

IN THE SUPREME COURT OF OHIO

BOARD OF TRUSTEES OF THE	:	Supreme Court Case No. 10-0118
TOBACCO USE PREVENTION AND	:	
CONTROL FOUNDATION, et al.,	:	On Appeal from the Franklin
	:	County Court of Appeals,
Plaintiffs-Appellants,	:	Tenth Appellate District
v.	:	
	:	Court of Appeals Case Nos.
KEVIN L. BOYCE,	:	09AP-768, 09AP-785,
TREASURER OF STATE, et al.,	:	09AP-832
	:	
Defendants-Appellants.	:	

ROBERT G. MILLER, JR., et al.,	:	
	:	
Plaintiffs-Appellants,	:	On Appeal from the Franklin
v.	:	County Court of Appeals,
	:	Tenth Appellate District
	:	
STATE OF OHIO, et al.,	:	Court of Appeals Case Nos.
	:	09AP-769, 09AP-786,
Defendants-Appellees.	:	09AP-833

**MEMORANDUM IN SUPPORT OF JURISDICTION BY AMICI CURIAE
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AMERICAN HEART ASSOCIATION, THE AMERICAN HEART
ASSOCIATION GREAT RIVERS AFFILIATE, THE AMERICAN LUNG
ASSOCIATION, THE AMERICAN LUNG ASSOCIATION OF THE MIDLAND
STATES, THE AMERICAN CANCER SOCIETY OHIO DIVISION, THE
AMERICAN CANCER SOCIETY CANCER ACTION NETWORK, THE
ASSOCIATION OF OHIO HEALTH COMMISSIONERS, THE CAMPAIGN FOR
TOBACCO-FREE KIDS, THE OHIO PUBLIC HEALTH ASSOCIATION AND
THE OHIO STATE MEDICAL ASSOCIATION**

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**I. EXPLANATION OF WHY THIS IS A CASE THAT INVOLVES
SUBSTANTIAL CONSTITUTIONAL ISSUES AND IS ONE OF PUBLIC
OR GREAT GENERAL INTEREST**

Pursuant to S. Ct. Prac. R. III, § 5, Amici Curiae, The Academy Of Medicine Of Cleveland & Northern Ohio, The American Heart Association, The American Heart Association Great Rivers Affiliate, The American Lung Association, The American Lung Association Of The Midland States, The American Cancer Society Ohio Division, The American Cancer Society Cancer Action Network, The Association Of Ohio Health Commissioners, The Campaign For Tobacco-Free Kids, The Ohio Public Health Association, and The Ohio State Medical Association submit this memorandum to urge the Supreme Court to accept jurisdiction in the above-captioned case because it involves substantial constitutional questions, S. Ct. Prac. R. II, § 1(A)(2) and “question[s] of public or great general interest.” S.Ct. Prac. R. II, §1(A)(3). In particular, the resolution of the constitutional question of whether the General Assembly has the power to divert the funds from the Ohio Tobacco Use Prevention and Control Endowment Fund (“Endowment Fund”) – a permanent trust fund created outside of the state treasury – has grave implications for the lives and health of literally hundreds of thousands of Ohioans, both adults and children. Amici respectfully submit that it is of the utmost importance for the Supreme Court to review this case and reinstate the injunction issued by the trial court requiring that the Endowment Fund be used for its intended purpose: support of tobacco prevention and cessation programs for the benefit of Ohioans. In the absence of such injunction, the funds will be used for other purposes to the great detriment to the health of Ohioans and the fiscal well-being of Ohio.

Amici are state and national voluntary and professional organizations dedicated to promoting and protecting the public health. Each has detailed knowledge and expertise

regarding the devastating impact that tobacco use has on the lives and health of Ohioans and the economy of Ohio, the important public health successes of the programs supported by the Endowment Fund, and the consequences to Ohioans and Ohio should the work supported by the Endowment Fund be permanently ended.

A. TOBACCO USE HAS DEVASTATING HEALTH AND FISCAL CONSEQUENCES FOR THE NATION AND FOR OHIO

Tobacco use is the leading cause of preventable death in the United States, causing more than 400,000 premature deaths each year.¹ The annual number of deaths due to cigarette smoking is substantially greater than the combined annual number of deaths due to illegal drug use, alcohol consumption, automobile accidents, fires, homicides, suicides, and AIDS.² In Ohio, approximately 18,600 people die prematurely every year from a tobacco-related disease resulting in over 264,000 years of life lost.³ Nearly 400,000 Ohioans suffer from at least one smoking attributable illness.⁴

Smoking causes cardiovascular disease (including heart attacks), coronary heart disease, emphysema, aortic aneurysms, lung cancer, bladder cancer, esophageal cancer, kidney cancer, laryngeal cancer, oral cancer, pancreatic cancer, acute myeloid leukemia, stomach cancer, cervical cancer, among other diseases.⁵ Smoking during pregnancy and infant exposure to tobacco smoke causes poor birth outcomes, such as prematurity, low birth weight, respiratory problems in the newborn and sudden infant death syndrome.⁶

¹ U.S. Centers for Disease Control and Prevention, *Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses—United States, 2000-2004*. MMWR 2008; 57(45);1226-1228.

² *U.S. v. Philip Morris*, 449 F.Supp.2d 1, 146 (D.D.C. 2006).

³ U.S. Centers for Disease Control and Prevention, *State-Specific Smoking-Attributable Mortality and Years of Potential Life Lost—United States, 2000-2004*. MMWR 2009; 58(02);29-33.

⁴ A. Hyland *et al.*, Roswell Park Cancer Institute, *Cigarette Smoking-Attributable Morbidity by State* (2003), available at http://roswell.tobaccodocuments.org/morbidity/morbidity_by_state.htm

⁵ Office on Smoking and Health, U.S. Centers for Disease Control and Prevention, *The Health Consequences of Smoking: A Report of the Surgeon General* (2004).

⁶ Institute of Medicine, *Ending the Tobacco Problem: A Blueprint for the Nation*, 29 (2007).

Exposure to secondhand smoke causes heart disease, lung cancer, and a myriad of other health problems.⁷

Tobacco's toll of death and disease imposes enormous economic burdens on the United States as a whole and on Ohio. According to the Centers for Disease Control and Prevention, national private and public health care expenditures for smoking related health conditions amount annually to an estimated \$96 billion with lost productivity accounting for another \$97 billion.⁸ Tobacco-related health care costs in Ohio, alone, amount to \$4 billion every year.⁹ Lost productivity due to smoking costs Ohio another \$4.8 billion annually.¹⁰ Because Medicaid eligible adults smoke at much higher rates than the population in general, tobacco-related disease places a particular burden on the Medicaid program. The Institute of Medicine estimates that, nationally, smoking causes \$28.4 billion in federal and state payments to Medicaid.¹¹ Ohio would save a projected \$550 million over five years if all of its Medicaid recipients stopped smoking.¹²

B. THE VAST MAJORITY OF SMOKERS BECOME ADDICTED AS TEENS

The public importance of the issues presented in this case is heightened by the fact that smoking is in many ways properly characterized as a pediatric epidemic,

⁷ U.S. Centers for Disease Control and Prevention Fact Sheet, *Secondhand Smoke Causes Heart Disease* (updated May 29, 2009) (reporting that between 22,700 and 69,000 people die each year as a result of heart disease caused by secondhand smoke); U.S. Centers for Disease Control and Prevention Fact Sheet, *Secondhand Smoke Causes Lung Cancer* (updated May 29, 2009); U.S. Centers for Disease Control and Prevention Fact Sheet, *Secondhand Smoke Causes Sudden Infant Death Syndrome* (updated May 29, 2009).

⁸ U.S. Centers for Disease Control and Prevention, *Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses—United States, 2000-2004*. MMWR 2008; 57(45):1226-1228.

⁹ Campaign for Tobacco Free Kids, *A Broken Promise to Our Children: The 1998 State Tobacco Settlement 11 Years Later* (2009).

¹⁰ U.S. Centers for Disease Control and Prevention, *Data Highlights 2006* (and underlying CDC data/estimates); U.S. Centers for Disease Control and Prevention's STATE System average annual smoking attributable productivity losses from 1997-2001 (1999 estimates updated to 2004 dollars); U.S. Centers for Disease Control and Prevention, *State-Specific Smoking-Attributable Mortality and Years of Potential Life Lost – United States, 2000-2004*, (MMWR) 58(2), January 22, 2009.

¹¹ Institute of Medicine, *Ending the Tobacco Problem: A Blueprint for the Nation*, 30 (2007).

¹² American Legacy Foundation, *Saving Lives, Saving Money II*. (2007).

overwhelmingly fueled by teenagers who are too young to appreciate the consequences of their actions and who then become life-long addicts. Nearly 80% of life-long smokers start before the age of eighteen and nearly 90% start before they turn twenty.¹³ The tobacco industry has long understood that “the base of [its] business is the high school student”¹⁴ and has aggressively marketed its deadly products to the young people it has chillingly described as “replacement” smokers.¹⁵ One-third of these teen smokers will die prematurely from a smoking-attributable illness.¹⁶ Congress explicitly based the recently enacted Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009), on findings regarding the grave impact of smoking on youth, *see, e.g.*, Sec. 2 (1) (“The use of tobacco products by the nation’s children is a pediatric disease of considerable proportions that results in new generations of tobacco-dependent children and adults”); Sec. 2 (4) (“Virtually all new users of tobacco products are under the minimum legal age to purchase such products”).

C. THE SCIENCE-BASED PROGRAMS SUPPORTED BY THE ENDOWMENT FUND SAVE LIVES AND MONEY

Smoking is a powerful addiction that, once in place, is extremely difficult to overcome. While more than 70% of smokers say that they want to quit, only about 5% are successful for three months or more in any given year.¹⁷ This is due in substantial part to very high relapse rates and the erroneous, although widely held, view that quitting is simply a matter of will power. But there is a growing body of scientific knowledge regarding specific services and supports that will help smokers successfully quit. There

¹³ Calculated based on data in Substance Abuse and Mental Health Services Administration (SAMHSA), *Results from the 2006 National Survey on Drug Use and Health (NSDUH)* (2007).

¹⁴ *U.S. v. Philip Morris*, 449 F.Supp.2d 1, 596 (D.D.C. 2006).

¹⁵ *Id.* at 28, 852.

¹⁶ Office on Smoking and Health, U.S. Centers for Disease Control and Prevention, *The Health Consequences of Smoking: A Report of the Surgeon General* 873 (2004).

¹⁷ U.S. Centers for Disease Control and Prevention, *Cigarette Smoking Among Adults, United States, 2000*. MMWR 2002; 51(29): 642-645.

is also a growing body of scientific knowledge about how to prevent young people from starting to smoke in the first place. The Endowment Fund-supported Ohio Tobacco Use Prevention and Control Foundation (“Foundation”), before its dissolution, was a national leader in implementing science-based, effective programs to help prevent young people from starting to smoke and to help smokers quit for good.

By way of just a few examples with which Amici are well-acquainted, the Foundation’s cessation programs included a highly effective telephone Quit Line reaching tens of thousands of Ohioans; sponsored in-person counseling programs; and the delivery of subsidized nicotine replacement therapies through an innovative public/private partnership. The Foundation’s youth countermarketing campaign, Stand, was widely credited with doing an excellent job of getting its tobacco prevention messages to and mobilizing youth. In both its adult and youth-focused programs, the Foundation importantly placed a particular emphasis on reaching those populations at most risk of tobacco dependence and tobacco-related death and disease. It worked closely and effectively with county and other public and private local organizations in order to build a successful tobacco control infrastructure. The Foundation also invested wisely in the statewide surveillance of tobacco use attitudes and behaviors among both adults and youth to assure the necessary framework to judge the success of its programs.

The clear evidence shows that the Foundation’s programs worked. In the all-important area of youth prevention, on the Foundation’s watch from 2000 to 2008, the smoking rate of Ohio high school students dropped 41%. During that same period the smoking rate of middle school students dropped an even more dramatic 64%.¹⁸

¹⁸ Tobacco Use Prevention and Cessation Program, Ohio Department of Health, *Ohio Youth Tobacco Survey, 2008*. (2009).

Also from 2000 to 2008, adult smoking rates in Ohio dropped by over 23%. As a result, there were approximately 450,000 fewer adult smokers in Ohio in 2008 than there were in 2000.¹⁹ This drop substantially exceeded the declines in smoking rates that were observed more generally--in fact, it was 50% more than the decrease in smoking rates in states contiguous to Ohio.²⁰ Amici estimate that, for the period 2000 to 2008, roughly 229,000 premature tobacco-related deaths were prevented in Ohio, thanks in large part to the Endowment Fund's investment in quality tobacco control programs.²¹

In addition to deaths averted, declines in smoking reap concrete health benefits and concomitant cost savings. Expert actuaries have estimated that insurance savings per quitter amount to \$213 in the first year and \$1,096 in the fifth year.²² These savings are achieved from lower rates of disease, for example, stroke, coronary heart disease and adult pneumonia among smokers. For smokers who quit, the added risk of heart attack drops 50% within one year and is the same as a non-smoker's after fifteen years. Lung function begins to improve after between two weeks and three months of stopping smoking and cancer risk begins a gradual decline. Ten years after quitting, a former smoker's risk of dying from lung cancer is half that of a smoker's.²³ Savings are also realized from lower rates of low birth weight babies and childhood ear infections among

¹⁹ U.S. Centers for Disease Control and Prevention, *Behavioral Risk Factor Surveillance System Survey Data* (2008) (Prevalence and Trends Data section, State: Ohio; Year: 2000; Category: Tobacco Use Question: Adults who are current smokers.); U.S. Census Bureau, *State and County Quickfacts: Ohio*, <http://quickfacts.census.gov/qfd/states/39000.html> (accessed January 8, 2010).

²⁰ U.S. Centers for Disease Control and Prevention, *Behavioral Risk Factor Surveillance System Survey Data* (2000 and 2008)

²¹ *Id.*; One half of life-time smokers will die prematurely from tobacco-related disease. Office on Smoking and Health, U.S. Centers for Disease Control and Prevention, *The Health Consequences of Smoking: A Report of the Surgeon General* 873 (2004).

²² Kate Fitch, Kosuke Iwasaki, & Bruce Pyenson, Milliman, Inc., *Covering Smoking Cessation as a Health Benefit: A Case for Employers* (2006), available at http://www.ctri.wisc.edu/Employers/Legacy_coverage_tob_treat.pdf.

²³ See generally Office on Smoking and Health, U.S. Centers for Disease Control and Prevention, *The Health Consequences of Smoking: What it Means to You* (2004).

smokers' children.²⁴ Increasing cessation rates also lowers the high costs of lost productivity due to tobacco-related disease. With fewer smokers, second hand smoke becomes less pervasive and less of a danger to non-smokers, and young people who do not start smoking largely avoid smoking-related diseases.

II. THE INTERESTS OF THE AMICI CURIAE

Amici Curiae include the following organizations:

The Academy of Medicine of Cleveland & Northern Ohio (AMCNO) is a professional nonprofit trade association, which was first established in 1824, representing more than 5,000 physicians, medical residents, medical students and physician groups from the contiguous counties in the Northern Ohio region. Its mission is to support physicians as strong advocates for all patients and to promote the practice of the highest quality medicine. The AMCNO is dedicated to building healthier lives, free of heart disease and stroke, eliminating cancer and protecting patients through education, advocacy and the promotion of public health initiatives.

The American Cancer Society (ACS) is the nationwide community-based voluntary health organization dedicated to eliminating cancer as a major health problem through research, education, advocacy and service. Research conducted by ACS was instrumental in establishing the original link between tobacco use and cancer. ACS Ohio Division is our chartered affiliate in the state. **The American Cancer Society Cancer Action Network (ACS CAN)**, the nonprofit, nonpartisan advocacy affiliate of the ACS, supports evidence-based policy solutions designed to eliminate cancer as a major health problem. ACS Ohio Division and ACS CAN have volunteer advocates who work to promote effective tobacco control policies throughout the state.

²⁴ *Id.*

The American Heart Association is the nation's oldest and largest voluntary health organization dedicated to building healthier lives, free of cardiovascular diseases and stroke. The AHA's involvement in tobacco prevention and cessation advocacy and education stems from the fact that smoking is a major preventable risk factor for the nation's number one and number three killers, heart disease and stroke.

The American Lung Association is the nation's oldest voluntary health organization, with 450,000 volunteers and affiliates in all 50 states and the District of Columbia. The American Lung Association of the Midland States is our chartered association for Ohio. Because cigarette smoking is a major cause of lung cancer and chronic obstructive pulmonary disease, the American Lung Association has long been active in research, education and public policy advocacy on the adverse health effects of tobacco products. The American Lung Association advocates for fully funding state tobacco prevention and cessation programs at levels recommended by the Centers for Disease Control and Prevention as one part of a comprehensive approach to reducing the terrible burden caused by tobacco use.

The Association of Ohio Health Commissioners (AOHC) is a non-profit organization whose membership consists of Health Commissioners and Administrators from almost every local health district in Ohio. The mission of AOHC is to lead Ohio's public health community by collaborating with its stakeholders to provide legislative and administrative leadership and by providing public health professionals with a forum for dialogue and continuing education. The AOHC works to strengthen the state of Ohio's public health system and to protect its citizens against the disease threats of today by promoting a vision for the future of healthy people in healthy communities in Ohio.

The Campaign for Tobacco-Free Kids is a 501(c)(3) nonprofit with more than 100 member organizations that works to promote public and private policies to prevent and reduce tobacco use and its harms, especially among youth. As one important part of that work, the Campaign tries to ensure that states use their tobacco settlement funds effectively to address smoking-caused disease, prevent tobacco use among youth, and reduce smoking-caused harms and costs.

The Ohio Public Health Association (OPHA) is Ohio's oldest statewide professional public health association and collectively represents diverse public health disciplines, friends of public health, and those interested in public health issues. As the Ohio affiliate of the American Public Health Association and a professional society for those engaged or interested in public health, our mission is to create and sustain an environment and infrastructure to achieve the optimal health of every Ohioan.

The Ohio State Medical Association (OSMA) is a non-profit professional association founded in 1835, and is comprised of approximately 20,000 physicians, medical residents, and medical students in the State of Ohio. The OSMA's membership includes most Ohio physicians engaged in the private practice of medicine, in all specialties. The OSMA strives to improve public health through education, to encourage interchange of ideas among members and to maintain and advance the standards of practice by requiring members to adhere to the concepts of professional ethics.

III. STATEMENT OF FACTS AND THE CASE

Amici adopt and incorporate the Statement Of Facts And The Case set forth in Appellants Robert G. Miller, Jr., David W. Weinmann, and American Legacy Foundation's Memorandum In Support of Jurisdiction.

IV. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The Retroactivity Clause of the Ohio Constitution, Article II, § 28, prohibits the General Assembly from divesting the equitable trust estate of, and depleting the previously disbursed monies held in, the Ohio Tobacco Use Prevention and Control Endowment Fund, which the General Assembly specifically established and funded in 2000 as a permanent trust outside the state treasury for lifesaving tobacco prevention and cessation programs.

Proposition of Law No. II: House Bill 544's purported liquidation and depletion of the Endowment Fund violates the Contracts Clauses of the United States Constitution, Article I, § 10, and the Ohio Constitution, Article II, § 28, by substantially impairing pre-existing trust rights and obligations.

Proposition of Law No. III: The State cannot take advantage of its own misconduct by deliberately setting up the very open meetings infractions that the State now claims invalidate the contract the Tobacco Use Prevention and Control Foundation entered into with American Legacy Foundation for the continuation of tobacco prevention and cessation programs in Ohio.

Amici adopt and incorporate the arguments in support of the three propositions of law set forth in Appellants' Robert G. Miller, Jr., David W. Weinmann, and American Legacy Foundation's Memorandum in Support of Jurisdiction.

V. CONCLUSION

The public health issues inherent in this case have profound implications for the people of Ohio and for the nation as a whole. Amici respectfully urge the Supreme Court to hear this case because it involves substantial constitutional questions and due to the great public importance of the issues presented.

Respectfully submitted,

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