KANSAS STATE UNIVERSITY
FOUNDATION
BOLDLY ADVANCING K-STATE FAMILY

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Members of the Senate Committee
on Federal and State Affairs
Kansas State Capitol
Room 144-S
Topeka, Kansas

Re: Senate Bill 133

Mr. Chairman and Members of the Committee:

On behalf of The Kansas State University Foundation and other foundations that raise and manage critical funds for this state's universities, please consider the following testimony expressing our strong opposition to Senate Bill 133 concerning judicial enforcement of donor-imposed restrictions.

We have serious concerns that the proposed legislation would, if enacted, cause substantial confusion and be a significant drain on charitable organizations' focus and resources.

There are a lot of potential problems with SB 133, including the following:

- **The bill conflicts with existing Kansas laws that adequately protect donor intent while recognizing that circumstances change**. Kansas statutes already require charities to comply with donor restrictions. See KSA 58-3611, et seq., the Uniform Prudent Management of Institutional Funds Act ("UPMIFA"). This Kansas statute mirrors statutes adopted in nearly every state and permits a charity to seek court approval to modify the purposes of a restricted gift if the use of the gift has become "unlawful, impracticable, impossible to achieve or wasteful," provided that the gift must, in all circumstances, continue to be used for charitable purposes. The Kansas Attorney General must receive an opportunity to appear in any such court action, and in the case of funds of less than $50,000 and more than 10-years old, a charity may modify them after providing notice to the Attorney General unless the Attorney General objects.

  This current law in Kansas appropriately protects donor intent while providing vital mechanisms for charities to obtain relief in narrow circumstances. Endowment funds are intended to last for "perpetuity." Technological, demographic, and financial changes inevitably cause some donor restrictions to

become impossible to achieve or wasteful, and current law appropriately allows charities to seek court approval of changes.

SB 133 does not reference UPMIFA, appears to conflict with it, and would result in significant confusion. If enacted, SB 133 literally would allow a "legal representative" to challenge a determination made decades earlier by the Attorney General or a Kansas court applying UPMIFA.

- **The bill does not define "legal representative" of a single donor.** It does not require much imagination to envision a dispute among the donor's conservator, executor, surviving spouse, children or even more distant relatives as to whether a charity is administering an endowment in accordance with the donor's intent. The bill could be construed as giving each of them with standing to bring a suit. The bill provides no guidance as to who the charity needs to have consent to a change or even name in a proceeding brought under the proposed statute to seek a determination that the charity is administering the endowed fund in accordance with the donor's intent.

- **The bill does not address the possibility of multiple donors or multiple "legal representatives" of multiple donors to a single fund.** Very often, many donors will contribute to the same endowed fund. Of course, donors responding to the same appeal may have somewhat different understandings of how the funds will be used. The bill arguably would allow any donor—or any "legal representative" of any donor—to challenge the use of a particular fund even if that person's view is not representative of the many other donors (or legal representatives) who are satisfied with the use of the fund.

- **The bill creates a forum for expensive litigation that would drain charitable resources**. The bill would permit a donor—or a "donor's legal representative" (a term that is undefined)—to bring a lawsuit challenging a charity's use of an endowment fund—regardless of the size of the fund, when it was created, or the seriousness of the alleged misuse of the fund. KSU Foundation and its counterparts across the State manage hundreds, if not thousands of endowed funds which were raised over decades to support a wide array of purposes. The very significant expense of defending a lawsuit relating to merely one of these funds—even if it lacked merit—would divert needed charitable resources from the more productive uses that the organization's donors desired to support.

- **The bill could spawn time-consuming and expensive lawsuits relating to gifts made decades ago**. The bill would allow a donor or "the donor's legal representative" to file a lawsuit within six years after *discovery* of the alleged violation of a donor restriction. Because the bill is not expressly limited to funds created after the bill is enacted and lacks a definition of "donor's legal representative," the bill could potentially allow a donor—or even a donor's descendants—to challenge the administration of a charitable gift made decades earlier. Suppose the six year statute runs as to one generation of legal

representatives. Does it re-start as to the next generation even if there has not been any change in administration of the fund? As noted above, the cost of defending such a suit could be very significant and would reduce the funds available for charitable purposes. The apparent lack of any real statute of limitations on these claims stands in contrast to the statute of limitations for fraud claims in Kansas (two years after discovery with an outside limitation period of 10 years in most cases even if the fraud is not discovered during that period). Charities like other Kansans, need the certainty that these statutes of limitation provide so that they can plan their activities and maximize their resources.

- **The bill does not address the possibility of conflicts among solicitation materials and other gift documentation**. The bill does not address the possibility that the intent of a donor (or that of multiple donors to a particular endowed fund) may be expressed inconsistently. Suppose one donor writes a letter with a donation to a particular fund expressing the desire to have the fund administered in one way while another donor writes a will, or leaves a bequest in a will, which expresses a different intent. How is this resolved? Under the bill the only recourse would be expensive litigation.

- **Donor intent is often difficult to interpret**. Especially with the passage of time and changing circumstances, the intent of a donor, even if reflected in a written instrument, is often susceptible to multiple interpretations. Allowing a donor—or a donor's "legal representative"—a forum to challenge a charity's good-faith use of a restricted gift is bad public policy.

- **The bill does not recognize the challenges of named gifts**. The bill would allow a donor to seek "restoration or a change to a name required by the donor-imposed restrictions." Charities take very seriously any decision to change the name of a program or property named in honor of a donor. However, there are many examples of information coming to light about a donor making it inappropriate, and damaging to the institution's reputation, to continue to honor the donor. As just two examples, Seton Hall and the University of Missouri received named gifts from Dennis Kozlowski and Ken Lay, respectively, who were each later convicted of serious financial crimes. In addition, physical assets named for donors wear out over time and must be replaced. The bill does not recognize these realities.

- **The bill would allow a donor to direct transfer of an endowment fund to another institution**. If a donor brought a successful challenge to a charity's use of a fund, the bill would authorize the court to order transfer of the endowment fund to another charitable organization "as directed by the donor." This could have very disruptive and harmful financial consequences for charitable organizations.

- **To make a tax-deductible charitable contribution, the donor must part with control of the gift**. To make a completed gift deductible for tax purposes,

donors must part with control of the gift. The bill would allow donors an ongoing right to challenge a charity's use of a gift and potentially have that gift redirected to another institution. This is inconsistent with the concept of a completed gift.

KSU Foundation and its peers in Kansas have a deep respect and appreciation for our generous donors, the requirements of existing law, and the practical reality that respecting donors' wishes is critical to our future ability to raise funds. SB 133 is not necessary to protect donors' wishes and would very likely result in costly litigation.

We urge the Committee not to advance this bill.

Sincerely,

The Kansas State University Foundation

By: 

Greg Willems,
President & CEO