

ORIGINAL

IN THE SUPREME COURT OF OHIO

BOARD OF TRUSTEES OF THE	:	Case No. 2010-0118
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
KEVIN L. BOYCE,	:	Case Nos. 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

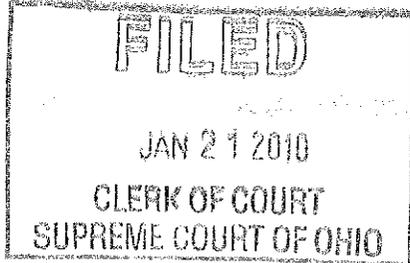
**MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICUS CURIAE CITIZENS'
 COMMISSION TO PROTECT THE TRUTH IN SUPPORT OF PLAINTIFFS-
 APPELLANTS ROBERT G. MILLER, JR., DAVID W. WEINMANN AND AMERICAN
 LEGACY FOUNDATION**

Russell A. Kelm (0011034), *Counsel of Record*
 Joanne W. Detrick (0041512)
 LAW OFFICES OF RUSSELL A. KELM
 37 W. Broad Street, Suite 860
 Columbus, Ohio 43215
 Tel: (614) 246-1000/Fax: (614) 246-8110
 kelm@kelmlawfirm.com
 detrick@kelmlawfirm.com

Harvey Kurzweil, Esq.
 Matthew L. DiRisio, Esq.
 Joseph A. Murphy, Esq.
 DEWEY & LEBOEUF LLP
 1301 Avenue of the Americas
 New York, New York 10019
 Tel: (212) 259-8000
 Fax: (212) 259-6333
 hkurzweil@dl.com;
 mdirisio@dl.com; jomurphy@dl.com

*Counsel for Amicus, Citizens' Commission to
 Protect the Truth*

*Counsel for Amicus, Citizens'
 Commission to Protect the Truth*



John W. Zeiger (0010707)
Stuart G. Parsell (0063510)
ZEIGER, TIGGES & LITTLE LLP
41 South High Street, Suite 3500
Columbus, Ohio 43215
(614) 365-9900
Facsimile: (614) 365-7900
zeiger@litoohio.com
parsell@litoohio.com

*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*

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*

Alexandra T. Schimmer (0075732)
Richard N. Coglianesse (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*

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*

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INTEREST OF AMICUS CURIAE

The Citizens' Commission to Protect the Truth ("the Commission") -- a nonprofit, independent public health organization -- was formed to promote public education to discourage smoking by children and teens, with a focus on continuing funding of the American Legacy Foundation's life-saving **truth**® campaign and discouraging and exposing marketing by tobacco companies targeting children and teens. The Commission has assembled former United States Secretaries of Health, Education, and Welfare, United States Secretaries of Health and Human Services, and all former United States Surgeons General and Directors of the Centers for Disease Control and Prevention from every administration, Republican and Democrat, since Lyndon Johnson, to support this single cause. They have so united because keeping children and teenagers tobacco-free is the single most effective way to prevent death and disease in this country.

The Commission is comprised of the following national health leaders, each of whom has devoted his or her career to working on behalf of public health in the United States:

U.S. Secretaries of Health, Education, and Welfare

- Joseph A. Califano, Jr., Carter Administration, 1977-1979, Chairman of the Citizens' Commission to Protect the Truth
- David Mathews, Ph.D., Ford Administration, 1975-1977

U.S. Secretaries of Health and Human Services

- Tommy G. Thompson, G.W. Bush Administration, 2001-2005
- Donna E. Shalala, Ph.D., Clinton Administration, 1993-2001
- Louis W. Sullivan, M.D., G.H.W. Bush Administration, 1989-1993
- Otis R. Bowen, M.D., Reagan Administration, 1985-1989
- Margaret M. Heckler, Reagan Administration, 1983-1985
- Richard S. Schweiker, Reagan Administration, 1981-1983

U.S. Surgeons General

- Richard H. Carmona, M.D., M.P.H., FACS, G.W. Bush Administration, 2002-2006
- David Satcher, M.D., Clinton & G.W. Bush Administrations, 1998-2002
- M. Joycelyn Elders, M.D., Clinton Administration, 1993-1994
- Antonia C. Novello, M.D., M.P.H., Dr.P.H., G.H.W. Bush Administration, 1990-1993
- C. Everett Koop, M.D., Reagan Administration, 1982-1989
- Jesse Steinfeld, M.D., Nixon Administration, 1969-1973

Directors of the Center for Disease Control

- James O. Mason, M.D., Dr.P.H., Reagan Administration, 1983-1989
- William H. Foege, M.D., M.P.H., Carter & Reagan Administrations, 1977-1983
- David J. Sencer, M.D., Johnson, Nixon, & Ford Administrations, 1966-1977

Directors of the Centers for Disease Control and Prevention

- Julie Louise Gerberding, M.D., M.P.H., G.W. Bush Administration, 2002-2009
- Jeffrey P. Koplan, M.D., M.P.H., Clinton & G.W. Bush Administrations, 1998-2002
- David Satcher, M.D., Ph.D., Clinton Administration, 1993-1998
- William L. Roper, M.D., M.P.H., G.H.W. Bush Administration, 1990-1993

The Commission's widespread influence in the area of smoking prevention is well-established. Indeed, since the Surgeon General issued the first Report on Smoking in 1964, almost every successive report on the topic was written under the leadership of a Commission member.

The Commission has knowledge and expertise on the devastating impact of tobacco use and the importance of effective tobacco prevention and cessation efforts, such as those at the heart of this litigation. Accordingly, the Commission submits this memorandum pursuant to S. Ct. P. R. III, § 5 to urge the Supreme Court to accept jurisdiction in this case.

**EXPLANATION OF WHY THIS CASE INVOLVES
SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND
IS OF PUBLIC AND GREAT GENERAL INTEREST**

A. This Case Involves Substantial Constitutional Questions.

For reasons well-articulated in the Memorandum In Support of Jurisdiction submitted by Appellants Robert G. Miller, Jr., David W. Weinmann, and American Legacy Foundation, this case involves substantial constitutional questions. Accordingly, the Commission adopts and incorporates the explanation from Appellants' Memorandum on these questions, and the Commission limits its argument to important practical and public considerations that demonstrate the need for action from this Court.

B. This Case Is of Public and Great General Interest.

As discussed below, maintaining the Ohio Tobacco Use Prevention and Control Endowment Fund ("Endowment Fund") and channeling its monies toward smoking prevention and cessation efforts are particularly important because of, *inter alia*, (1) the demonstrable need for continued (and enhanced) tobacco prevention and cessation efforts in Ohio, and (ii) the proven efficacy of the smoking prevention and cessation programs for which the funds were originally earmarked.

1. The Continued Proliferation of Tobacco Prevention and Cessation Efforts in Ohio is Critical to the Public Health.

While tremendous strides have been made in the field of youth smoking prevention and cessation, tobacco use among Ohio's (and the country's) children and teens remains a public health epidemic. Tobacco use is the number one preventable cause of death and disease in the

United States.¹ It causes around 440,000 deaths each year, and costs more than \$157 billion in annual health-related economic losses.² Approximately one in five adults in the United States smoke cigarettes.³ Nearly 80% of adult smokers first become regular smokers before age 18 and 90% become regular smokers before they turn twenty.⁴

Ohio is not immune from the toll that smoking inflicts on society. Although progress has been made in reducing smoking rates, the continued impact of smoking in the state, particularly upon youth, should not be underestimated: approximately 18,500 people die each year because of their smoking; more than 10,000 youth have lost at least one parent to a smoking-caused death; more than 20,000 youth become new, addicted smokers every year; nearly 20% of high school students smoke, and over 20% of adults smoke.⁵ Given current smoking levels,

¹ U.S. Dept. of Health and Human Svcs., Ctrs. for Disease Control and Prevention. *The Health Consequences of Smoking: A Report of the Surgeon General*, Executive Summary at 7 (2004), http://www.cdc.gov/tobacco/data_statistics/sgr/2004/index.htm.

² U.S. Dept. of Health and Human Svcs., Ctrs. for Disease Control and Prevention, *The Health Consequences of Smoking: A Report of the Surgeon General*, 2004, at Executive Summary at 7; Chapter 7 at 869. http://www.cdc.gov/tobacco/data_statistics/sgr/2004/index.htm.

³ U.S. Dept. of Health and Human Svcs., Ctrs. for Disease Control and Prevention, *Sustaining State Programs for Tobacco Control: Data Highlights 2006*, at 7 (2006), http://www.cdc.gov/tobacco/data_statistics/state_data/data_highlights/2006/pdfs/dataHighlights06rev.pdf.

⁴ Campaign for Tobacco-Free Kids, *The Path to Smoking Addiction Starts at Very Young Ages* (2009), <http://www.tobaccofreekids.org/research/factsheets/pdf/0127.pdf>.

⁵ Campaign for Tobacco-Free Kids. *A Broken Promise to Our Children: The 1998 State Tobacco Settlement 11 Years Later*, at 72 (2009), <http://www.tobaccofreekids.org>. 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*, at Executive Summary and 12 (2008), <http://www.tobaccofreekids.org/pressoffice/ohioreport2008.pdf>.

approximately 293,000 of the youth alive today in the state will die prematurely from smoking.⁶ Moreover, “every year, the state’s government, businesses, and households spend more than \$4.3 billion on smoking-caused health care costs[,]” and the state suffers over \$4.6 billion in smoking-caused productivity losses.⁷ Accordingly, tobacco use remains a wide-spread crisis within Ohio, and the need for continued support for prevention and cessation programs is more acute than ever.

2. The Smoking Prevention and Cessation Programs Supported by the Endowment Fund Have Proven Effective.

The impact of efforts enabled by the Endowment Fund in Ohio is enormous; programs supported by the Endowment Fund have saved lives and money in the state. In earlier proceedings in this case, the Court of Common Pleas, Franklin County recognized the successes of the Endowment Fund-supported Ohio Tobacco Use Prevention and Control Foundation (“Foundation”). The Court found that “[d]uring the existence of the Foundation, from 2000 through 2007, adult smoking rates in Ohio dropped from around 26% to about 22%. During the same period, youth smoking rates in Ohio dropped from about 33% to 20%.” Order Granting Preliminary Injunction ¶ 95 (citations omitted). It further found that:

If a tobacco control program is eliminated or cut-back, there will be either an immediate increase in the smoking rate or the truncation of a pre-existing decline trend, followed by an increase. A one percent increase in youth smokers in Ohio will result in

⁶ 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, at Executive Summary and 12 (2008), <http://www.tobaccofreekids.org/pressoffice/ohioreport2008.pdf>.

⁷ *Id.* at Executive Summary and 12. See also U.S. Dept. of Health and Human Svcs., Ctrs. for Disease Control and Prevention, *Sustaining State Programs for Tobacco Control: Data Highlights* 2006, at 17, http://www.cdc.gov/tobacco/data_statistics/state_data/data_highlights/2006/pdfs/dataHighlights06rev.pdf.

2,200 future premature deaths. A one percent increase in adult smokers in Ohio will result in 35,000 future premature deaths.

Id. ¶ 96 (citations omitted).

Tobacco use in Ohio (and across the country) remains a deadly epidemic that exacts a heavy toll not only on public health, but on states' economies. In these difficult economic times, investments in (a) effective youth smoking prevention campaigns to prevent people from starting to smoke and (b) programs to help those who already smoke to quit serve both to stem the tide of this epidemic and to provide enormous fiscal returns by diminishing the health care costs and lost productivity associated with smoking. These real world implications only highlight the importance to the public health that the Endowment Fund's monies be preserved for their original purpose: reducing tobacco use by Ohioans through the continued (and increased) support of effective smoking prevention and cessation efforts.

STATEMENT OF THE CASE AND FACTS

Because Appellants have presented this Court with the appropriate recitation of facts, the Commission adopts and incorporates the Statement of the Case and Facts set forth in Appellants Robert G. Miller, Jr., David W. Weinmann, and American Legacy Foundation's Memorandum In Support of Jurisdiction.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

In their Memorandum In Support of Jurisdiction, Appellants Robert G. Miller, Jr., David W. Weinmann, and American Legacy Foundation present three propositions of law. Specifically, Appellants propose that (1) the Retroactivity Clause of the Ohio Constitution prohibits the General Assembly from divesting the equitable trust estate of, and depleting the previously disbursed monies held in, the Endowment Trust, which the General Assembly specifically established and funded in 2000 as a permanent trust outside the state treasury for

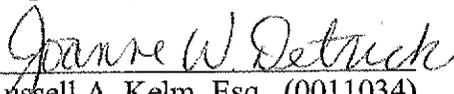
lifesaving tobacco prevention and cessation programs, (2) House Bill 544's purported liquidation and depletion of the Endowment Trust violates the Contracts Clauses of the United States Constitution, Article I, § 10, and the Ohio Constitution, Article II, § 28, by substantially impairing pre-existing trust rights and obligations, and (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 Foundation entered into with Legacy for the continuation of tobacco prevention and cessation programs in Ohio. The Commission urges this Court to accept each proposition of law presented in Appellants' Memorandum. The Commission thus adopts and incorporates the Argument in Support of Propositions of Law set forth in Appellants Robert G. Miller, Jr., David W. Weinmann, and American Legacy Foundation's Memorandum In Support of Jurisdiction.

CONCLUSION

For the reasons set forth above, this case presents substantial constitutional questions and issues of public and great general interest. Accordingly, the Commission respectfully requests that the Supreme Court accept jurisdiction and hear this case.

Dated: January 21, 2010

Respectfully submitted,


Russell A. Kelm, Esq. (0011034)
Joanne W. Detrick, Esq. (0041512)
Law Offices of Russell A. Kelm
Suite 860
37 West Broad Street
Columbus, Ohio 43215
Phone: (614) 246-1000
Fax: (614) 246-8110

*Attorneys for Amicus Curiae
Citizens' Commission To Protect The Truth*

Of Counsel:

DEWEY & LEBOEUF LLP

Harvey Kurzweil

Matthew L. DiRisio

Joseph A. Murphy

1301 Avenue of the Americas

New York, New York 10019-6092

(212) 259-8000

(212) 259-6333

PROOF OF SERVICE

This is to certify that a copy of the foregoing Amicus Brief for Citizens' Commission To Protect The Truth was this 21st day of January, 2010 served by first class U.S. Mail upon counsel as follows:

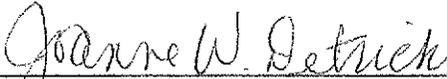
John W. Zeiger (0010707)
Stuart G. Parsell (0063510)
ZEIGER, TIGGES & LITTLE LLP
41 South High Street, Suite 3500
Columbus, Ohio 43215
(614) 365-9900
Facsimile: (614) 365-7900
zeiger@litohio.com
parsell@litohio.com
*Counsel for Plaintiffs-Appellants
Robert G. Miller, Jr., David W. Weinmann, and
American 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*

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*

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*

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*



Counsel for Amicus Curiae
Citizens' Commission To Protect The Truth