

**IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT  
FRANKLIN COUNTY**

<b>AVAYA INC.</b>	)	<b>CASE NO. 21-AP-000194</b>
	)	
<b>Appellant,</b>	)	<b>REGULAR CALENDAR</b>
	)	
<b>vs.</b>	)	
	)	
<b>OHIO DEPARTMENT OF COMMERCE, DIVISION OF UNCLAIMED FUNDS,</b>	)	<b>APPEAL FROM THE FRANKLIN COUNTY COMMON PLEAS COURT CASE NO. 20 CV 007959</b>
	)	
<b>Appellee.</b>	)	

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**BRIEF OF AMICUS CURIAE THE UNCLAIMED PROPERTY  
PROFESSIONALS ORGANIZATION IN SUPPORT OF  
APPELLANT AVAYA INC.**

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## **STATEMENT OF INTEREST OF AMICUS CURIAE**

The Unclaimed Property Professionals Organization (“UPPO”), which was established in 1992, is the premier national organization concentrating on all aspects of unclaimed property compliance and education and advocating for the interests of both the holders and owners of unclaimed property. UPPO is a nonprofit organization currently composed of over 400 companies encompassing over 1,400 unclaimed property professionals as members who represent nearly all segments of the United States economy. In furtherance of its mission, UPPO identifies ambiguities in multistate unclaimed property laws and practices, as well as issues that interfere with the legal rights of owners and holders of unclaimed property, and works with state regulators, legislators and other interested parties to resolve those issues. To its knowledge, UPPO is the only private trade association singularly dedicated to these goals.

As a result, UPPO is in a unique position to provide the perspective of the owner and holder communities with respect to the important issues presented by this dispute between Avaya Inc. (“Avaya”) and the Ohio Department of Commerce, Division of Unclaimed Funds (“DUF”).



UPPO submits this brief to call the court's attention to the challenges faced by owners who attempt to claim property from unclaimed property offices, particularly when the property has been reported to the state in accordance with the second priority rule established by the Supreme Court of the United States in the seminal case of *Texas v. New Jersey*, 379 U.S. 674, 85 S.Ct. 626, 13 L.Ed.2d 596 (1965). These challenges can lead to the forfeiture of the property of rightful owners in contravention of the legislative purpose of unclaimed property statutes, while undermining confidence in the escheat process as a whole.

In particular, UPPO urges the court to affirm the need for transparent, fair and objective claims procedures that allow the DUF the flexibility to fulfill its statutory mandate of returning funds to rightful owners of unclaimed property, without increasing the likelihood of payment to incorrect parties, whether due to mistake or fraud. Without such guidance, it is likely that rightful owners will be deprived of their property, thus frustrating the legislative intent behind the Ohio Unclaimed Funds Act. R.C. 169.01 *et seq.* ("UFA"). Further, if the DUF is not transparent in its process for returning funds to rightful owners, it will

undermine the credibility of the justification for the UFA, which could lead to increased challenges from holders and owners alike. Such challenges risk the Ohio DUF's collection of unclaimed property in the future.

## **LAW AND ARGUMENT**

### **I. The statute's purpose to reunite owners with their property supersedes the state's right to accept and retain such property.**

Unclaimed property statutes serve multiple valuable purposes in society. First, these statutes reunite owners with their unclaimed property. They require the holder of the third party's property to send notification to the owner, alerting the owner that the property will be escheated if not claimed. R.C. 169.03(E). In this manner, the statutes further a primary goal without the involvement of the state or expenditure of any of the state's resources.

Second, they allow the states to benefit from unclaimed property until the owner does come forward to claim the property. If the owner does not respond to the holder's due diligence mailing, the property is transferred to the appropriate state pursuant to the jurisdictional rules

established by the Supreme Court in *Texas*. Pursuant to this precedent, the priority rules for taking custody of property are:

1. The state of the last known address of the apparent owner, as shown on the records of the holder, has priority over all others to escheat.
2. The state of domicile of the holder has secondary priority to escheat if:
  - a. the records of the holder do not reflect the identity of the person entitled to the property; or
  - b. the records of the holder do not reflect the last known address of the apparent owner.

The Supreme Court has twice affirmed this priority scheme, most recently in *Delaware v. New York*, 507 U.S. 490, 113 S.Ct. 1550, 123 L.Ed.2d 211 (1993).

Ohio therefore benefits from the application of the “second priority rule” when a holder is domiciled in Ohio, and reports property without an address for the owner. The Supreme Court noted that this outcome was “not controlled by statutory or constitutional provisions or past decisions,

nor is it entirely one of logic. It is fundamentally a question of ease of administration and of equity.” *Texas* at 683. Clearly, a simple, efficient process for transferring property to the state is desirable, as it allows for the second purpose of unclaimed property statutes to be fulfilled, namely, allowing the state to receive the benefit of the property *until the rightful owner appears to claim it*.

In remarks to the Massachusetts legislature when urging the passage of the Massachusetts Disposition of Unclaimed Property Act, Governor Paul Dever said, “We need to adopt a law which will cover the disposition of all kinds of abandoned and unclaimed property; will protect true owners’ rights when and if they appear to substantiate their claims; and provide a smooth and simple procedure for transferring such property into the state treasury.” *Treasurer and Receiver General v. John Hancock Mutual Life Ins. Co.*, 388 Mass. 410, 423, 446 N.E.2d 1376 (1983) (citing 1950 Sen. Doc. No. 1, at 22). The second priority rule accomplishes the objective of a smooth transfer of property, but it is still secondary to the protection of owners’ rights.

The role of unclaimed property statutes in protecting the rights of owners as described by Governor Dever in 1950 continues today across the nation and internationally. The National Association of Unclaimed Property Administrators' ("NAUPA") membership consists of the administrators from all 50 states, the District of Columbia, the Commonwealth of Puerto Rico, Alberta, British Columbia, New Brunswick, Québec, and Kenya. National Association of Unclaimed Property Administrators, *Who We Are*, <https://unclaimed.org/who-we-are/> (accessed June 1, 2021). According to NAUPA, "[t]he purpose of unclaimed property laws is to protect the public by ensuring money and property owed to them is returned to them, rather than remaining permanently with financial institutions, business associations, *governments*, and other entities." National Association of Unclaimed Property Administrators, *Policies and Legislation*, <https://unclaimed.org/policies/> (accessed May 27, 2021) (emphasis added).

Ohio's courts have emphasized the UFA's purpose of protecting property owners over any benefit to the state. For example, the Ohio

Court of Common Pleas has noted that “[t]he purpose of the Ohio Unclaimed Funds Act is threefold: (1) to protect the property right of the owner and reunite the owner with his or her funds; (2) to provide a centralized contact for potential unclaimed-funds owners, and (3) to relieve holders of unclaimed funds from further legal liability.” *Sogg v. White*, 139 Ohio Misc.2d 58, 2006-Ohio-4223, 860 N.E.2d 163, ¶7 (C.P.). The holding further recognized that the “division holds unclaimed funds in trust for the owner in perpetuity. Funds . . . never escheat or otherwise become property of the state of Ohio.” *Id.* at ¶10. Ohio’s recognition that the owners’ rights should be paramount is admirable. Therefore, the state’s ability to evaluate claims properly is tremendously important so that it can fulfill its mandate of returning property to rightful owners.

Absent a transparent, fair and objective claim review process, there is a significant chance that owners will not be reunited with their property, particularly when the funds have been escheated without an address for the owner pursuant to the second priority rule, as was the case with the check issued to Avaya. This case in particular highlights the need for state administrators to thoughtfully consider the rights of potential owners

when accepting second priority private property. Where, as here, the state applies standards that are impossible to meet in order for an owner to recover their property, the result is a *de facto* forfeiture, notwithstanding Ohio's recognition that the property does not belong to the state. Such is the predicament of Avaya. The state recognizes that Avaya is the owner of the property but has nevertheless denied its claim. ("The document thus provided in addition to that in which you sent me fairly establishes that the claimant is the reported owner yet does not clearly establish ownership of the property"). Email to Avaya's representative from A. Hardy p. 598.

In the current case, the holder who reported the funds, National City Corporation ("National City"), was a regional bank holding company headquartered in Cleveland and domiciled in Ohio. PNC Bank, N.A., News Releases, "*PNC to Acquire National City*" (Oct. 24, 2008), <https://pnc.mediaroom.com/index.php?s=3473&item=74230> (accessed June 1, 2021). The funds were described as an accounts payable check, naming Avaya Inc. as the payee. The only other pieces of information reported to the DUF were the check's date of issuance and the amount of

the check. The report did not include an address for Avaya. The report did not provide further information about the reporting entity's relationship with Avaya, nor does the DUF report request or require such information. Holder Batch Report p. 463.

The DUF has authority to request additional information from the holder, or reject a holder's unclaimed property report as incomplete. *See* Ohio Adm.Code 1301:10-3-03(D) ("If any person fails to file any reports, *files a report in gross error* or refuses to deliver funds to the director as required . . . the director may bring an action in a court of appropriate jurisdiction to require the filing of the report and to recover the funds with interest and penalties due.) (emphasis added). *See also* R.C. 169.03(A)(1). The DUF's hearing witness acknowledged that the DUF does in fact reach out to holders that the DUF believes has filed insufficient reports. Hearing Transcript p. 133 ("Q: Does the Division ever contact holders for additional information if the report appears deficient? A: We have."). Notably, and as described more thoroughly below, if National City had reported an address associated with Avaya, the DUF likely would not have required Avaya to provide evidence of a



business relationship with National City, nor would the DUF have required evidence of entitlement to particular funds.

Further, effective as of September 2000, the Ohio UFA eliminated checks issued by a business to another business from the definition of unclaimed property. R.C. 169.01(B)(2). *See also*, State of Ohio, Dep't of Commerce, Div. of Unclaimed Funds, *Notice of Change in Reporting Procedures, Business to Business Exemption* available at <https://www.com.ohio.gov/documents/btob.pdf> (accessed May 28, 2021).

Thus, the DUF also had grounds to reject the funds reported by National City for Avaya, since the check was exempt from reporting. Nevertheless, the DUF accepted the funds and considered the report to be adequate. The DUF has had the ability to use the funds that are payable to Avaya since 2006.

Instead, the facts here indicate that there may be *no* circumstance in which the DUF would ever return the collected funds to a purported owner. Avaya is a technology company. With a focus on the financial services sector, Avaya counts the top 10 commercial banks in the United States as clients. Avaya, *Our Company*,

<https://www.avaya.com/en/about-avaya/> (accessed May 28, 2021). There is evidence in the record that National City was a client of Avaya's in 2002 and that the relationship continued through at least 2006. Purchase Order Database of Avaya Inc. p. 502-503. It is thus logical, and likely obvious, that Avaya was providing its services to National City, prompting the issuance of the check now at issue, even if the information related to the specific 2002 transaction and associated payment by check is, unsurprisingly, now limited. Even so, and perhaps most significantly, there is *no legal requirement* that Avaya must substantiate the exact transaction that National City reported in order to establish entitlement. Ohio Adm.Code 1301:10-4-02(A)(1).

**II. While accuracy in claims payment is critical, it should not be used to preclude any return of unclaimed property to the state's own benefit.**

UPPO recognizes that state administrators can be placed in a difficult position when evaluating claims. State administrators must be responsive to people who claim to be true owners of abandoned property, while at the same time being careful to make sure that any claimant is, in

fact, the actual owner of the funds. As part of this process, it is completely appropriate that the DUF exercise caution to avoid potential payment to the wrong party, whether through mistake or fraud by claimants. *See, e.g.*, United States Department of Justice, The United States Attorney’s Office, Eastern District of California, *Tennessee Woman Pleads Guilty to Filing False Claims for Unclaimed Property* (Apr. 15, 2021), <https://www.justice.gov/usao-edca/pr/tennessee-woman-pleads-guilty-filing-false-claims-unclaimed-property> (accessed May 30, 2021).

However, the DUF cannot protect “true” owners from fraud to the extent that it completely precludes *any* return of property. *See Sogg v. Zurz*, 121 Ohio St.3d 449, 2009-Ohio-1526, 905 N.E.2d 187 (noting the importance of protecting the rights of individuals in the administration of the UFA). Ideally, the DUF’s policies would therefore walk the line between deterring fraud and removing barriers to reunification. All parties would presumably agree that a balance must be struck to deal with these potentially conflicting aims—reunification on the one hand and custodial protection on the other. That balancing process is best guided by the Ohio Administrative Procedures Act (“APA”). R.C. 119.01 *et seq.*

When enacting regulations pursuant to the APA, administrative agencies must consider public concerns with respect to their proposed policies. R.C. 119.03. Such was the procedure used in adopting the regulations that complement the UFA. *See, e.g., Princeton City Sch. Dist., Bd. of Educ. v. Ohio State Bd. of Educ.*, 96 Ohio App. 3d 558, 645 N.E.2d 773, 1994 Ohio App. LEXIS 3557 (1st Dist. 1994). As such, the regulations with respect to processing claims reflect that on balance, property should be returned to owners. The regulations explicitly provide that “[l]attitude may be provided in the claim paying process to allow for individual and unique situations which arise.” Ohio Adm.Code 1301:10-4-02(B). The regulation further provides that “Ownership may be established by supplying the director with the claimant's name, address and taxpayer identification number (social security number). Where the address shown by a holder's report is not the current address of the claimant, the claimant may submit correspondence, statements or copies of other documents that were received at or addressed to the last known address reported. *The claimant may also submit documentation substantiating a relationship with the reporting holder.*” (emphasis

added). In choosing to accept the funds in light of the limited information provided by National City, the DUF implicitly recognized the need to be flexible with respect to a future claim made by Avaya.

Yet, instead, the DUF Hearing Officer stated that, “Avaya must prove that it had a business relationship with National City *in 2002* that shows it is entitled to that \$18,100.” Report and Recommendation p. 1181 (emphasis added). That is not what the regulation requires. This statement adopted the DUF’s legally unsupported argument that “In order to prove ownership of an abandoned property, the claimant must produce documentation: (1) matching the name of the owner and (2) the address reported by the holder or *showing a relationship with the holder that occurred at the report date of the property’s transaction.*” Post-Hearing Brief of Dep’t of Commerce, Div. of Unclaimed Funds p. 930 (emphasis added). That is also not what the regulation requires.

Still, the DUF rejected the proffered evidence of a business relationship on a technicality, namely, that the support provided was not one of the listed examples of the types of evidence that could be used in order to substantiate the existence of a business relationship. More

specifically, the DUF's internal "Claim Policy & Procedures" document lists money orders, original gift cards, an insurance policy, a financial institution statement, a utility bill and a mortgage account statement as examples that may be relied upon. Claims Policy and Procedure Manual p. 611-612. Clearly, these items are not applicable in the present case, nor do they encompass every conceivable type of business relationship that may arise. Some, such as the gift card example, would in fact reflect a relationship between a customer and a retailer, not a business relationship.

The DUF's *ad hoc* determination in this case, requiring evidence for a transaction that occurred 18 years ago, evidence which neither the holder nor the owner is required to retain now, or at the time of the transaction, fails to honor the balance set by the duly enacted regulations regarding claims. *See* R.C. 169.03(F)(2). The information that the DUF is requiring Avaya to produce is missing or unavailable through no fault of Avaya. The DUF not only accepted the reported property with limited information, but in refusing to return the property to the claimant, it misstated and misapplied the guidelines outlined in Ohio Adm.Code 1301:10-4-02(A)(1). It ignored the regulatory emphasis on flexibility and

deference to the claimant. The type of decision making employed here by the DUF makes holders and claimants suspicious that the motivation of the DUF is to retain the unclaimed funds for use by Ohio, rather than to reunite the funds with the party that is obviously the true owner.

If the DUF intends to impose documentation requirements beyond those prescribed by the legislature, the DUF must revise Ohio Adm.Code 1301:10-4-02(A)(1) in accordance with the APA to provide for such additional diligence steps. Such revisions provide the public with notice and the opportunity to comment on the proposed change in language and requirements, especially in light of the state's ability to accept second priority property with no indicated address. It is also important to note that the imposition of additional requirements on claimants must still comport with the legislative intent of the UFA. Regulations must be consistent with the statute and clarify its implementation. *See, e.g., PayPal, Inc. v. Consumer Financial Protection Bureau*, D.D.C. No. 19-3700 (RJL), 2020 U.S. Dist. LEXIS 244761 (Dec. 30, 2020) (Despite agency's authority to provide for "additional requirements" that it deemed "necessary and proper", any "additional requirements" must still be

within the confines of the means authorized by the legislature. *Id.* at \*15. “The [agency] cannot simply rely on the overarching purpose of the statute without giving credence to how Congress intended the agency to fulfill the statute’s purpose.” *Id.* at \*19).

Since the earliest escheat statutes were enacted, courts have disapproved of their implementation to the extent that they operated as forfeitures. *See State v. U.S. Steel Corp.*, 95 A.2d 734, 738 (N.J.1953) (“It is a well-settled principle that escheat and forfeiture are not favored by the law, and any doubt as to whether property is subject to escheat is resolved against the State.”). *See also, Ohio Dept. of Liquor Control v. Sons of Italy Lodge 0917* (1992), 65 Ohio St.3d 532, 532, 1992-Ohio-17, 605 N.E.2d 368 (“Forfeitures are not favored by the law. The law requires that we favor individual property rights when interpreting forfeiture statutes.”). Because Avaya cannot provide the documentation included in the DUF’s uncodified Claim Policy & Procedure document and cannot provide proof of the specific transaction underlying the funds reported by National City, notwithstanding there being no legal requirement that it do so, Avaya will forfeit the funds held by the DUF.



This is not the outcome envisioned by a statute that is designed to return funds to rightful owners, nor should it be accomplished by relying on a demonstrably inaccurate policy that has not been subject to the required public process. That is especially the case where the existing duly enacted administrative regulations favor deference to claimants. Ohio courts similarly recognize that the law, “must be impartial in operation and not unduly oppressive on individuals” lest it “interfere with private property rights beyond the necessities of the situation.” *Sogg v. Zurz*, 121 Ohio St.3d 449, 2009-Ohio-1526, 905 N.E.2d 187, ¶12 (citing *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶41).

To the extent the state is concerned about fraud, there is no indication in this case that Avaya’s claim is fraudulent—the circumstances support the opposite. Avaya has gone to great lengths to demonstrate entitlement to the funds. If Avaya cannot claim these funds, then no other claimant will ever be able to claim the funds, and the State of Ohio has *de facto* expropriated these funds for its own use. The DUF has created a standard that is impossible for Avaya (and, undoubtedly,

numerous other true owners of abandoned property currently held by the DUF) to satisfy: a standard that does not comport with a valid regulation enacted pursuant to the APA. This is not due process, and it is violative of the APA.

### **III. Procedural Boundaries Surrounding Unclaimed Property Revenue Retention Help Protect the Longevity of the State's Program.**

While the DUF plays a vital role in administering the UFA, this case highlights that allowing it unfettered discretion in determining claims could undermine the integrity and stability of Ohio's unclaimed property program. Over the last decade, courts have expressed concern regarding the states' growing dependence on revenue from unclaimed property, and how that dependence encourages the expansion and aggressive enforcement of the law. These tactics contribute to a lack of confidence in fair treatment, inviting broad challenges that threaten the very existence of the program's ability to operate.

States utilize funds collected pursuant to unclaimed property laws, and as such have come to rely on these programs as a source of much-

needed revenue. *See Temple-Inland v. Cook et al.*, 192 F. Supp.3d 527, 532 (D.Del.2016) (noting Delaware’s own recognition that unclaimed property was a “vital element” in the state’s operating budget). Credit rating agencies consider the strength of a state’s unclaimed property program in evaluating a state’s economic stability. *See Fitch Ratings*, “Fitch Rates Delaware’s \$301MM GO Bonds ‘AAA’; Outlook Stable,” (Feb. 10, 2016) (noting that abandoned property typically accounted for over 10 percent of Delaware’s general fund revenues in fiscal 2015 and such revenue was expected to increase). While states typically record a liability on their financial statements for the amount they expect to return to owners, the remainder is considered general revenue or invested in particular government projects. *See State of Ohio, Office of Budget and Management, Comprehensive Annual Financial Report* at n. 14 (June 30, 2020),

[https://archives.obm.ohio.gov/Files/State\\_Accounting/Financial\\_Reporting/Comprehensive\\_Annual\\_Financial\\_Report/2020/CAFR\\_2020.pdf](https://archives.obm.ohio.gov/Files/State_Accounting/Financial_Reporting/Comprehensive_Annual_Financial_Report/2020/CAFR_2020.pdf)

(accessed June 1, 2021).

Further, unclaimed property funds can immediately be transferred to plug state budget shortfalls or finance particular projects without raising taxes. In 2018, for example, the Illinois legislature unsuccessfully sought to reroute unclaimed property collections to allow the Treasurer to purchase and renovate a new building. S.B. 2921, 100<sup>th</sup> Gen. Assemb., Reg. Sess. (Ill. 2018). In vetoing the proposed bill, Governor Bruce Rauner warned against using the state’s unclaimed property act “as a mechanism to fund the Treasurer’s building projects.” Letter from Gov. Bruce Rauner to the Illinois House of Representatives, (Aug. 28, 2018), *available* *at* <https://www.ilga.gov/legislation/100/SB/PDF/10000SB2921gms.pdf>. It is therefore not surprising that unclaimed property legislation and enforcement reflect an increased focus on adding unclaimed property to state coffers.

For example, new laws seek to broaden the definitions of “property” to capture additional funds and deem property “abandoned” sooner, requiring companies to turn over amounts more quickly. *See, e.g.*, S.B. 103, 151<sup>st</sup> Gen. Assemb., Reg. Sess. (Del. 2021) (extending Delaware’s

unclaimed property law to include “virtual currency”); A.B. 3002, 2010-2011 Leg., Reg. Sess. (N.J. 2010) (extending New Jersey’s unclaimed property law to include “stored value cards”). *See also*, Bower, *Inequitable Escheat?: Reflecting on Unclaimed Property Law and the Supreme Court’s Interstate Escheat Framework*, 74 Ohio St.L.J. 515, 529, n. 81 (2013); *Am. Express Travel Related Servs. v. Sidamon-Eristoff*, 669 F.3d 359 (3rd Cir.2012) (addressing the contractual impact of New Jersey’s retroactive dormancy period reduction from 15 years to three years); and H.B. 278, 2013-2014 Gen. Assemb., Reg. Sess. (Pa. 2014) (reducing dormancy period for several property types from five to three years). Recent legislation (enacted and proposed) also seeks to roll back long-standing reporting exemptions from the law, retroactively collecting old property that was not previously reportable. *See, e.g.*, S.B. 188, 2021 Gen. Assemb., Reg. Sess. (Ind. 2021) (as proposed, the bill sought to retroactively eliminate the state’s business-to-business exemption); and S.B. 88, 73<sup>rd</sup> Gen. Assemb., Reg. Sess. (Colo. 2019) (retroactively eliminating standard deduction for certain property).

While raising revenue through unclaimed property can be a legitimate aim of state law, it becomes controversial when it causes harm to the original owners of the funds. One such area of controversy, for example, is the requirement that states immediately liquidate privately-held securities collected pursuant to unclaimed property laws, sometimes as soon as three years after issuance, regardless of any harm to the shareholder. *See, e.g.*, S.D. Codified Laws § 43-41B-23(c) (requiring that securities be sold within 180 days of receipt); Fla. Stat. Ann. § 717.122 (requiring the sale of securities upon receipt); *A.W. Fin. Servs., S.A. v. Empire Res., Inc.*, 981 A.2d 1114 (Del.2009) (permitting shareholder action against issuer for damages incurred due to state liquidation of shares); and *JLI Invest S.A. v. Computershare Trust Co., N.A.*, D.Mass. No. 15-cv-11474-ADB, 2016 U.S. Dist. LEXIS 124115, 2016 WL 4775450 (Sept. 13, 2016) (permitting action to proceed for damages from escheatment of shares to Delaware and subsequent liquidation, and noting related Delaware action alleging Delaware State Escheator liable for negligence and conversion). Such provisions

undermine the consumer-protection justification that states use to defend the laws in the first instance.

This problem—the disproportionate focus on raising revenue to the detriment of private interests—has increased in agency administration of these laws over the past decade as well. *See, e.g., Yee v. ClubCorp Holdings, Inc.*, No. CGC-19-576314, (Cal. Super. Ct., Apr. 27, 2021) (allowing claim that State Controller failed to follow necessary procedures before engaging private unclaimed property audit firms); *Thrivent Financial for Lutherans et al. v. Yee*, No. CGC-15-548384 (Cal. Super. Ct. July 18, 2018) (invalidating Office of the State Controller’s policies contained in reporting handbook as promulgated in violation of the California Administrative Procedure Act); *Temple-Inland* at 550 (finding Delaware audit methodology “shocked the conscience” such that it violated constitutional due process constraints); *BBB Value Servs. v. Treasurer, State of N.J.*, 451 N.J.Super. 483, 486, 168 A.3d 1227 (Super.App.Div.2017) (finding that New Jersey improperly refused to refund remittances attributable to gift cards not subject to escheat); *Sogg v. Zurz*, 121 Ohio St.3d 449, 2009-Ohio-1526, 905 N.E.2d 187 (finding

that the state's retention of the interest earned on unclaimed property constitutes a taking).

Notably, Justices Alito and Thomas of the Supreme Court of the United States have expressed alarm at the problem, cautioning:

This trend — combining shortened escheat periods with minimal notification procedures — raises important due process concerns. As advances in technology make it easier and easier to identify and locate property owners, many States appear to be doing less and less to meet their constitutional obligation to provide adequate notice before escheating private property. Cash-strapped States undoubtedly have a real interest in taking advantage of truly abandoned property to shore up state budgets. But they also have an obligation to return property when its owner can be located.

*Taylor v. Yee*, 136 S. Ct. 929, 930, 194 L.Ed.2d 237 (2016) (concurring in the denial of certiorari).

Where states value revenue generation or retention over owner claims, unclaimed property appears less like consumer protection and more like taxation, without the necessary constitutional and procedural protections. This makes unclaimed property programs vulnerable to broad existential challenges. *See, e.g., Taylor v. Westly*, 488 F.3d 1197, 1202 (9th Cir.2007) (enjoining California's unclaimed property collections and suggesting court supervision may be warranted). In light



of these trends, procedural safeguards against unfettered agency action become paramount. *N.J. Retail Merchs. Ass'n v. Sidamon-Eristoff*, 669 F.3d 374, 388 (3rd Cir.2012) (finding “complete deference to a legislative assessment of reasonableness and necessity is not appropriate where the State’s self-interest is at stake” and citing, *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 26, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977)). Boundaries on agency discretion help foster the credibility of these programs and insulate them from further challenge. Conversely, a short-term focus on state revenue threatens to deplete the strength of the program overall.

## **CONCLUSION**

Respectfully, we submit that this court should consider the trend of legislatures and agencies to favor revenue generation over individual property rights in this area, especially in light of Ohio’s emphasis on owner reunification over other policy goals. Unfettered discretion to deny claims could have dire consequences for the longevity of state unclaimed property programs. Thus, transparency and procedural safeguards serve to maintain the balance between the dual purposes served by the law.

## CERTIFICATE OF SERVICE

I certify that, on June 2, 2021, I sent a copy of the foregoing via first-class United States mail, postage prepaid, as follows:

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