STATEMENT OF THE OHIO STATE BAR ASSOCIATION
IN OPPOSITION TO UPMIFA PROVISIONS IN SENATE BILL 83
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Before the Senate Workforce and Higher Education Committee
Senator Jerry Cirino, Chair

Chairman Cirino, Vice Chair Rulli, Ranking Member Ingram, and members of the Senate Workforce and Higher Education Committee: Thank you for the opportunity to submit opposition testimony on behalf of the Ohio State Bar Association (OSBA) to the amendments to the Uniform Prudent Management of Institutional Funds Act (UPMIFA) contained in Senate Bill 83.

I am the legislative counsel for the OSBA. We have been engaged on this issue since it first appeared in Senate Bill 135 from the 134th General Assembly. Since that time, we have had several discussions with the proponents of the bill and have offered language that we would support the legislature adopting instead of what is proposed in Senate Bill 83. Our proposal makes clear that a benefactor could expressly reserve a right to enforcement in the endowment agreement. Such conversations should occur between the benefactor and the charitable organization on the front end, not 30 years later by some unnamed party who could have a different intent than the original benefactor.

That language that we approved would be as follows:

"1715.551 Standing to Enforce a Gift Instrument
If a gift instrument expressly so provides, a donor, and any other person or class of persons the donor empowers in the gift instrument, may maintain a proceeding to enforce the express terms of the gift instrument. This section shall not limit the independent authority of the attorney general to enforce the provisions of sections 1715.51 to 1715.59 of the Revised Code."

The OSBA remains vehemently opposed to the amendments to UPMIFA contained in Senate Bill 83for several reasons. While we disagree with the policy decision to subvert donor intent and to change the terms of existing gift endowment contracts retroactively, we also have practical concerns over the proposed amendments.

At the outset, we believe that conversations about the enforcement of charitable endowment gifts in Ohio should occur before the gift agreement is asigned. At that point, the donor and the charity can freely negotiate, and both parties can evaluate what terms they are willing to accept. We further believe that the default mechanism for a remedy for a breach of gift term should remain that the Attorney General is the right party to investigate and bring actions to enforce the terms of the agreement. We are willing to discuss whether this default should remain and whether it may be beneficial to expressly require that benefactors are notified before they sign a fgift agreement that they have the right to stipulate an enforcement mechanisim other than the Attorney General. What we are not willing to discuss is the attempt for this bill to apply to all existing endowment agreements, in a way that overrides decades of well-setttled law upon which many donors and charities have relied.. This bill could have devastating effects on the existing agreements between

Ohio charities and their donors. We have counseled our clients on thousands of charitable gift agreements based on the current state of the law. If Senate Bill 83 were to pass it would insert this new private right of action into every charitable gift instrument, irrespective of whether the benefactor would want that in their agreement. While such a change could be unconstitutional, it also is bad public policy.

The OSBA urges that a change of this magnitude should be carefully vetted before being adopted, as it will have a tremendous impact on all Ohio charitable organizations and the ways in which donor intent can be protected. Among our initial concerns and questions are the following:

1. Senate Bill 83 could undermine the protection of donor intent by allowing unknown future generations of a family, or even unrelated strangers, to affect and possibly frustrate the realization of the donor's intent.

2. This measure would override the rights of donors to establish the terms of their own charitable gifts. Under current law, donors may negotiate for enforcement rights, if they so choose and if the charitable organization consents. Senate Bill 83 would impose additional provisions on a gift, regardless of whether a donor actually wants them and regardless of who a donor would choose to enforce them.

3. This measure may put charitable organizations in Ohio at a distinct disadvantage relative to organizations in other states that do not have these provisions. This could lead to actions that seek to (i) divert funds from Ohio charitable organizations that the original donor wished to support, and instead (ii) transfer those Ohio charitable funds to out-of-state chartiable orgnizations that the original donor’s descendants wish to support.

4. This measure could lead to more entrenched special interests and harmful litigation, which could affect the goals of donors and the achievement of their charitable intent.

5. This measure could negatively impact the willingness of civic-minded citizens to serve on charitable boards, because it could subject them to financial risk and jeopardize their personal reputations in the community if a disgruntled heir of a donor decides to sue a charity, in a public litigation proceeding, over the terms of a long-ago signed gift agreement.

6. This measure could negatively impact the financial stability of many Ohio charities, if they have to find funding for legal counsel to defend themselves (and their board members and executive officers) against possible future claims on their endowment contracts, This would place an undue burden on Ohio charities.

7. This measure could affect the ability of the Ohio Attorney General to appropriately handle complaints. It would seemingly eliminate the confidentiality of Attorney General investigations, which may make it harder to achieve resolutions timely.

8. Courts will have little guidance in how the expenses for litigating these issues would be satisfied. Would the expenses of the charitable organization be payable from the fund at issue? Would the expenses of the family members be payable from the fund? Would this measure promote costly

suits that would provide more benefit to the lawyers than to the achievement of the donor's charitable intent? Would the handling of expenses impact the entitlement of a donor to a charitable tax deduction?

8. The creation of new private causes of action would lead to (i) significant confusion, (ii) inconsistent positions and results, and (iii) substantial new economic burdens on Ohio charities. It replaces a definite process with an indefinite one, and will burden both courts and Ohio charities.

To enact this legislative proposal without addressing these concerns could lead to significant disruption and could harm both donors and the Ohio charities they support. We urge that this proposal undergo substantial additional vetting and not be passed in a rush during this busy legislative season.

The remaining portion of this testimony will address specific technical concerns and problems presented with the proposed UPMIFA Amendments in Senate Bill 83, and then will suggest some possible alternative solutions.

1. **Effective Date Concerns**. Existing gift agreements were entered into under current Ohio law, which does not provide donors with standing to enforce gift restrictions unless the donor (a) expressly reserved standing in the gift instrument, or (b) the donor placed the funds in trust. It would be fundamentally unfair (and possibly in violation of the Ohio Constitution) to create "new" enforcement rights under gift instruments entered into prior to any such change in the law. **Any change in donor enforcement rights should apply (a) only to funds contributed on or after the effective date. and (b) donors should have the ability to "opt out" or "waive" any or all private enforcement rights created by the new legislation.**

2. **Scope/Identity of Benefactor's Representative (Section 1715.51(A)(1)).** "Benefactor's representative" **should not include a donor's estate**—it should be limited to persons identified by the donor in the gift instrument. Under current probate law, under some circumstances any "suitable person" can open an estate and serve as administrator. (ORC §2113.06). A person (even someone who had been estranged from, or at odds with, or totally unrelated to, the donor) could easily re-open the estate of a donor and use the private right of action to attack the donor's charitable cause. Furthermore, the **statute should clarify a standard of conduct for the benefactor representative's conduct**. Is the benefactor representative a fiduciary? To whom is the benefactor representative accountable?

3. **Unnecessary "Endowment Agreement" Definition (Proposed Section 1715.51(E))**. The proposed new definition of "endowment agreement" is an unnecessary complication. The well-established and understood definition of a "gift instrument" should be the basis for any determination of the charity's obligations (and the source for divining the donor's intentions). **The existing statutory term "gift instrument" should be retained**, without adding a new definition for an "endowment agreement".

4. **Should Not Apply to Endowment Funds with Multiple Donors**. Proposed Section 1715.551(A) would provide a private right of action to "the person who transferred property to an institution under the agreement". Any person, even someone contributing just $1 (and that person's estate), would have a private right of action for decades. This creates a class of persons with a private right of action which is too broad and could lead to persons being motivated to contribute a nominal amount to an endowment fund solely for the purpose of establishing standing for themselves. **1715.551(A) should be limited to "the person who transferred property to an institution and who signed a gift instrument".**

5. **Time Frame for Attorney General Review is Inadequate (Section 1715.551(B)(1)**. 180 days is not nearly enough time to allow the Ohio Attorney General's (OAG's) office to complete an investigation of a donor-initiated written notice alleging that a charity is violating a donor-imposed restriction. Subject to input from the OAG's office, the **period for OAG review should be at least one year**.

6. **Complaint Filing Procedure Does Not Take Into Account OAG Position/Response (Proposed Section 1715.551(B)(1))**. At the very least, if a private litigant is going to file a complaint to enforce donor-imposed restrictions on a charity, that **litigant should bear the** risk and cost (i.e., be responsible for the **defendant-charity's attorney fees) if the charity committed no material breach of the donor-imposed restrictions**. Perhaps in every case a private litigant should be required to **post a supersedeas bond** in the amount of anticipated, reasonable attorney fees that would be incurred by the defendant charity. If the OAG at any point in the proceedings asserts the position that no material breach has been committed by the charity, then, as a condition to continuing to pursue any private litigation, the private plaintiff should be required to post a supersedeas bond both to cover the reasonable attorney fees already incurred by the charity in defending the action and to cover the amount of anticipated, reasonable attorney fees that would be incurred by the defendant charity going forward in defending the action.

7. **No Opt Out Provisions (Proposed Section 1715.551(B)(2)(a))**. Other portions of UPMIFA are written as default language that donors can modify with the consent of the charity. This proposal does not contain any language such as **"subject to the intent of a donor expressed in a gift instrument. . .** ", thus appearing to make it impossible for donors to opt out. If the donor wishes not to burden the donee-charity with the threat of future private litigation, that "opt-out" intention should be honored. Thus, for example, even if private actions are to be permitted in the future, the statutory right to file a complaint should be limited or eliminated if the donor expresses such an intention: "(a) It may be filed regardless of whether the gift instrument expressly reserves a right to sue or enforce**, unless the gift instrument expressly provides that the donor does not reserve a right to sue or enforce**."

8. **Inadequate Limitations on Remedies (Proposed Section 1715.551(B)(2)(b) & (c))**. Under (B)(2)(b), in addition to prohibiting the plaintiff from seeking damages, etc., the provisions also should expressly prohibit the award of such damages or monetary relief. For example: "(b) It shall not seek a judgment awarding…money or other property; **and under no circumstances shall the plaintiff be entitled to an award of damages,**

court costs, attorney's fees, or any other award of money or other property." Similarly, to make it clear that any relief to plaintiff must exclude any economic damages or property payable to the plaintiff, **(B)(2)(c) should start with the phrase: "(c) Subject to the limitations of (B)(2)(b), it shall seek only one or both of the following:"**

9. **Additional Procedural Burdens on Ohio Attorney General (OAG) (Proposed Section 1715.551(E)(3)**. The statute would require the OAG to "name as parties" and "notify" the person(s) who contributed property or the benefactor representative if such person(s) can be "located and identified after diligent inquiry." In cases where the OAG is simply exercising its general enforcement powers (i.e., in cases where the OAG complaint was not initiated after the filing of a notice of alleged breach per Section 1715.551(A)), this "diligent inquiry" requirement could be quite burdensome, especially if the funds in question were donated by many different donors.

10. **A "Discovery Rule", as applied to an Estate, Creates an Illusory Period of Limitations**. Many donors do not have estates which are administered through probate. Where a donor's estate has never been opened, or is already closed, there is no executor or administrator then serving, and therefore it is impossible to "discover" a breach in order to start the running of the six-year time limitation within which to raise a complaint. The effect of this would be to leave the charity subject to a complaint for all of its actions for 50 years, which places an undue burden on the charity.

11. **Statute of Repose Would be Unduly Burdensome to Charities (Proposed Section 1715.551(H)).** As drafted, there would be an overall 50-year limitation on private actions, but (within that 50 years) a plaintiff could file a complaint "within six years after discovery of the accrual of the cause of action" (emphasis added). Such a "discovery" rule is not warranted in these situations—the donor is aware when the donor establishes an endowment fund and, if the donor is acutely interested in monitoring the charity's administration of the endowment fund, **no "discovery" rule should be required, and the period of limitations should be measured from the date of the act constituting the breach**. Further, even if the "discovery" rule is eliminated, **six years after accrual of the cause of action is too long**. A four-year period of limitation applies to actions to address breaches of trust (ORC §5810.05) and breaches of contract (ORC §2305.07(A)).

12. **Inadequate opportunity for the OAG to Come to Reasonable Conclusion Once Notice is Given.** Proposed §1715.551(B) does not contemplate the possibility that the OAG may conclude that there is no violation. Nor does §1715.551(B) contemplate that a remedy other than "full compliance with the restriction, and restitution" is appropriate under the circumstances. §1715.551(B) implies that a private right of action could be brought even if the OAG and the charity negotiate a settlement agreement which does not constitute "full compliance with the restriction." Greater consideration must be given to these points: (a) define what constitutes a "violation" and whether it should require a "material violation" vs. a technical or minor violation; (b)clarify what would be appropriate remedies to correct a violation; (c) clarify what happens if a settlement is reached between the charity and the OAG, and the benefactor representative disagrees with the terms of the settlement; (d) clarify whether an extension of time could be granted to conclude an investigation or a

settlement if it appears that investigation has been undertaken and that progress is being made toward a resolution, before a private party lawsuit is filed; and (e) if "restitution: is to be paid, the statute should clarify where the funds to pay the restitution can, or cannot, be paid from.

13. **Inconsistent with the OAG's Duty of Confidentiality.** Under current law, R.C. 109.28 provides that "the register established by section 109.26 shall be open to the inspection of any person at such reasonable times and for such legitimate purposes as the attorney general may determine; provided, however, that any investigation of a charitable trust shall not be open to public inspection." **Current law does not provide any mechanism for a donor or benefactor representative to be notified of whether an investigation is commenced or what the result of it might be.** This new UPMIFA provision would create an inconsistency in the law: does the AG maintain confidentiality of an investigation, per 109.28, or divulge the results of the investigation at a part of the process under 1715.551(B) and violate the duty of donfidentiality?

List of General Concerns and Alternative Approaches.

1. **More Study Is Needed.** Before enacting dramatic changes to Ohio law, the OSBA strongly recommends that the issues (and potential implications) surrounding the enactment of "private enforcement" legislation and the scope of such legislation should be studied more carefully. There already is a standing UPMIFA Committee of the Estate Planning, Trust and Probate Law Section Council of the OSBA that is reviewing these matters. However, a thorough review of what other states have done/allowed in this area has not yet been completed, and before making any fundamental change in Ohio law, the desire of donors to see their restrictions faithfully observed by donee charities must be weighed against the increased administrative and insurance costs that would be borne by charities if such private litigation is allowed. While it is possible that some level of private enforcement might be a good idea in principle, the substantive and procedural limitations required to make such a system viable while balancing the interests of donors and charities alike should be considered thoughtfully and carefully.

2. **Codifying Current Ohio Law Would Be Helpful.** Ohio common law currently provides that **a donor may reserve standing (i.e., the right to sue) for the donor and any designated "benefactor's representative**" (to use the parlance of the Moritz proposal) **by making express provisions in the gift instrument to that effect**. The OSBA has suggested statutory language designed to codify that result. By doing so, we would be making clear that, if the donor reserves a private right to sue and the donee charity accepts a restricted gift with that express condition, then it is fair for the donor to be able to pursue enforcement of the donor's restrictions as set forth in the gift instrument. Such a codification fairly would apply to all gift instruments, whenever signed (i.e., both before and after enactment).

3. **In Other Situations Private Enforcement Should Be A Last Resort (If Permitted At All), And Firmer Procedural Limitations Would Be Appropriate.**

A. **Mandamus Actions As An Alternative?** Before the legislature grants standing to private donors, consider the alternative of enacting legislation to **permit private donors to pursue mandamus actions to require the OAG to investigate potential breaches of donor restrictions** and, if breaches are found to have occurred, to require the OAG to either (a) file its own complaint to compel the charity to remedy prior breaches and to reasonably comply with such restrictions going forward; or (b) grant the aggrieved donor/plaintiff a private right to sue (still naming the OAG as a party). So that the OAG would not be flooded with such actions, a private plaintiff should be required (as in any case involving injunctive relief) to demonstrate to a court that the OAG (or the plaintiff, if granted a private right to sue by the OAG) is likely to prevail on the merits and, to the extent any immediate injunctive relief is sought, the plaintiff would have the burden of demonstrating the likelihood of irreparable harm if prompt action is not taken.

   Of course, the OAG's office should weigh in on any such "mandamus" approach, but such an approach would have the distinct advantage of actively involving the OAG in the process, rather than "passively" notifying the OAG and then, after a fixed period of time has elapsed, letting private plaintiffs file complaints without further procedural limitations.

B. **In the Absence of Express Reservation of Standing, Private Actions Should Be Permitted (If at All) Only As to Gifts Made After Enactment.** See concern #1 above.

C. **Consider "Loser Pays" for Private Plaintiffs Only.** In addition to precluding private plaintiffs from obtaining attorney's fee awards, a "losing" private plaintiff should be responsible for the charity's reasonable attorney fees. See Concern #6 above. Charities must not be crippled by the costs of defending private litigation and by the possibility that the threat of such litigation might deter people from serving on charitable boards, so frivolous litigation must be strongly discouraged.

Thank you for the opportunity to submit our testimony on this important issue.