baker Hostetler. Michael Moritz was one of my partners.

Since 2017, I have represented the Moritz family in the family's quest to seek compliance with the commitments to the Michael Moritz scholarship program established in Ohio State University's endowment agreement with Michael.

In the past four years, I have read the essential terms of hundreds of endowments and learned how universities spend endowed funds.

I am testifying today at no fee to my clients—as Senate Bill 135 is not a "Moritz family" bill, but a bill to cure two systemic problems in Ohio law.

By necessity, most of my knowledge comes from studying what Ohio State has done. But I also know that other public universities in Ohio largely parallel OSU.

Ohio’s public universities speak as though they have one big endowment—valued at so many millions or billions of dollars.

But they have no single endowment. University endowments are an aggregate of thousands of smaller endowments.

Endowments work this way:

A wealthy benefactor signs a written agreement promising to provide a large sum of money to a university within a specified deadline.

In exchange, the university commits to invest that sum permanently. And the university commits to restrict its spending of the investment earnings to purposes specified in the agreement.

It’s especially common to restrict endowment spending to provide scholarships to students.

After the benefactor provides the promised sum, it’s up to the university to live up to its end of the bargain.

About 80% of a university’s privately-funded endowments work that way.

The universities have Advancement Offices. Their purpose is to solicit new endowments. They cultivate wealthy people, build personal relationships, and then ask for contributions to establish new endowments—which also restrict spending.

It turns out that public universities in Ohio spend from privately-funded endowments every year to pay salaries and bonuses to the public employees in their Advancement offices.

These are not small sums.

In 2018, five of the top 20 highest-paid administrators at one large Ohio university were Advancement officers.

One of them received a $300,000 bonus that year, bringing his total compensation to over one-million-dollars ($1 million).

Only the university's president and the dean of the medical school made more than he did.

He made more than the university's chief financial officer, chief investment officer, and the provost.

His compensation almost tripled the compensation of the dean of the law school.

The universities also spend privately-endowed funds to pay to entertain the wealthy to coax new endowments from them.

These are not small sums either. A single entertainment event costs as much as $1½ million. And many of those events occur outside of Ohio.

One large university spends as much as $19 million a year from privately-funded endowments to underwrite its Advancement Office.

Spending money to attract new endowments is plainly worthwhile. New endowments benefit students and benefit the universities.

The problem is that universities have too much leeway to drain existing endowments to pay the costs of attracting new ones.

Spending money from existing endowments to solicit new ones inevitably diminishes the existing endowments.

The universities shortchange the scholarships to ensure a steady flow of endowed funds to the Advancement office.

The existing endowments lose that money and never get it back.

And they lose the investment earnings from the money taken by the Advancement office.

The existing endowments gradually lose their full capacity to provide what they were established to provide—such as promised student scholarships.

Ohio's universities publicly tout how much they have grown their endowments. But they never acknowledge that they shrink existing endowments to pay the costs of bringing in new ones.

Ohio law has two pivotal flaws that enable this spending and shield universities from accountability for it.

One of those flaws is a statutory provision unique to Ohio.

Ohio is the only state in the country that gives universities and other charitable organizations complete legal immunity when they spend a percentage of the market value of a privately-funded endowment in any given year.

Ohio's law is a version of the Uniform Prudent Management of Institutional Funds Act—produced by the Uniform Law Commission, a nonprofit organization whose members are appointed by the states.

49 states have adopted some version of the Act.

But only one—Ohio—makes any amount of endowment spending legally incontestable.

In Ohio, spending as much as five percent (5%) of an endowment's market value in any year is incontestable by law—immune from challenge.

Senate Bill 135 would repeal that unique immunity. It would conform Ohio to Uniform Law Commission's version of the Act, equating it with the law of 48 other states plus the District of Columbia.

Under Senate Bill 135, there would be no amount of spending of endowed funds that is immune from challenge.

The second pivotal flaw in Ohio law is that nobody enforces any restriction on university spending of endowed funds.

The attorney general has authority to enforce spending restrictions in endowment agreements—and spending restrictions in the Uniform Prudent Management of Institutional Funds Act.

Yet I have found no case that reached any Ohio appellate court—during the 19^{th} century, the 20^{th} century, or the 21^{st} century—where the attorney general enforced any spending restriction against a public university.

Theoretically, the universities might never breach their endowment agreements. But we know from the Moritz endowment that breaches occur—sometimes egregious breaches.

The universities and the attorney general insist that a benefactor who enters into an endowment agreement cannot enforce his or her own agreement.

Whether that is true is open to question. But Senate Bill 135 would resolve the issue.

Senate Bill 135 would supplement the attorney general's authority.

Under the Bill, if a benefactor who signed an endowment agreement discovers a breach, the benefactor can demand that the attorney general cure the breach.

If the attorney general does nothing—or does not fix the problem within six months—Senate Bill 135 would allow the benefactor to sue the university to enforce the agreement.

The benefactor would have <u>no</u> right to sue for damages—just to stop the breach and to restore misspent funds to the endowment.

Senate Bill 135 would—for the first time—make universities accountable for breaching their endowment agreements and for overspending endowed funds.

David Marburger