

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

\_\_\_\_\_  
NATIONAL COLLEGIATE ATHLETIC :  
ASSOCIATION, :  
:

Plaintiff, :

v. :

CIVIL ACTION

THOMAS W. CORBETT, JR., in his :  
capacity as Governor of the Commonwealth :  
of Pennsylvania, ROB MCCORD, in his :  
capacity as Treasurer of the Commonwealth :  
of Pennsylvania, MARK R. ZIMMER, in :  
his capacity as Chairman of the :  
Pennsylvania Commission on Crime and :  
Delinquency, and EUGENE :  
DEPASQUALE, in his capacity as Auditor :  
General of the Commonwealth of :  
Pennsylvania, :

No. 13-457

(Chief Judge Yvette Kane)

\_\_\_\_\_  
Defendants. :

**TREASURER ROBERT M. MCCORD'S MEMORANDUM IN  
OPPOSITION TO THE NCAA'S MOTION FOR JUDGMENT ON THE  
PLEADINGS**

Date: October 23, 2014

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## **FACTUAL BACKGROUND**

### **A. NCAA-Imposed Binding Consent Decree.**

In the wake of the Sandusky scandal, the Pennsylvania State University (“PSU”) executed the “Binding Consent Decree Imposed by the National Collegiate Athletic Association and Accepted by the Pennsylvania State University” with the NCAA on July 23, 2012 (“Consent Decree”). Pursuant to the Consent Decree, PSU is compelled to pay \$60 million into “an endowment for programs preventing child sexual abuse and/or assisting the victims of child sexual abuse.” Consent Decree at 5 (Attachment 1).

The Consent Decree is silent as to any detail regarding the endowment, management, safekeeping and prioritization of the funds beyond the general purpose of preventing or assisting victims of child abuse. *Id.*; *see also* McCord Answer ¶¶ 68, 73.

### **B. Endowment Act.**

On February 20, 2013, the Institution of Higher Education Monetary Penalty Endowment Act (“Endowment Act”) was enacted. Act of Feb. 20, 2013 (P.L. 1, No.1), 24 P.S. §§ 7501-7505. (Attachment 2). The Endowment Act applies when “an institution of higher education pays a monetary penalty pursuant to an agreement entered into with a governing body and: (1) the monetary penalty is at least \$ 10,000,000 in installments over a time period in excess of one year; and (2)

the agreement provides that the monetary penalty will be used for a specific purpose.” 24 P.S. § 7503(a). An “institution of higher education” is a “postsecondary educational institution in this Commonwealth that receives an annual appropriation from an act of the General Assembly.” 24 P.S. § 7502. A “governing body” is an “organization or legal entity with which an institution of higher education is associated and which body may impose a monetary penalty against the institution of higher education.” *Id.*

In the absence of a contrary agreement, the Endowment Act creates a custodial structure for safeguarding and administering the funds. The State Treasurer is designated as the custodian of the Endowment Trust Fund and the Pennsylvania Commission on Crime and Delinquency is responsible for allocating the funds “in accordance with the purposes enumerated in the agreement between the institution of higher education and the governing body and subject to the provisions of paragraph (4).” 24 P.S. § 7503(b)(1), (3).

**C. Pennsylvania State University.**

PSU is not a private institution of higher education, but a creation of the state legislature, “with the faith of the State . . . pledged.” *See* Act of April 1, 1863 (P.L. 213, No. 227). Established by the General Assembly to benefit the Commonwealth, PSU is a public, state-related university. A progeny of the federal

Morrill Land-Grant Act of 1862, PSU is Pennsylvania's only land grant institute.  
*Id.*

PSU receives substantial state financial support in the form of direct annual appropriations from the General Assembly, amounting to almost \$1.2 billion over the past five fiscal years. In addition to direct General Fund appropriations, PSU has received over \$390 million in funding for capital improvement projects over the past ten fiscal years. PSU also receives the benefit of other support from the Commonwealth, including Pennsylvania Higher Education Assistance grants, tax benefits as a qualified state non-profit and direct support within the annual Agricultural Department Budget.

The enactment of the Endowment Act is a continuation of the state legislature's regulation and oversight of state-supported public institutions of higher education.

## **ARGUMENT**

### **I. Standard of Review.**

The Standard of Review for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) is identical to a motion to dismiss pursuant to Fed. R. Civ. P. 12(b). *Miller v. Trometter*, 2014 WL 5089092 (M.D. Pa. Oct. 9, 2014); *Beynon v. Noonan*, 2014 WL 3534974 (M.D. Pa. July 16, 2014). The facts alleged in the pleadings, including the responding parties' answer, and any inferences drawn

from the facts, are to be view in light most favorable to the non-moving party. *Id.* The NCAA's motion is to be granted only if, considering all of the facts, inferences and conclusions with deference to the Commonwealth, it is clear that there could be no other conclusion than that the NCAA is entitled to judgment as a matter of law. *Roth v. Norfalco, LLC*, 651 F.3d 367, 374 (3<sup>rd</sup> Cir. 2011). Any doubt should be resolved against the NCAA.

**a) Presumption of Constitutionally**

The Endowment Act is entitled, as a matter of law, to the presumption of constitutionality. *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 153 (1944); *Lockport v. Citizens for Community Action*, 430 U.S. 259, 272 (1977). This presumption is applicable within the context of constitutional challenges to state legislative enactments involving commerce and contracts clause challenges. *See, e.g., Alliance of Auto. Mfrs. v. Gwasdosky*, 304 F. Supp. 2d 104 (D. Me. 2004) (upholding constitutionality of Maine statute governing dealer reimbursement costs for parts and labor under federal commerce and contracts clauses, explicitly noting presumption of constitutionality afforded to Maine statute); *Amanda Acquisition Corp. v. Universal Foods Corp.*, 708 F. Supp. 984, 996-97 (E.D. Wis. 1989) (upholding constitutionality of Wisconsin Business Combination Act under federal commerce clause, stating that "state law is entitled to presumption of constitutionality").

The NCAA faces a difficult hurdle. The “burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.” *Mabey Bridge & Shore, Inc. v. Schoch*, 666 F.3d 862, 876 (3<sup>rd</sup> Cir. 2012) (quoting *Heller v. Doe*, 509 U.S. 312, 320-21 (1993)).

**b) Pennsylvania Commonwealth Court decision.**

It is appropriate to consider Pennsylvania Commonwealth Court’s persuasive reasoning and determination of the NCAA’s claims.<sup>1</sup> Though the NCAA strenuously disagrees with Commonwealth Court’s analysis and decision to uphold the constitutionality of the Endowment Act in the face of identical constitutional challenges brought before this Court, its disagreement is insufficient justification to dismiss Commonwealth Court’s reasoning and conclusion. The NCAA restates to this Court the exact same assertions and arguments that were previously rejected by the Commonwealth Court, offering no compelling reason why the twenty-nine page decision of the state court should be dismissed as “deeply unpersuasive.”

In *Corman v. NCAA*, the NCAA advanced the same three federal constitutional challenges. *Corman v. NCAA*, 74 A.3d 1149 (Pa. Cmwlth. Ct. 2013)

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<sup>1</sup> Litigators have an obligation to bring relevant decisions before this Court for consideration. See, e.g., *Gill v. Mid-Penn Consumer Discount Co.*, 671 F. Supp. 1021, 1025 (E.D. Pa. 1987), *aff’d*, 853 F.2d 917 (3d Cir. 1998).

(*Corman I*) (Attachment 3); *Corman v. NCAA*, 93 A.3d 1 (Pa. Cmwlth. Ct. 2014) (*Corman II*) (Attachment 4). The NCAA has conspicuously failed to identify a legal precedent or authority that would suggest the Court's reasoning was in error. *See, e.g.*, Mem. in Supp. of Pl.'s Mot. for J. on Pleadings at 20-21. The fact remains, *Corman I* is analogous and persuasive authority, rendered by a state Court, sitting *en banc*, adjudicating identical constitutional issues involving a state statute.

## **II. The Endowment Act Does Not Violate The Commerce Clause.**

There is no Commerce Clause violation under two distinct analyses. First, the limitations on use are tied to state appropriations, thus bringing the Endowment Act within the ambit of the market participant doctrine and outside the scope of the Commerce Clause. Second, even if the Commerce Clause applied, there is no discrimination against out-of-state economic interests.

### **a) Market Participant**

Annually, the Pennsylvania legislature appropriates funds to build infrastructure, promote the general welfare, encourage economic development and provide educational opportunities for students at state-funded institutions. The appropriations traditionally impose "within the state" priorities on the use of those funds. The funds are intended primarily to benefit Pennsylvanians, and the money, with rare exceptions, stays in Pennsylvania.

The appropriation process can be viewed as the actions of a “market participant,” in which capacity the state is free “to favor [their] own citizens over others” and is “not subject to the restraints of the Commerce Clause.” *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1980); *White v. Mass. Council of Constr. Emp’rs*, 460 U.S. 204, 208 (1983). If the award of contracts under a statute requiring public projects in Pennsylvania to use American-made steel satisfies the market participant doctrine, as it does, *see Trojan Techs v. Pennsylvania*, 916 F.2d 903 (3rd Cir. 1990), surely the underlying allocation of Endowment funds does as well (paid by public and state-related university).

The Supreme Court has upheld actions taken when the state is performing a governmental function against Commerce Clause challenges. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007) (upholding a municipal waste flow control provision). The challenged statute was identical to that invalidated in *C & A Carbone v. Clarkstown*, 511 U.S. 383 (1994), with one exception – it required haulers to bring waste to a public rather than private waste facility. 550 U.S. at 334. That requirement made all the difference. As the Court summarized in *Kentucky v. Davis*, 553 U.S. 328, 341 (2008):

a government function is not susceptible to standard dormant Commerce Clause scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause abhors.

It continued: “[w]e should be particularly hesitant to interfere . . . under the guise of the Commerce Clause’ where a local government engages in a traditional government function.” *Id.* (quoting *United Haulers*, 550 U.S. at 344).

In *Davis*, the Court upheld Kentucky’s exemption from state income taxes interest on bonds issued by it or its political subdivisions, but not on bonds issued by other States. This disparate treatment was justified because the issuance of debt securities to pay for public projects was “a quintessentially public function,” a way in which government obtains the funds necessary to “protect[] the health, safety, and welfare of citizens.” 553 U.S. at 342. The Court noted that both *Davis* and *United Haulers* “may also be seen under the broader rubric of the market participation doctrine.” 553 U.S. at 343.

*Davis* also confirms that market regulation tied to the market participant activity does not make the latter inapplicable. *Id.* at 344-45.<sup>2</sup> There, Kentucky issued bonds and was the taxing authority, the latter a traditional regulatory function; plaintiffs argued that this, in turn, disqualified Kentucky from being a market participant. The Supreme Court found that fact irrelevant because the two roles were intertwined. *Id.* at 344 (“[T]here is no ignoring the fact that imposing

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<sup>2</sup> The Third Circuit’s decision in *Trojan* necessarily reaches the same conclusion, because the “American Steel” requirement was in a statute separate from the appropriations. *See* 916 F.2d 903.

the differential tax scheme makes sense only because Kentucky is also a bond issuer.”).

Providing funding for higher education is a traditional governmental function. Annually, Pennsylvania appropriates funds for both “state-system universities” and “state-related” institutions (Temple University, the University of Pittsburgh, Lincoln University and PSU). In the case of PSU, that support exceeded \$1 billion over the past five fiscal years. The financial assistance also takes the form of capital improvement grants, tax exemptions and student aid.

The legislature enacted the Endowment Act to accomplish two modest public policy objectives: to (1) safeguard and oversee the use of public resources expended by public institutions of higher education and (2) prioritize the use of public funds for the benefit of state residents. As to the first objective, the Commonwealth Court correctly noted, “it is reasonable that the General Assembly, given its authority over state finances and responsibility to safeguard Commonwealth funds, drafted the Endowment Act to regulate Commonwealth post-secondary educational institutions . . . .” *Corman II* at 12. The expectation – and implicit condition – of all of these higher education appropriations was that state funds be spent primarily in Pennsylvania. For example, Temple cannot reasonably be thought to use its state funding – \$139,917,000 for FY 2014-15 – to

open campuses in New Jersey or Delaware without legislative authorization.<sup>3</sup> The Endowment Act’s direction that funds should be “used within this Commonwealth for the benefit of the residents of this Commonwealth” is little more than a reminder, not the imposition of a new requirement.

As to the second purpose of the Endowment Act, the circumstances that gave rise to the NCAA’s action also demonstrate the need that the legislature has sought to prioritize – allocating resources for the prevention of and treatment for victims of child abuse in Pennsylvania. See [www.childprotection.state.org](http://www.childprotection.state.org) (Pennsylvania Task Force on Child Protection report identifying funding need for child abuse prevention and treatment services within the Commonwealth). The Endowment Act simply prioritizes the allocation of public resources (in the absence of contrary language) paid by a state-supported university pursuant to an imposed penalty.

**b) No Impediment to Out-of-State Providers.**

The Commerce Clause prohibits states from “mandat[ing] differential treatment of in-state and out-of-state economic interests that benefit the former and burdens the latter.” *Heffner v. Murphy*, 745 F.3d 56, 70 (3d Cir. 2014). A dormant Commerce Clause inquiry “begins with determining whether the [challenged

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<sup>3</sup> See *Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 496 n.9 (10<sup>th</sup> Cir. 1998) (University of New Mexico’s admission preference for long-term in-state residents was constitutional under Commerce Clause because “educational activities constitute participation in the market for educational services.”).

statute] discriminates against interstate commerce in either purpose or effect.” *Id.* Discrimination against out-of-state business interests is a prerequisite even under the *Pike v. Bruce* balancing test.<sup>4</sup> That principle requires the Court to reject the NCAA’s Commerce Clause claim.

In *Heffner*, the Court rejected the trial court’s repeated findings of discrimination and unconstitutionality because in each instance, in-state and out-of-state persons and entities were treated identically. Both groups had equal opportunity to become licensed funeral directors in Pennsylvania; they simply needed to satisfy the licensing criteria. The Court of Appeals soundly rejected the contention that Pennsylvania’s limitation was discriminatory because “the challenged provisions impose the same limitation on out-of-state funeral directors *and* those in Pennsylvania.” *Id.* at 72. The Court’s review of the challenged provisions under *Pike* balancing likewise looked for discrimination against out-of-state interests and found none, therefore no violation.<sup>5</sup>

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<sup>4</sup> *Pike v. Bruce Church*, 397 U.S. 137 (1970). The “‘incidental burden on interstate commerce’ appropriately considered in Commerce Clause balancing is the degree to which the state action incidentally discriminates against interstate commerce relative to intrastate commerce. It is a comparative measure.” *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 406 (3d Cir. 1987) (emphasis added). See also *Instructional Sys. v. Computer Curriculum Corp.*, 35 F.3d 813, 826-27 (3d Cir. 1994).

<sup>5</sup> See, e.g., *W.V. Univ. Hosps. v. Rendell*, 2007 WL 3274409 (M.D. Pa 2007). Reviewing a state Medicaid program that targeted grant funds to Pennsylvania-based trauma centers and excluded out-of-state providers, this Court determined that the grant eligibility exclusion discriminated against interstate commerce. *Id.* at \*10. The important distinction between the Endowment Act and the Medicaid program in *WVU Hospitals*, is that unlike the Medicaid program, the Endowment Act imposes no discriminatory classification against out-of-state child abuse

The relevant economic interest – the ability of out-of-state organizations to receive contracts from the endowment fund on a level basis with in-state providers – is unaffected by the Endowment Act. All organizations with sound proposals for programs preventing child sexual abuse and/or assisting the victims of child sexual abuse can apply and receive fair consideration. The NCAA references that “100% of the funds” could be awarded to Pennsylvania entities “if they submitted the best proposals ....” Mem. in Supp. of Pl.’s Mot. for J. on Pleadings at 1. The converse is true: “100% of the funds” could be awarded to non-Pennsylvania entities if they submitted the best proposals. The “in Pennsylvania” requirement is no different constitutionally than PSU’s recent effort to seek a new President, conducting a nationwide search but requiring the selected candidate to perform his duties in State College.

The NCAA attempts to assert that the Endowment Act discriminates against out-of-state child abuse victims, equating them with market participants, relying on *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997), for the proposition that the Commerce Clause precludes a state from restricting access to “services provided by state residents.” At issue in *Camps Newfound* was a disparate tax exemption for non-profits that varied based on whether the non-profit served Maine residents or non-residents. Thus, it “penalized” Maine non-profits

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program providers who are otherwise eligible to apply for and receive Endowment Trust funds. The Endowment Act does not cross the line identified by this Court in *WVU Hospitals*.

that wanted to engage in interstate commerce by serving non-residents. *Id.* at 576. In that context, the Court wrote that “a statutory prohibition against providing camp services to nonresidents ... would almost certainly be invalid.” *Id.* There are substantial differences between barring nonresidents from attending summer camp in Maine and requiring that Endowment Trust funds be used in the only state that appropriated funds to the entity providing funds to the endowment.

The NCAA’s Brief, almost without exception, excerpts broad Commerce Clause principles divorced of their context. Commerce Clause cases are fact-specific and the NCAA falls short in applying those principles to this case. *See, e.g., Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996) (involving a discriminatory tax); *United Haulers*, 550 U.S. 330 (no Commerce Clause violation in municipal waste flow control regulation); *W. Lynn Creamery v. Healy*, 512 U.S. 186 (1994) (involving restriction comparable to “protective tariff or customs duty”); *and City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (involving the “impos[ition] on out-of-state commercial interests the full burden of conserving the State's remaining landfill space.”). Accordingly, because the Endowment Act does not discriminate against out-of-state entities, it does not violate the Commerce Clause. *See Corman I* at 1169 (“[N]othing in the Endowment Act prohibits out-of-state entities from applying for and receiving monies from the Fund, as is required by any in-state entity. In addition, there are no allegations that the Fund has any

impact on out-of-state economic interests, let alone burdens any out-of-state economic interest.”).

### **III. Endowment Act Does Not Violate the Takings Clause.**

The NCAA argues the Endowment Act violates the Takings Clause of the United States and Pennsylvania Constitutions. The Fifth Amendment to the U.S. Constitution prohibits the taking of “private property . . . for public use, without just compensation.” U.S. Const. amend. V. A takings claim arises when the government directly appropriates private property as its own, without just compensation or when a scheme of regulation so limits private property as to “den[y] an owner economically viable use of his [property].” *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 (1992) (citations omitted); *Keystone Bituminous Coal Ass’n. v. DeBenedictis* 480 U.S. 470, 485 (1987). The error in the NCAA’s analysis is that the Endowment Act does not transform the purpose or use of the funds.

Under the Act, the endowment funds are allocated to a “separate trust fund in the State Treasury and the State Treasurer shall be custodian thereof.” 24 P.S. §7503(a). The role of the State Treasurer is one of custodian, not owner. As custodian, the Treasurer is responsible for safeguarding the trust funds, prudently managing the investment of the funds and ensuring that they are expended for the very same purpose identified under the Consent Decree – child abuse prevention

and treatment programs. The Commonwealth does not assume ownership of the funds, the Treasurer's responsibility is as a fiduciary, not an owner. 24 P.S. §7503 (b)(1-4). *See also, e.g.,* 72 P.S. § 1301.1 *et seq.* (Unclaimed Property Law directs Treasury to take custodial care—not ownership—of abandoned property). The sole purpose for the Treasurer's involvement is to insure funds are spent as required. If, as argued above, the use limitations are valid, then the ancillary authority given to the Treasurer to determine compliance with them cannot be invalid.

It is well established “that only persons with a valid property interest at the time of the taking are entitled to compensation.” *Kortlander v. United States*, 107 Fed. Cl. 357, 371 (Fed. Cl. 2012) (internal quotation marks and citations omitted). Accordingly, this Court should only consider whether the Endowment Act “amount[s] to a compensable taking” if the NCAA has a legally cognizable property interest at stake. *Id.* The Endowment Act does not take any private property from the NCAA, as the NCAA does not have a legally cognizable property interest in the sanction payment from a state-supported university. Accordingly, the Takings Clause analysis is inapplicable.

Nothing within the Consent Decree conveys to the NCAA ownership of the fine money paid by PSU. *See* McCord Answer ¶¶ 68-69. The Consent Decree provides that the penalty funds are to be paid “into an endowment,” a trust for

which the beneficiary is neither the NCAA nor PSU. Rather, by the terms of both the Consent Decree and the Endowment Act, as drafted by the NCAA, the intended beneficiaries are victims of child abuse, not the NCAA. The NCAA has not claimed to stand as a fiduciary, acting on behalf of abused children or program providers. Other than the NCAA's claim of an unspoken "mutual understanding," no language exists to suggest that the NCAA has the right to direct how the funds are spent. *See Corman I* at 1168 ("To endorse the NCAA's argument would require this Court to speculate as to the intentions of the parties, which is not its role.").<sup>6</sup>

The Endowment Act's allocation of the funds does not depart from NCAA's stated intention in the Consent Decree. 24 P.S. § 7503(b)(3) (directing the Commission on Crime and Delinquency to "expend the money of the endowment in accordance with the purposes enumerated in" the Consent Decree). "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). What constitutes "too far" depends on the facts and circumstances of the specific case. The Supreme Court has identified as significant: "the economic impact of the regulation on the claimant . . . particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . . [and] the

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<sup>6</sup> The NCAA's claim that its control of the Endowment is an important property interest begs the question: as drafter of the Consent Decree, why was it not included?

character of the governmental action.” *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). “[A] ‘public program adjusting the benefits and burdens of economic life to promote the common good’ . . . ordinarily will not be compensable.” *New Jersey v. United States*, 91 F.3d 463, 468 (3d Cir. 1996) (quoting *Penn Cent.*, 438 U.S. at 124-25). The provisions of the Endowment Act do not implicate the “significant factor” test.

The NCAA avoids acknowledging that the penalty payments originated from the general fund of a state-supported university. By enacting the regulatory framework embodied in the Endowment Act, the General Assembly was plainly exercising its police power – controlling the expenditure of public funds by state-supported universities. When the General Assembly legislates pursuant to its general police power, it may regulate all manner of subjects “to promote health, safety and general welfare and . . . [is not required to] compensate[e] . . . [a] property owner, even if there is an actual taking or destruction of property . . . .” *Machipongo Land & Coal Co. v. Dep’t of Env’tl. Res.*, 676 A.2d 199, 202 (Pa. 1996) (quoting *Redevelopment Auth. of Oil City v. Woodring*, 445 A.2d 724, 727 (Pa. 1982)). Moreover, the background presumption is that “the General Assembly intends to favor the public interest as against any private interest.” 1 Pa. C.S. § 1922(5).

The Endowment Act’s assignment of fiduciary responsibility to the Treasurer and to the Pennsylvania Commission on Crime and Delinquency protects the general welfare by, among other things, ensuring the proper use of public funds by state institutes of higher educations, requiring that the Treasurer “invest the money in the endowment subject to the prudent investor provisions” and that the Commission expend “not more than 50% of” the fine annually “during the first five years[.]” 24 P.S. § 7503(b)(1), (b)(5)(i). Importantly, it does not deprive any person or entity (including the NCAA) of its expected use.

#### **IV. The Endowment Act Does Not Violate The Contracts Clause.**

The NCAA’s final claim is that the Endowment Act impermissibly interferes with its contractual rights under the Consent Decree. Presupposing the validity of the Consent Decree under state law, the NCAA asserts the provisions of the Endowment Act substantially impair the imposed contractual relationship between the NCAA and PSU. As recognized by Commonwealth Court, the NCAA is unable to identify any contractual impairment beyond the disputed assertions that there was an “expectation” to support child abuse treatment and prevention programs outside the Commonwealth. *Corman I* at 1171.

Article I, Section 10 of the United States Constitution provides, that “[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .” U.S.

Const. art. I, § 10, cl. 1. To establish a Contracts Clause violation, the NCAA must demonstrate that the Endowment Act “operate[s] a substantial impairment of a contractual relationship.” *Am. Express Travel Related Servs. v. Sidamon-Eristoff*, 669 F.3d 359, 368 (3d Cir. 2012) (internal quotation marks and citation omitted) (emphasis added). This means, for the NCAA to prevail, this Court must determine “(1) [that there] there is a contractual relationship; (2) . . . [that] a [subsequent] change in a law . . . impaired that contractual relationship; and (3) . . . [that] the impairment is substantial.” *Schimes v. Barrett*, 427 F. App’x 138, 142 (3d Cir. 2011) (alterations in original) (quoting *Transport Workers Union, Local 290 v. SEPTA*, 145 F.3d 619, 621 (3d Cir. 1998)). Additionally, even if these conditions were satisfied, the NCAA must establish that the Endowment Act lacks any legitimate and important public purpose and that the adjustment of the parties’ contractual relationship was unreasonable in light of such purpose. *Sidamon-Eristoff*, 669 F.3d at 368-69.

The NCAA argues that the Endowment Act substantially impairs the Consent Decree and was “plainly” not enacted for a legitimate and important public purpose. Mem. in Supp. of Pl.’s Mot. for J. on Pleadings at 19-20. The facts are clear, the Endowment Act does not substantially impair the contractual relationship between PSU and the NCAA. Rather, the Act only impacts a single portion (the manner in which the Endowment Fund is allocated) of a

comprehensive remedial action agreement. The following provisions remain unaffected: (1) ban on participation in postseason play in football; (2) reduction of grants-in-aid; (3) five years of probation; (4) vacating of football wins since 1998; (5) waiver of transfer rules and grant-in-aid retention; (6) allowing the NCAA to determine further individual penalties; (7) adopting all recommendations in the Freeh Report; (8) implementing the Athletics Integrity Agreement in the Freeh Report; (9) creation of a Compliance Officer for the Athletic Department; (10) creation of a Compliance Council for the Athletic Department; (11) creation of a Disclosure Program; (12) establishing procedures and personnel for Internal Accountability and Compliance Certifications; (13) establishing annual certification process to Board of Trustees and NCAA; (14) creating or updating an Athletics Code of Conduct; (15) providing ethics training and education for all persons associated with the Athletic Department; and (16) appointing an independent Athletics Integrity Monitor.

Even as it pertains to the penalty payment, the Endowment Act does not alter: (1) the amount of the fine; (2) the minimum payment amount; (3) the purpose for the funds' use (programs preventing child sexual abuse and/or assisting the victims of child sexual abuse); (4) its structure as an endowment fund; or (5) prohibiting any sponsored athletic team budget paying the fine. Its sole impact is

to provide for the custodial safeguarding of the fund and direct the manner in which funds are allocated. Period.

With respect to the Consent Decree, the pleadings do not establish that spending the fine money nationwide was an “important purpose” of the Agreement, and PSU did not “expressly affirm[]” that the endowment funds would be spent nationwide. *See* Mem. in Supp. of Pl.’s Mot. for J. on Pleadings at 19. Rather, the pleadings establish only that the PSU President issued a press release in which he explained that “[a]s part of” the Consent Decree, “the NCAA mandated that Penn State become a national leader to help victims of child sexual assault across the nation.” *See* Compl. ¶¶43, 44 (emphasis added); McCord Answer ¶¶ 43, 44. Neither this statement nor the Consent Decree establish a common agreement that the Endowment funds be spent nationwide, outside of the Commonwealth. Significantly, if it did, the Endowment Act would not prevent this expenditure. 24 P.S. § 7503(b)(4).

The Endowment Act functions as a supplement to voluntary agreements between public institutions of higher education and governing bodies, providing certain default terms when the parties’ agreement is otherwise silent as it pertains to the expenditure of public funds. For example, if the agreement states the purposes for the monetary penalty, then the funds placed in the Endowment Trust Fund must be spent to support those purposes. *See* 24 P.S. 7505(b)(3). Similarly,

if the agreement specifies where funds may be used, the Endowment Act permits them to be spent in those locations; if the agreement does not specify, the Endowment Act directs that the funds are to be prioritized for use in the Commonwealth. *See* 24 P.S. § 7503(b)(4) (“Unless otherwise expressly stated in the agreement, the funds may only be used within this Commonwealth...” (emphasis added)); *see also Corman I*, 74 A.3d at 1171 (“Because the Consent Decree is silent as to the establishment and control of the subject endowment, and the Endowment Act does not interfere with PSU's Consent Decree obligations . . . the Endowment Act does not impair the contractual relationship between the NCAA and PSU.”).

The NCAA provides no basis to support a finding that the Endowment Act substantially impairs an important purpose of the Consent Decree, is unreasonable and improper, or otherwise lacks a legitimate or important public purpose.

## **CONCLUSION**

WHEREFORE, for these reasons, Pennsylvania Treasurer Robert M. McCord requests that this Court deny the NCAA’s Motion for Judgment on the Pleadings.

Respectfully submitted,

COMMONWEALTH OF  
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**CERTIFICATE OF COMPLAINT WITH LOCAL RULE 7.8(b)(2)**

I hereby certify that this brief complies with the word-count limit described in Local Rule 7.8(b)(2). This brief contains 4,996 words, excluding the title page, table of contents, table of authorities and the signature block.

Date: October 23, 2014

/s/ Christopher B. Craig