

ORIGINAL

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

FILED
MAY 04 2010
CLERK OF COURT
SUPREME COURT OF OHIO

**BRIEF OF THE AMICI CURIAE LISTED BELOW
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

- | | |
|---|--|
| THE ACADEMY OF MEDICINE OF
CLEVELAND & NORTHERN OHIO | THE AMERICAN HEART ASSOCIATION |
| THE AMERICAN HEART
ASSOCIATION GREAT RIVERS
AFFILIATE | THE AMERICAN LUNG ASSOCIATION OF
THE MIDLAND STATES |
| THE AMERICAN LUNG ASSOCIATION | 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 |
| THE OHIO STATE MEDICAL
ASSOCIATION | THE AMERICAN MEDICAL ASSOCIATION |

James E. Arnold (0037712)
R. Gregory Smith (0071493)
James E. Arnold & Associates, LPA
115 W. Main Street, Fourth Floor
Columbus, Ohio 43215
(614) 460-1610

Counsel for Amici Curiae

Alexandra T. Schimmer (0075732)
Richard N. Coglianesi (0066830)
Aaron Epstein (0063286)
Assistant Attorneys General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
(614) 466-2872

Counsel for Defendants-Appellees
State of Ohio and Attorney General

Katherine J. Bockbrader (0066472)
Assistant Attorney General
Health & Human Services Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215-3428
(614) 466-8600

Counsel for Defendants-Appellees
The Ohio Department of Health and its
Director Alvin D. Jackson

John W. Zeiger (0010707)
Stuart G. Parsell (0063510)
Zeiger, Tigges & Little LLP
41 South High Street, Suite 3500
Columbus, Ohio 43215
(614) 365-9900

Counsel for Plaintiffs-Appellants

Robert G. Miller, Jr., David W. Weinmann, and
American Legacy Foundation
Damian Sikora (0075224)
Assistant Attorney General
Constitutional Offices
30 East Broad Street, 16th Floor
Columbus, Ohio 43215-3400
(614) 466-2872

Counsel for Defendant-Appellee
Ohio Treasurer of State

Steven McGann (0075476)
Assistant Attorney General
Court of Claims Section
150 East Gay Street, 23rd Floor
Columbus, Ohio 43215
(614) 723-5470

Counsel for Plaintiff Board of Trustees of The
Tobacco Use Prevention and Control Foundation

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
A. Tobacco Use Has Devastating Health And Fiscal Consequences For The Nation And For Ohio.....	1
B. The Vast Majority of Smokers Become Addicted As Teens.....	3
C. The Science-Based Programs Supported By The Endowment Fund Save Lives And Money.....	4
THE INTERESTS OF THE AMICI CURIAE.....	7
STATEMENT OF FACTS AND THE CASE.....	10
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....	11
<u>Proposition of Law No. 1:</u> 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.....	11
<u>Proposition of Law No. 2:</u> 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.....	11
<u>Proposition of Law No. 3:</u> 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.....	15
CONCLUSION.....	15
CERTIFICATE OF SERVICE.....	16

TABLE OF AUTHORITIES

Page

U.S. Centers for Disease Control and Prevention, <i>Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses—United States, 2000-2004</i> . MMWR 2008: 57(45):1226-1228	2, 3
<i>U.S. v. Philip Morris</i> , 449 F.Supp.2d 1 (D.D.C. 2006).....	2, 4
U.S. Centers for Disease Control and Prevention, <i>State-Specific Smoking-Attributable Mortality and Years of Potential Life Lost—United States, 2000-2004</i> . MMWR 2009: 58(02); 29-33	2
A. Hyland, <i>et al.</i> , Roswell Park Cancer Institute, <i>Cigarette Smoking-Attributable Morbidity by State</i> (2003), available at http://roswell.tobaccodocuments.org/morbidity/morbidity_by_state.htm	2
Office on Smoking and Health, U.S. Centers for Disease Control and Prevention, <i>The Health Consequences of Smoking: A Report of the Surgeon General</i> (2004)	2
Institute of Medicine, <i>Ending the Tobacco Problem: A Blueprint for the Nation</i> , 29 (2007)	2
U.S. Centers for Disease Control and Prevention Fact Sheet, <i>Secondhand Smoke Causes Heart Disease</i> (updated May 29, 2009); U.S. Centers for Disease Control and Prevention Fact Sheet, <i>Secondhand Smoke Causes Lung Cancer</i> (updated May 29, 2009); U.S. Centers for Disease Control and Prevention Fact Sheet, <i>Secondhand Smoke Causes Sudden Infant Death Syndrome</i> (updated May 29, 2009)	2
U.S. Centers for Disease Control and Prevention, <i>Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses—United States, 2000-2004</i> . MMWR 2008: 57(45); 1226-1228	3
Campaign for Tobacco Free Kids, <i>A Broken Promise to Our Children: The 1998 State Tobacco Settlement 11 Years Later</i> (2009).....	3
Institute of Medicine, <i>Ending the Tobacco Problem: A Blueprint for the Nation</i> , 30 (2007)	3
U.S. Centers for Disease Control and Prevention, <i>Data Highlights 2006</i>	3
American Legacy Foundation, <i>Saving Lives, Saving Money II</i> (2007).....	3
Substance Abuse and Mental Health Services Administration (SAMHSA), <i>Results from the 2006 National Survey on Drug Use and Health (NSDUH)</i> (2007)	3
Office on Smoking and Health, U.S. Centers for Disease Control and Prevention, <i>The Health Consequences of Smoking: A Report of the Surgeon General</i> 873 (2004).....	4, 6

U.S. Centers for Disease Control and Prevention, <i>Cigarette Smoking Among Adults, United States, 2000</i> . MMWR 2002: 51(29): 642-645	4
Farrelly, MC, <i>et al.</i> , "The Impact of Tobacco Control Programs on Adult Smoking," <i>American Journal of Public Health</i> 98:304-309, February 2008	5, 7
Farrelly, MC, <i>et al.</i> , "The impact of tobacco control program expenditures on aggregate cigarette sales: 1981-2000," <i>Journal of Health Economics</i> 22: 843-859, 2003	5, 7
Tauras, JA, <i>et al.</i> , "State Tobacco Control Spending and Youth Smoking," <i>American Journal of Public Health</i> 95:338-344, February 2005	5, 7
Hyland, A., <i>et al.</i> , "State and Community Tobacco-Control Programs and Smoking – Cessation Rates Among Adult Smokers: What Can We Learn From the COMMIT Intervention Cohort?" <i>American Journal of Health Promotion</i> 20(4):272, April/March 2006	5, 7
Tobacco Use Prevention and Cessation Program, Ohio Department of Health, <i>Ohio Youth Tobacco Survey, 2008</i> . (2009)	6
U.S. Centers for Disease Control and Prevention, <i>Behavioral Risk Factor Surveillance System Survey Data</i> (2008) (Prevalence and Trends Data section, State: Ohio; Year: 2000; Category: Tobacco Use Question: Adults who are current smokers.); U.S. Census Bureau, <i>State and County Quickfacts: Ohio</i> , http://quickfacts.census.gov/qfd/states/39000.html	6
U.S. Centers for Disease Control and Prevention, <i>Behavioral Risk Factor Surveillance System Survey Data</i> (2000 and 2008)	6
Office on Smoking and Health, U.S. Centers for Disease Control and Prevention, <i>The Health Consequences of Smoking: A Report of the Surgeon General</i> 873 (2004)	6
Kate Fitch, Kosuke Iwasaki, & Bruce Pyenson, Milliman, Inc., <i>Covering Smoking Cessation as a Health Benefit: A Case for Employers</i> (2006), available at http://www.ctri.wisc.edu/Employers/Legacy_coverage_tob_treat.pdf	6
Office on Smoking and Health, U.S. Centers for Disease Control and Prevention, <i>The Health Consequences of Smoking: What it Means to You</i> (2004)	7
Campaign for Tobacco-Free Kids, <i>A Win-Win Solution for Ohio's Health and Economy: Raise the Tobacco Tax to Fund Economic Stimulus and Preserve Tobacco Prevention Programs</i> , April 2008, http://tobaccofreekids.org/reports/prices/reports.shtml	7

INTRODUCTION

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, The Ohio State Medical Association and The American Medical Association submit this brief in support of the efforts of Plaintiffs-Appellants Robert G. Miller, Jr., David W. Weinmann, and American Legacy Foundation to enforce the constitutional restrictions against the State of Ohio's diversion of funds from the Ohio Tobacco Use Prevention and Control Endowment Fund ("Endowment Fund").

Amici respectfully submit that it is of the utmost importance for this Court to 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 unlawfully diverted to other purposes to the great detriment to the health of Ohioans and the fiscal well-being of Ohio.

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

The devastating effects of smoking on its participants, non-participants, and youth are indisputable, as are the benefits of education and cessation programs dedicated to reducing tobacco use. 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 coronary artery disease and heart attacks, aortic aneurism and peripheral vascular disease) emphysema, chronic bronchitis, 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 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

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).

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).

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. 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 Medicaid expenditures.¹⁰ According to the Centers for Disease Control and Prevention, the Ohio Medicaid program makes smoking-caused expenditures of approximately \$1.4 billion per year.¹¹ Despite the ongoing health harms from past smoking, Ohio would save a projected \$550 million over five years if all of its Medicaid recipients stopped smoking, and those Medicaid savings would grow much larger over time.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, 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

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

¹¹ U.S. Centers for Disease Control and Prevention, *Data Highlights 2006*.

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

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).

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 substantial body of scientific knowledge regarding specific services and supports that will help smokers successfully quit. There is also a growing body of scientific knowledge about how to prevent young people from starting to smoke in the first place. Studies show that increased funding for state tobacco prevention programs reduces cigarette consumption by both adult and youth. Perversely,

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.

reductions to state tobacco prevention programs increase overall smoking and the numbers of adults and youth who smoke.¹⁸

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

¹⁸ Farrelly, MC, *et al.*, “The Impact of Tobacco Control Programs on Adult Smoking,” *American Journal of Public Health* 98:304-309, February 2008; Farrelly, MC, *et al.*, “The impact of tobacco control program expenditures on aggregate cigarette sales: 1981-2000,” *Journal of Health Economics* 22: 843-859, 2003; Tauras, JA, *et al.*, “State Tobacco Control Spending and Youth Smoking,” *American Journal of Public Health* 95:338-344, February 2005; Hyland, A, *et al.*, “State and Community Tobacco-Control Programs and Smoking – Cessation Rates Among Adult Smokers: What Can We Learn From the COMMIT Intervention Cohort?” *American Journal of Health Promotion* 20(4):272, April/March 2006.

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%.¹⁹

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 2000.²⁰ 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.²¹ Amici conservatively estimate that, for the period 2000 to 2008, roughly 120,000 premature tobacco-related deaths were prevented in Ohio, thanks in large part to the Endowment Fund's investment in quality tobacco control programs.²² 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.²³ 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

¹⁹ Tobacco Use Prevention and Cessation Program, Ohio Department of Health, *Ohio Youth Tobacco Survey, 2008*. (2009).

²⁰ 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).

²¹ U.S. Centers for Disease Control and Prevention, *Behavioral Risk Factor Surveillance System Survey Data* (2000 and 2008) This CDC publication estimates that quitting smoking reduces the risk of premature death by 26.5% on average. Thus 450,000 fewer smokers yields approximately 120,000 fewer premature deaths. This is likely an underestimate as many of the 450,000 are not quit smokers but rather youth who were prevented from smoking and are 100% prevented from smoking related illness and death.

²² See, e.g., CDC, Projected Smoking-Related Deaths Among Youth -- United States, *MMWR* 45(44): 971-974, November 8, 1996.

²³ 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.

smoker's risk of dying from lung cancer is half that of a smoker's.²⁴ Savings are also realized from lower rates of low birth weight babies and childhood ear infections among smokers' children.²⁵ Increasing cessation rates also lowers the high costs of lost productivity due to tobacco-related disease. With fewer smokers, secondhand 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.

On the other hand, reductions to state efforts and expenditures to prevent and reduce tobacco use have been found to translate directly into increased tobacco use levels and increased tobacco use harms and costs.²⁶ Based on this research, the Campaign for Tobacco-Free Kids, one of the Amici Curiae, issued a report estimating that the withdrawal of funding for the Foundation's tobacco prevention efforts in 2008 would translate into approximately 8,200 more high school smokers in Ohio, increase the number of Ohio's children likely to grow up to be addicted adult smokers by 56,700, increase the number of Ohio residents dying prematurely from smoking by more than 23,000, and increase future healthcare costs in the state by \$992 million.²⁷

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

²⁴ 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).

²⁵ *Id.*

²⁶ Farrelly, MC, *et al.*, "The Impact of Tobacco Control Programs on Adult Smoking," *American Journal of Public Health* 98:304-309, February 2008; Farrelly, MC, *et al.*, "The impact of tobacco control program expenditures on aggregate cigarette sales: 1981-2000," *Journal of Health Economics* 22: 843-859, 2003; Tauras, JA, *et al.*, "State Tobacco Control Spending and Youth Smoking," *American Journal of Public Health* 95:338-344, February 2005; Hyland, A., *et al.*, "State and Community Tobacco-Control Programs and Smoking – Cessation Rates Among Adult Smokers: What Can We Learn From the COMMIT Intervention Cohort?" *American Journal of Health Promotion* 20(4):272, April/March 2006.

²⁷ Campaign for Tobacco-Free Kids, *A Win-Win Solution for Ohio's Health and Economy: Raise the Tobacco Tax to Fund Economic Stimulus and Preserve Tobacco Prevention Programs*, April 2008, <http://tobaccofreekids.org/reports/prices/reports.shtml>.

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.

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.

The American Medical Association (AMA) is an Illinois non-profit corporation founded in 1847 and is the largest association of physicians and medical students in the United States. Its physician members practice in every state and in all fields of medical specialization. The objects of the AMA are to promote the science and art of medicine and the betterment of public health. The AMA has developed expertise in the pharmacology of nicotine, the toxic effects of cigarette smoke, and the societal implications of tobacco usage. For many years, the AMA has been one of the leading anti-smoking organizations in the United States.

STATEMENT OF FACTS AND THE CASE

Amici adopt and incorporate the Statement of Facts set forth in the Merits Brief of Appellants Robert G. Miller, Jr., David W. Weinmann, and American Legacy Foundation.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: 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. 2: 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.

Ohio intentionally – and wisely – created the Tobacco Use Prevention and Control Endowment Fund as a trust, with its assets out of the reach of the state's legislative power.

Forty-six states entered into the historic Master Settlement Agreement with the tobacco companies in November, 1998. Ohio shortly turned to the question of how to spend the billions of dollars that it would receive as a result of the settlement.²⁸ The process began with Governor Taft who, in his March 9, 1999, State of the State address called for the creation of a bipartisan task force to make recommendations to him and the General Assembly on how to best use the MSA dollars. The Tobacco Settlement Task Force (Task Force) held 14 public meetings, heard from 60 witnesses and held several deliberative meetings. The Final Report of the Governor's Tobacco Task Force to Governor Taft and the Leadership and Members of the Ohio General Assembly was

²⁸ The language of the Master Settlement Agreement indicates that its intent was that a significant amount of the payments to each of the states would be allocated to promote public health and prevent and reduce smoking and other tobacco use, especially among youth. The final "Whereas" clause in the Agreement states that the settling states and the manufacturers participating in the agreement "have agreed to settle their respective lawsuits and potential claims pursuant to terms which will achieve for the Settling States and their citizens significant funding for the advancement of public health, the implementation of important tobacco-related public health measures, including the enforcement of the mandates and restrictions related to such measures, as well as funding for a national Foundation dedicated to significantly reducing the use of Tobacco Products by Youth." [Master Settlement Agreement, November 23, 1998, Section I, page 2, available online at <http://www.naag.org/backpages/naag/tobacco/msa>, accessed September 23, 2009.]

approved by the task force on September 29, 1999, and the formal report issued on Oct. 6, 1999.²⁹

The Task Force determined that a portion of the settlement proceeds should be permanently set aside and committed to a charitable foundation for funding tobacco control programs in Ohio. To accomplish this, the Task Force recommended a special trust fund established outside the state treasury to assure that these dedicated monies were beyond the control of the General Assembly and could not be diverted to other purposes in the future. Later in its report, the Task Force reiterated the idea that the charitable foundation's endowment should be separated from the state's funds: "The assets of the Foundation should be held outside of the State Treasury." *Id.* at 14.

The 123rd General Assembly adopted many of the Task Force's recommendations when it approved Senate Bill 192, including the establishment of the Foundation. Section 183.04 provides, "There is hereby created the Tobacco Use Prevention and Control Foundation, the general management of which is vested in a Board of Trustees." Continuing in section 183.08 (A): "There is hereby created the Tobacco Use Prevention and Control Endowment Fund, which shall be in the custody of the state ***but shall not be a part of the State Treasury.*** . . . The Foundation is the trustee of the endowment fund. Disbursements from the fund shall be paid by the Treasurer of the State only upon instruments duly authorized by the Board of Trustees of the Foundation." (emphasis added). And, finally in section 183.08 (B): "The Foundation shall be self-sustaining and should not expect to receive funding from the state beyond the amounts appropriated to it from the Tobacco Use Prevention and Cessation Trust Fund."

²⁹ Final Report of the Governor's Tobacco Task Force to Governor Taft and the Leadership and Members of the Ohio General Assembly, October 6, 1999.

The Task Force recommendations and the enabling legislation both intended and provided that the Tobacco Use Prevention and Control Foundation's endowment be separate from the State Treasury. To emphasize this independence, the legislation specifically grants the only authority to spend money in the Endowment Fund to the Foundation's Board of Trustees. The unequivocal intent was to insulate the money so it would only be used for the express purpose of tobacco prevention and cessation programs.

The structure of the legislation reinforces the intent of the legislature to shield these tobacco control funds from being used for other purposes. When the General Assembly passed the legislation creating the Foundation and the Endowment Fund, it enacted the recommendations of the Task Force to create other funds into which other settlement dollars would be paid. The purposes of these other funds included law enforcement improvements, public health priorities, biomedical research and technology, educational facilities, education technology, and agricultural and community development. These other funds were, unlike the Endowment Fund, explicitly created *within* the State Treasury. *See, e.g.*, R.C. §183.10 (creating "in the State Treasury" the law enforcement improvements fund); R.C. §183.18 (creating "in the State Treasury" Ohio's public health priorities fund); R.C. §183.19 (creating "in the State Treasury" the biomedical research and technology transfer fund); R.C. §183.26 (creating "in the State Treasury" the education facilities fund); R.C. §183.28 (creating "in the State Treasury" the education technology fund).

In contrast to these other funds created "in the State Treasury," S.B. 192 expressly created the "endowment fund" *outside* the State Treasury. *See* R.C. § 183.08. In the uncodified provisions of S.B. 192, the 123rd General Assembly, at Section 6, not only

appropriated \$234,861,033 of the then existing MSA monies for tobacco use prevention, but, in the same statutory provision, directed the Director of the Department of Health to “disburse” all of those monies to the Endowment Fund, created by R.C. § 183.08, that “shall not be a part of the State Treasury.”

While funds in the State Treasury funds could be (and often were) reappropriated for other purposes, the 123rd General Assembly intentionally transferred all of the tobacco cessation program monies out of an internal “fund” to an outside “endowment fund.” As such, the endowment fund monies were transferred outside the State Treasury and the reach of the State to reappropriate them for other purposes.

This structure makes abundant sense. The tobacco settlement dollars were meant to compensate the state for tobacco-related health costs and to reduce youth smoking. Accordingly, the General Assembly drafted legislation to ensure that funds from the settlement for the important purposes of reducing smoking rates and mitigating the adverse economic impact of reduced tobacco production in Southern Ohio could not later be diverted for other purposes. Clearly, Governor Taft and the enacting General Assembly intended to dedicate funds to the tobacco control endowment fund, free from future political and appropriations processes.

It is also important to point out that only a relatively small portion of Ohio’s MSA payments was dedicated to the Foundation. Although the state acknowledges receiving to date approximately \$10.1 billion in MSA payments,³⁰ and although Senate Bill 192’s allocation plan would have sent \$1.2 billion of MSA funds to the Foundation’s endowment, only the first two payments were actually disbursed to the endowment outside the State Treasury, totaling approximately \$330 million. Ohio has spent the

³⁰ Court of Appeals’ Brief of Appellants Ohio Attorney General Richard Cordray and the State of Ohio, p. 7.

remaining nearly \$9.3 billion on other purposes. Only the remainder of the \$330 million disbursed to the endowment fund – less than 3.5% of the MSA settlement receipts – is at issue here.

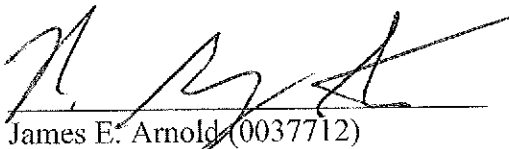
Proposition of Law No. 3: The State cannot take advantage of its own misconduct by deliberately setting up the very open meetings infractions that the State now claims invalidate the contract the Tobacco Use Prevention and Control Foundation entered into with American Legacy Foundation for the continuation of tobacco prevention and cessation programs in Ohio.

Amici adopt and incorporate the arguments in support of Proposition of Law No. 3 set forth in the Merits Brief of Appellants Robert G. Miller, Jr., David W. Weinmann, and American Legacy Foundation.

CONCLUSION

The Amici, representing the health interests of millions of Ohioans and others intent on protecting Ohio's children from tobacco addiction and aiding those already addicted to overcome their dependence, urge the court to protect the trust funds wisely and permanently dedicated to tobacco prevention and control. To do otherwise will both jeopardize the lives and health of hundreds of thousands of Ohio citizens, including thousands of Ohio children, and thwart the intent of the enacting General Assembly.

Respectfully submitted,



James E. Arnold (0037712)
R. Gregory Smith (0071493)

JAMES E. ARNOLD & ASSOCIATES, LPA
115 W. Main Street, Fourth Floor
Columbus, Ohio 43215
Ph: (614) 460-1600
Fax: (614) 469-1066

Counsel For Amici Curiae

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief of the Amici Curiae in Support of Plaintiffs-Appellants was served via U.S. mail this 4th day of May, 2010 upon:

John W. Zeiger, Esq.
Stuart G. Parsell, Esq.
Zeiger Tigges & Little LLP
41 South High Street, Suite 3500
Columbus, Ohio 43215

Attorneys for Plaintiffs-Appellants
Robert M. Miller, Jr. and David W. Weinmann
and American Legacy Foundation

Alexandra T. Schimmer, Esq.
Chief Deputy Solicitor General
Richard N. Coglianese, Esq.
Aaron D. Epstein, Esq.
Assistant Attorneys General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215

Attorneys for Defendants-Appellees
State of Ohio and Attorney General

Katherine J. Bockbrader, Esq.
Assistant Attorney General
Health & Human Services Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215-3428

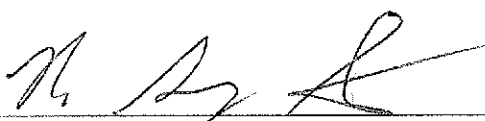
Attorney for Defendants-Appellees
Alvin D. Jackson, Director, and
Ohio Department of Health

Steven McGann, Esq.
Assistant Attorney General
Court of Claims Section
150 East Gay Street, 23rd Floor
Columbus, Ohio 43215

Attorney for Plaintiff Board of Trustees
of the Tobacco Use Prevention and Control
Foundation

Damian Sikora, Esq.
Assistant Attorneys General
Constitutional Offices
30 East Broad Street, 16th Floor
Columbus, Ohio 43215-3400

Attorney for Defendant
Ohio Treasurer of State



One of the Attorneys for Amici Curiae