

THE SUPREME COURT OF OHIO

NORTHEAST OHIO PSYCHIATRIC
INSTITUTE,)

Appellant,)

v.)

WILLIAM W. WILKINS)
[Richard A. Levin])
TAX COMMISSIONER OF OHIO,)

Appellee.)

CASE NO. 2008-0033

On Appeal from the
Board of Tax Appeals

Board of Tax Appeals
Case No. 2005-M-1683

AMICUS CURIAE BRIEF OF THE OHIO COUNCIL OF BEHAVIORAL
HEALTHCARE PROVIDERS IN SUPPORT OF APPELLANTS

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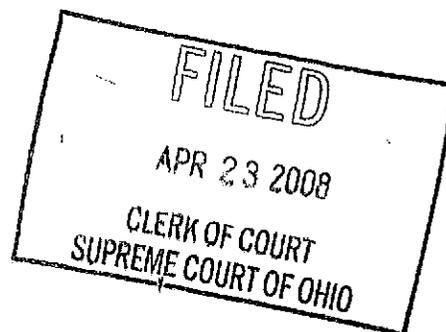


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STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Council of Behavioral Healthcare Providers represents the interests of private nonprofit healthcare corporations that provide community mental health or addiction treatment services in Ohio. Its members are certified by the Ohio Department of Mental Health or Ohio Department of Alcohol and Drug Addiction Treatment Services. All Ohio Council members are also accredited by national entities such as the Joint Commission on Accreditation of Health Care Organizations. Appellant Northeast Ohio Psychiatric Institute is a member of the Ohio Council.

The funding for mental-health and addiction-treatment services comes from Alcohol, Drug Addiction, and Mental Health Boards (“ADAMH Boards”) under Chapter 340 of the Ohio Revised Code. The ADAMH Boards provide no direct services themselves. Instead they enter into contracts with community mental health and chemical dependency service providers to perform that function.

The lease involved in this appeal is typical of the leases into which such service providers customarily enter. ADAMH Boards ordinarily do not reimburse their service providers for real-property ownership costs (e.g., mortgage amortization or depreciation), but do reimburse rental expenses. Providers thus generally operate in premises that they lease from a nonprofit entity. This framework allows the service providers to focus on rendering services instead of assuming the costs, risks and responsibilities of owning property. It also allows entities holding real property to conduct other fundraising activities that lower the cost of alcohol, drug addiction and mental health services. That leaves the direct provider of alcohol, drug addiction and mental health services free to focus on its core mission of actual service, not fundraising.

The Ohio Council has a strong interest in preserving this operationally beneficial structure, which serves the public well. The tax-exempt status of the nonprofit entities that hold real property for service providers makes those facilities available at lower cost. Without an exemption for the real-property owners, the lessees would face higher rents or steep capital outlays. The need to acquire property or pay higher rent due to taxation of property holders like the Northeast Ohio Psychiatric Institute would reduce the money available to provide alcohol, drug addiction and mental health services. Such pressures on the budgets of service providers would leave them with less to offer the people they serve, to the ultimate detriment of those most in need of mental health and addiction treatment assistance.

PROPOSITION OF LAW: An entity granted Section 501(c)(3) status by the Internal Revenue Service shall be presumed charitable for purposes of R.C. 5709.121 unless it falls into an exception recognized by the Supreme Court of Ohio.

Tax exemptions are an integral part of this state's public policy of fostering charitable activity. As with any public policy, there is an inevitable balance to be struck between efficiency and compliance. Ideally, the public would receive the benefit of charitable work, with the only cost to the state being the erstwhile revenue attributable to the tax exemption. Because a tax exemption is a valuable legal privilege that diminishes the public coffers, however, Ohio has a competing interest in ensuring that only organizations that further charitable causes (and donors to such organizations) are relieved of tax liability. The goal of compliance systems should be to reduce policing costs to the lowest level that still ensures compliance with the letter of the charitable exemption.

The Ohio Council submits that the state of Ohio can greatly reduce its policing costs without a corresponding decrease in compliance by presumptively relying on an organization's federal status as a Section 501(c)(3) entity. Section 501(c)(3) of the Internal Revenue Code bestows tax exempt status on “[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals * * * .” Section 501(c)(3), Title 26, U.S. Code.¹ Section 5709.121(A)(1)(b) of the Ohio Revised Code likewise provides a property tax exemption for real property owned by a charitable institution and that is used “under a lease * * * [for] charitable * * * purposes.”

A 501(c)(3) presumption would eliminate the need for most litigation over an entity's status as a charitable organization under Ohio law. While Section 501(c)(3) and R.C. 5709.121 are not coextensive, they have substantial overlap. This Court can make

¹ In full, Section 501(c)(3) lists the following as eligible for tax exemption:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

sure that Ohio enjoys the benefits of a Section 501(c)(3) presumption without subordinating Ohio policy by enforcing that presumption unless a decision of this Court recognizes a specific divergence between Section 501(c)(3) and the Revised Code.

Section 501(c)(3) status is worthy of reliance. Organizations that seek a Section 501(c)(3) exemption must successfully complete the rigorous IRS application process and undergo continued monitoring. The application—Form 1023—is at least a dozen pages long (depending on the type of entity) and requires the entity to offer, among other things, a narrative description of its past, present and future activities; the details of compensation of its five highest-paid employees; and information about its relationships with employees and directors. The Ohio Department of Taxation recognizes the utility of IRS review and oversight: the standard Ohio form for real property exemptions—DTE Form 23—asks for the “IRS Determination Letter” that a 501(c)(3) entity would secure if it meets the federal criteria.²

The initial hurdle of securing 501(c)(3) status, and the burden of maintaining it (see IRS publication 4221, *Compliance Guide for 501(c)(3) Public Charities*), should serve as a proxy for Section 5709.121 charitable status unless this Court has directly held that a 501(c)(3) category fails the test set forth in *Planned Parenthood Ass'n v. Tax Comm'r* (1966), 5 Ohio St.2d 117, 214 N.E.2d 222, at syllabus paragraph 1 (charity means the “attempt in good faith, spiritually, physically, intellectually, socially and economically to advance and benefit * * * those in need of advancement and benefit in particular, without regard to their ability to supply that need from other sources, and

² Available at http://tax.ohio.gov/documents/forms/real_property/DTE_DTE23.pdf (last visited April 22, 2008).

without hope or expectation * * * of gain or profit by the donor or by the instrumentality of the charity.”).

A. Court decisions about state-law charitable exemption of 501(c)(3) entities are consistent, but BTA decisions are not.

The consistency of this Court’s decisions on real-property charitable tax exemptions for 501(c)(3) entities stands in sharp contrast to the wide-ranging conclusions reached by the Board of Tax Appeals. With one exception, the Court has left undisturbed in such cases the proposition that a 501(c)(3) entity is a “charitable” institution for purposes of R.C. 5709.121. See *Episcopal School of Cincinnati v. Levin*, ___ Ohio St.3d ___, 2008-Ohio-939, ___ N.E.2d ___ (charitable status of 501(c)(3) church entity not questioned); *Community Health Professionals v. Levin*, 113 Ohio St.3d 432, 2007-Ohio-2336, 866 N.E.2d 478 (charitable status of 501(c)(3) organization not questioned); *Bethesda Healthcare, Inc. v. Wilkins* (2004), 101 Ohio St.3d 420, 2004-Ohio-1749, 806 N.E.2d 142 (charitable status of 501(c)(3) entity not questioned); *Case Western Res. Univ. v. Tracy* (1999), 84 Ohio St.3d 316, 703 N.E.2d 1240 (state-supported emerging technology and economic development entities were charitable); *Herb Society v. Tracy* (1994), 71 Ohio St.3d 374, 643 N.E.2d 1132 (nonprofit society formed to study herbs and educate the public about them deemed charitable) (reversing BTA); see also, *Miracit Dev. Corp. v. Zaino*, 10th Dist. No. 04AP-322, 2005-Ohio-1021 (economic revitalization/family assistance organization running a day care center deemed charitable) (reversing BTA).

The one judicial exception is *Olmsted Falls Bd. of Educ. v. Tracy* (1997), 77 Ohio St.3d 393, 397, 674 N.E.2d 690, in which the Court held that a German-American cultural society was not “charitable” even though it enjoyed section 501(c)(3) status

because the society did not “advance or benefit mankind in general or those in need of advancement or benefit in particular,” and thus failed the *Planned Parenthood* test.

Notably, the entity at issue had conducted activities that primarily benefited its members.

Id. With that exception, this Court and the Tenth District have treated 501(c)(3) entities as charitable for purposes of R.C. 5709.121.

By contrast, the experience of 501(c)(3) entities in exemption cases before the Board of Tax Appeals shows the need for a uniform rule of greater predictability. Since 1985 there have been seventeen cases in which the Board has addressed the charitable status of a 501(c)(3) entity seeking a real-property tax exemption. In nine cases the Board deemed the entity to be a charitable institution under Ohio law.³ In eight cases the Board concluded that the entity was not a charity.⁴ This zigzag landscape of Board

³ *Private Duty Services v. Zaino*, (Aug. 31, 2007), BTA Case No. 2004-B-688, 2007 WL 2688698 (nursing services); *Consumer Credit Counseling Service v. Lawrence* (July 7, 2000), BTA Case No. 99-K-688, 2000 WL 901258 (free credit counseling to the public); *St. Vincent Hotel, Inc v. Tracy* (April 25, 1997), Case No. 96-K-420, 1997 WL 1909714, (supervised residential program for homeless young men); *City of Cincinnati v. Tracy*, BTA Case No. 93-X-75 (June 21, 1996), 1996 WL 346234 (public training facility for sport of rowing, allied with local waterfront redevelopment); *Olmsted Falls Bd. of Educ. v. Tracy* BTA Case No. 93-P-1381 (Nov, 3, 1995), rev'd 77 Ohio St.3d 393, 674 N.E.2d 690 (1997) (German-American society); *Warman v. Tracy* (Feb. 4, 1994), BTA Case No. 91-B-1272, 1994 WL 38079 (Ohio Bd.Tax.App.) (hospital-owned housing for nuns); *Ohio Seed Improvement Ass'n v. Tracy* (Oct. 22, 1993) BTA Case No. 91-M-1330, 1993 WL 438662 (university-affiliated agency that certified seed); *Northland Community Center v. Limbach* (April 23, 1993), BTA Case No. 90-R-1154, 1993 WL 141933 (community swimming pool); *Quest International v. Limbach* (Feb. 26, 1993), BTA Case No. 89-K-476, 1993 WL 66200 (youth and family counseling seminars).

⁴ *Kollel v. Wilkins* (Jan. 20, 2006), BTA Case Nos. 2004-K-1441, 2004-K-1442, 2006 WL 200649 and *Cincinnati Community Kollel v. Zaino* (June 14, 2002), BTA Case No. 99-P-1578, 2002 WL 1338673 (both cases concerned a residential training program in Orthodox Judaism that sought exemption as charitable or educational institution, rather than religious institution); *Beta Theta Pi Foundation v. Tracy* (June 5, 1998), BTA Case No. 97-J-119, 1998 WL 309092 (social fraternity office, library and archives); *Rehab Project v. Tracy* (May 23, 1997), BTA Case No. 95-R-418, 1997 WL 1909686 (entity that assisted low income families and redeveloped deteriorated neighborhoods by

decisions calls out for guidance from this Court. As the Eighth District has observed, “certainty and predictability * * * are always important in taxation.” *Euclid, Inc. v. Tax Admin. Of the City of Euclid* (Ohio App. June 22, 1978), 8th Dist. No. 37567, 1978 WL 218102, at *4.

The Ohio Council submits that the simple way to bring more certainty and predictability to the question of whether an entity is charitable for purposes of R.C. 5709.121 is to announce a presumption based on 501(c)(3) status. To avoid needless litigation over the character of charitable institutions, the Court should announce a presumption that a 501(c)(3) entity is charitable for purposes of R.C. 5709.121 unless it falls within an exception recognized by this Court.

B. The General Assembly has indicated that 501(c)(3) status should create a conclusive presumption of charitable status under Ohio law.

The General Assembly has relied on Section 501(c)(3) status in abrogating two Board of Tax Appeals decisions that denied charitable recognition to various 501(c)(3) entities for state taxation purposes. See R.C. 5709.12(D)(1) (establishing conclusive presumption that a 501(c)(3) entity dedicated to advancing science is charitable) and 5709.12(E) (granting two-year tax exemption to real property held by a 501(c)(3) entity dedicated to constructing or rehabilitating residences for eventual transfer to qualified low-income families). Those statutes establish charitable status for entities such as those denied recognition in the *American Chemical Society* and *Rehab Project* cases. In fact,

rehabilitating housing without taking any profit); *Miami Valley Research Foundation v. Tracy* (June 17, 1994), BTA Case No. 91-J-161, 1994 WL 279437 (economic development entity); *Columbus Bd. of Educ'n v. Limbach and American Chemical Society* (June 26, 1992), BTA Case No. 86-H-566, 1992 WL 153126 (nonprofit scientific professional association involved in abstracting and disseminating chemical research); *Kaiser Foundation Health Plan v. Limbach* (June 8, 1990), BTA Case No. 87-A-228, 1990 WL 208259 (medical office building); and the decision on appeal here.

Section 5709.12(D)(1) uses the same conclusive presumption that the Ohio Council urges this Court to adopt as a general rule.

The only plausible inference from the legislative invocation of Section 501(c)(3) status in repudiating those Board of Tax Appeals decisions is that the General Assembly views 501(c)(3) status as a legitimate indicator that an entity should also enjoy state tax immunity from real property taxes. The Court should take this legislative cue and eliminate the confusion that confronts litigants before the Board of Tax Appeals and other tribunals in property-tax exemption cases. A presumption that 501(c)(3) entities are charitable would eliminate this confusion while leaving to this Court alone the adjudicatory task of deciding what entities fall into the narrow class of organizations that are 501(c)(3) exempt, but not charitable for purposes of R.C. 5709.121.⁵

The General Assembly's acts to reverse the *American Chemical Society* and *Rehab Project* decisions did not address the 501(c)(3) issue generally because those bills were reactive. The uncodified language in the bill that overturned the *American Chemical Society* ruling, for example, underscored the General Assembly's focus on the problem facing that organization: "The purpose of these amendments is to clarify the

⁵ Indeed, Ohio is not the only state that looks to 501(c)(3) determinations for certain state-tax exemptions. In 1997, Virginia amended its tax laws to define "tax exempt organization" as "any corporation, partnership, organization or trust which has received written notice of its exempt status from the Internal Revenue Service, if such notice is required by the Internal Revenue Service to obtain exempt status." Section 58.1-1, Va. Code. In 2007, California amended the process for securing certain state tax exemptions to allow an organization to submit its 501(c)(3) status to qualify for the state tax exemption. "[A]n organization organized and operated for nonprofit purposes in accordance with this section shall be exempt from taxes imposed by this part * * * upon its submission to the Franchise Tax Board of a copy of the notification issued by the Internal Revenue Service approving the organization's tax-exempt status pursuant to Section 501(c)(3) of the Internal Revenue Code." Section 23701d(c)(1), Cal. Rev. & Tax Code.

intent of the General Assembly that organizations of the kind described in the amendments are, and always have been, entitled to * * * tax exemption * * * and that such organizations are encouraged to locate and to remain in this state.” 1992 H.B. 782 § 9.

Yet the pattern of the legislature’s response to the aberrations created by the Board of Tax Appeals decisions in *American Chemical Society* and *Rehab Project* is a compelling endorsement of the use of Section 501(c)(3) status as a threshold test for state charitable property-tax exemption decisions. When the General Assembly has considered specific problems of 501(c)(3) entities that have been denied charitable status under Ohio law, it has acted quickly to restore what the Board of Tax Appeals had taken away. The legislative signals in R.C. 5709.12(D)(1) and (E) plainly invite this Court to make explicit a presumption that Section 501(c)(3) entities are charitable institutions for purposes of state tax law, subject to exceptions that this Court recognizes.

C. Courts in other states use section 501(c)(3) as a hallmark of state-tax immunity.

Courts in other states recognize the utility of the intensive federal process for securing tax exemptions. The Kansas Supreme Court has held that, while not controlling, “the granting of a federal income tax exemption under I.R.C. § 501(c)(3) is to be given **great weight** in determining if an applicant qualifies for a property tax exemption under [Kansas law].” *Presbyterian Manors, Inc. v. Douglas County* (Kan.2000), 998 P.2d 88,

paragraph 1 of the syllabus (emphasis added).⁶ In a related context, “most states * * * now recognize that any organization ‘qualified as a tax exempt organization under 26 U.S.C. 501(c)(3)’ is a charity for purposes of limited liability under the law.” Paul T. O’Neill, *Charitable Immunity: The Time to End Laissez-Faire Health Care in Massachusetts Has Come* (1997), 82 Mass. L. Rev. 223, 224-225. A federal 501(c)(3) determination carries weight because it is the result of substantial documentation and detailed scrutiny. This Court can enhance tax-litigation efficiency by according to 501(c)(3) entities a presumption that they satisfy R.C. 5709.121.

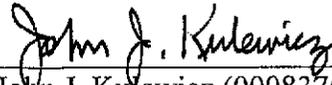
CONCLUSION

The Court should use this case as an opportunity to announce a rule that would effectively reduce state government monitoring costs by presumptively relying on the federal government’s efforts to monitor 501(c)(3) entities. The proposed rule would save state enforcement costs, reduce charitable compliance costs and decrease tax litigation costs. The result of those savings will ultimately accrue to the public in the form of community mental health and addiction treatment services for those most in need.

⁶ Some state courts have held that Section 501(c)(3) status has no relation to state tax exemption. Many of these decisions, though, involve state tax structures unlike the Ohio exemption at issue here. See, e.g., *Surtees v. Carlton Cove, Inc.*, (Ala.Civ.App.2007), 974 So.2d 1013, 1019 (rejecting 501(c)(3) as “controlling” as to state tax exemption because Alabama law exempts property based on the use of the property, not the status of the property owner); *NRA Special Contribution Fund v. Bd. of County Comm’rs* (N.M.Ct.App.1978), 591 P.2d 672, 680 (501(c)(3) status had “no applicability” to state property-tax exemption, but New Mexico law exempts property based on its use). The Ohio Council does not contend that Section 501(c)(3) status conclusively answers the exemption question, but only that it should presumptively answer the question of whether an entity is charitable for purposes of R.C. 5709.121.

Respectfully submitted,

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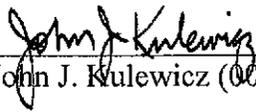
Ohio Council of Behavioral Healthcare Providers

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by ordinary U.S. Mail, postage prepaid, this 23d day of April, 2008, upon the following:

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