ORIGINAL

IN THE SUPREME COURT OF OHIO

BOARD OF TRUSTEES OF THE TOBACCO USE PREVENTION AND CONTROL FOUNDATION, et al.,	:	Supreme Court Case #2010-0118
Plaintiffs-Appellants, v.	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
KEVIN L. BOYCE, TREASURER OF STATE, et al.,	:	Court of Appeals Case Nos. 09AP-768, 09AP-785, 09AP-832
Defendants-Appellants.	:	

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

MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICUS CURIAE FORMER OHIO ATTORNEY GENERAL BETTY D. MONTGOMERY, FORMER OHIO SENATE PRESIDENT RICHARD H. FINAN, AND FORMER DIRECTOR OF THE OHIO DEPARTMENT OF HEALTH J. NICK BAIRD, M.D.

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EXPLANATION OF WHY THIS CASE INVOLVES SUBSTANTIAL CONSTITUTIONAL ISSUES AND IS OF PUBLIC OR GREAT GENERAL INTEREST

Amici Curiae former Ohio Attorney General Betty D. Montgomery, former Ohio Senate President Richard H. Finan, and former Director of the Ohio Department of Health J. Nick Baird, M.D. submit this memorandum to urge the Supreme Court to accept jurisdiction of this case because it not only involves substantial constitutional questions pursuant to S. Ct. Prac. R. 2.1(A)(2), it also involves matters of public and great general interest pursuant to S.Ct. Prac. R. 2.1(A)(3).

Specifically, *Amici* implore this Court to review this case and reinstate the permanent injunction issued by the Franklin County Common Pleas Court protecting the moneys previously disbursed to the Tobacco Use Prevention and Control Endowment Fund for their intended purpose. The endowment fund was carefully established in 2000 as a sequestered trust fund outside the state treasury, so as to assure that the assets dedicated to tobacco cessation and prevention could not be diverted to other uses by future legislative action.

Amici have a unique historical involvement in the issues in this case, because they were members of the bipartisan Ohio Tobacco Task Force created in 1999 to determine the appropriate use of the more than $10 billion that Ohio was to receive as part of the Tobacco Master Settlement Agreement ("MSA"). Then Attorney General Betty Montgomery successfully represented Ohio in the litigation generating the MSA moneys, part of which funded the tobacco use prevention and control endowment fund, and personally served as representative of her office on the Task Force. Then Senate President Richard Finan personally served as a representative of the Ohio Senate on the Task Force and led the successful legislative efforts to adopt its recommendations. And then Director of Ohio's Department of Health, J. Nick Baird, M.D., served as a representative of Governor Taft on the Task Force and was charged with implementing the transfer of the moneys at issue "outside the state treasury." Having lived the events culminating in the legislation at issue in this appeal, *amici* offer their understanding of the context surrounding that legislation.

The Task Force was formed to recommend allocation of the MSA proceeds between and among numerous worthy uses, each having support and merit in its own right. Early in its deliberations, the Task Force determined that, inasmuch as the MSA payments settled litigation commenced to recoup Ohio's hundreds of millions of dollars of medical expenditures resulting from the deleterious effects of tobacco use, good public policy required that a portion of the MSA settlement should be permanently set aside and dedicated to funding tobacco use cessation and prevention programs in Ohio.

Knowing that the General Assembly will always be subject to competing budgetary pressures, the Task Force concluded that a sequestered trust fund, established outside the state treasury, was necessary to assure that the assets dedicated to tobacco cessation and prevention could not be diverted to other uses by future legislative action. The Task Force was open and direct about the importance of its proposed trust fund approach that would be outside the power of the General Assembly to divert to other uses. Multiple analyses of the Legislative Service Commission ("LSC") informed the members of the 123rd General Assembly that the "appropriated money . . . is to be placed into the Tobacco Use Prevention and Control Endowment Fund, which the act creates as a 'custodial fund of the Treasurer of State' to carry out the duties of the Foundation." To assure a clear understanding of the consequences of the proposed structure, the LSC analysis added its own assessment of the General Assembly's power to divert moneys in this custodial account to other uses in the future: "(Money in a custodial fund of the Treasurer of State is not subject to appropriation by the General Assembly.)"

This structure reflected exactly what the Task Force sought – immunizing the tobacco use prevention and cessation moneys from future legislative action diverting them to other, then current demands. And, having been directly told by LSC (and the Office of Budget and Management) that moneys appropriated for disbursement to the proposed "custodial fund" outside the state treasury would not be subject to the control of future General Assemblies, the 123rd General Assembly enacted S.B. 192. In doing so, it expressly appropriated $234,861,033 of the initially received MSA settlement proceeds to the Ohio Department of Health and then mandated that Dr. Baird, as the Director of the Ohio Department of Health, "disburse" that same $234,861,033 "to the Tobacco Use Prevention and Control Endowment Fund." S.B. 192 (Section 6). Dr. Baird did as the 123rd General Assembly directed, transferring the money to the trust's custodial account that is "not . . . a part of the state treasury." R.C. 183.08.

Once the money was disbursed to the endowment fund, it was spent. The General Assembly no longer had possession of it or control of its expenditure. Rather, as the Task Force proposed, upon the disbursement by the Director of these moneys, the trustees of the endowment became the legal owner of the funds, subject to the vested equitable rights of the beneficiaries identified in R.C. 183.07.

Simply put, the Task Force recommended a trust structure that would place the moneys in the Tobacco Use Prevention and Control Endowment Fund outside the state treasury and outside the reach of future General Assemblies' power to divert them from their intended purpose. In 2000, the General Assembly adopted this recommendation and expressly directed "disburse[ment]" of the moneys to the Endowment. The enactment of S.B. 192 was the culmination of the Task Force's clearly intended and clearly articulated efforts to assure permanent funding for Ohio's critical tobacco cessation and prevention programs.

Yet, contrary to S.B. 192's carefully designed structure to protect the moneys in the endowment fund in perpetuity, the decision of the Franklin County Court of Appeals would impermissibly allow the General Assembly to reach outside the state treasury, divest the endowment's trust estate, and divert its corpus to other purposes. *Amici* urge the Court to review this case so that the moneys previously disbursed into the endowment fund continue to be used for their intended purpose.

STATEMENT OF THE CASE AND FACTS

Amici adopt and incorporate the Statement of the Case and Facts set forth in the Memorandum in Support of Jurisdiction of Appellants Robert G. Miller, Jr., David W. Weinmann, and American Legacy Foundation ("Appellants"). *Amici* also offer their unique, historical insights about the establishment and funding of the endowment fund.

In November 1998, Attorney General Montgomery and the Attorneys General of 45 other states signed the Tobacco Master Settlement Agreement ("MSA") with the nation's largest tobacco manufacturers. The MSA resolved litigation that the Attorneys General had brought against the tobacco companies to recover state health care expenses incurred as a result of tobacco-related disease. Under the MSA, Ohio was to receive approximately $10.1 billion in payments through 2025 and additional future settlement payments in perpetuity.

After Ohio signed the MSA, Governor Taft and the General Assembly created a bipartisan group of Ohio legislators and other public officials in 1999 for the purpose of making recommendations regarding the appropriate use of Ohio's MSA payments. This group became known as the Tobacco Task Force (the "Task Force"). The Task Force engaged in months of research and analysis, and conducted a lengthy series of public meetings and deliberations, all of which culminated in the Task Force's issuance of its Final Report on October 6, 1999.

The Task Force's Final Report called for the General Assembly to create several separate funds into which the MSA payments would be made, with each fund using the moneys therein for a different purpose, such as construction of school facilities and funding biomedical research and technology. The Task Force recommended that these several funds, and any undisbursed moneys therein, be kept under the control of the General Assembly for reappropriation. As such, these funds would be expressly created in the state treasury.

The Task Force also concluded, however, that it was important to ensure that a portion of the moneys from the MSA payments be **committed in perpetuity** to the funding of tobacco use prevention and cessation programs for the protection of Ohioans. All of the MSA funding had resulted from Attorney General Montgomery's efforts to recoup the hundreds of millions of dollars of medical expense incurred by the State as a result of tobacco related death and disease. Thus, the Task Force determined that good public policy required that at least a portion of the MSA moneys be permanently and irrevocably committed to the tobacco programs in a manner that would protect them from future efforts to redirect them to other agendas. The Task Force settled on an approach of recommending a sequestered trust fund outside the state treasury, like the state retirement system trusts, to protect it from legislative reappropriation. The Task Force proposed that this trust receive a one-time allocation as a nest egg with the resulting investment income being used to partially fund Ohio's anti-smoking programs into the indefinite future. It was fundamental to the Task Force's conclusions and recommendations that the moneys designated to support programs seeking prevention and cessation of tobacco use had to be protected from diversion in the future to other, more politically expedient uses.

To accomplish this objective, the Task Force recommended that the General Assembly:

- Establish a separate, permanent endowment fund, **which unlike the other funds proposed by the Task Force**, would be outside the state treasury.
- Disburse the MSA payments outright and unconditionally to the endowment fund.
- Limit the use of the assets of the endowment fund solely and exclusively for the purpose of funding tobacco prevention and cessation programs and research for the benefit of Ohio's tobacco users and youth.
- Establish a charitable foundation called the Tobacco Use Prevention and Control Foundation to act as the trustee of the endowment fund.
- Impose on the trustees of the Foundation fiduciary obligations to assure that the endowment fund is safeguarded and used only for its intended purpose.
- Permit disbursements from the endowment fund only upon the approval of the trustees of the Foundation.

In short, the Task Force sought to protect the endowment fund for its intended purpose by creating a structure like that protecting Ohio's state retirement funds from being diverted to other purposes: a permanent trust that is maintained outside the state treasury and is not subject to the General Assembly's control.

In February 2000, the 123rd General Assembly adopted the Task Force's recommendations when it enacted S.B. 192. Governor Taft signed the bill into law on March 3, 2000. S.B. 192 incorporated the Task Force's recommendations, including its recommendations regarding the establishment and funding of a permanent endowment fund for the purpose of funding tobacco cessation and prevention programs, which would be maintained outside of the state treasury. The General Assembly's adoption of the Task Force recommendations is reflected in the sections of S.B. 192 that were codified at R.C. 183.04, 183.07, and 183.08. Specifically, these sections created "the tobacco use prevention and control endowment fund, which shall be in the custody of the treasurer of state but shall not be a part of the state treasury," R.C. 183.08; created "the tobacco use prevention and control foundation," which was to act as "the trustee of the endowment fund," R.C. 183.04 and 183.08; and articulated that the sole purpose of the endowment fund is to fund research and treatment programs related to tobacco use prevention and cessation. R.C. 183.07. Other provisions of S.B. 192 also reflect the recommendations and intent of the Task Force in mandating that future "[d]isbursements 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," that "[t]he endowment fund shall be used by the foundation to carry out its duties" and that "[t]he foundation shall be self-sustaining. . . ." R.C. 183.08.

Thus, in enacting S.B. 192, the General Assembly adopted the Task Force's objectives of creating the endowment fund as a permanent trust, making the Foundation the trustee of the endowment, establishing the purpose of the endowment to be exclusively the funding of tobacco use prevention and cessation programs and research, and, most importantly, providing for "disburse[ment]" of the trust assets outside the state treasury. The Task Force sought this express provision placing the moneys outside the state treasury knowing that Article II, Section 22 of the Ohio Constitution, defines the General Assembly's power of appropriation only in the context of moneys in the state treasury: "[n]o money shall be drawn ***from the treasury***, except in pursuance of a specific appropriation, made by law. . . ." (Emphasis added.) By placing the endowment fund outside the state treasury as provided in R.C. 183.08, and by directing "disburse[ment]" of the appropriated moneys to this fund outside the state treasury, S.B. 192 at Section 6, the General Assembly undertook to ensure, as the Task Force recommended, that the moneys in the endowment fund would not be subject to future diversion to other purposes.

The 123rd General Assembly, of course, understood perfectly well what the Task Force was recommending and the effect of its decision to disburse the moneys to a fund that "shall not be a part of the state treasury." R.C. 183.08(A). As is typical in the legislative process, the Ohio Legislative Service Commission prepared a series of analyses of S.B. 192 for lawmakers as they debated and considered this bill. Each of these five separate analyses expressly stated that S.B. 192, if enacted, would immunize the endowment fund moneys from future legislative action diverting them to other purposes. The Final Analysis is typical:

> The act [proposed S.B. 192] contemplates that the General Assembly will . . . appropriate money . . . for . . . the Tobacco Use Prevention and Control Foundation. The appropriated money . . . is to be placed into the Tobacco Use Prevention and Control Endowment Fund, which the act creates as a "custodial fund of the Treasurer of State" to carry out the duties of the Foundation. (***Money in a custodial fund of the Treasurer of State is not subject to appropriation by the General Assembly.***) The Foundation is the trustee of the endowment fund, and the Treasurer of State can pay disbursements from the fund only upon instruments duly authorized by the Foundation's board of trustees.
>
> [LSC Final Analysis of S.B. 192 at 6 (emphasis added)]

The Ohio Office of Budget and Management also prepared a financial analysis of S.B. 192 titled "Ohio's Plan for Using the Tobacco Settlement Revenue" for consideration by the members of the 123rd General Assembly. It too explained that S.B. 192, if adopted, would protect the endowment fund from being diverted to other uses:

> The Endowment Fund is created in law as a custodial fund in the custody of the Treasurer of State. ***As with all other custodial funds, it is not considered to be in the state treasury and appropriations will not be made from it. . . .***
>
> [OBM March 6, 2000 Report at 3 (emphasis added)]

Having been fully informed about the import of the proposed legislation, the 123rd General Assembly adopted S.B. 192. The uncodified sections of the legislation reflect the General Assembly's intent to actually "disburse" the appropriated moneys to the endowment fund in the manner proposed by the Task Force to protect them from reappropriation. Section 6 of the uncodified portion of S.B. 192 appropriated $234,861,033 of the then existing MSA proceeds to the Ohio Department of Health, but went on and expressly directed that Dr. Baird, the Director of the Department of Health, "shall disburse moneys appropriated in this appropriation item to the Tobacco Use Prevention and Control Endowment Fund created by section 183.08 of the Revised Code to be used by the Tobacco Use Prevention and Control Foundation to carry out its duties." Thus, the moneys in the endowment fund - the very same moneys that are the subject of the appeal pending before this Court - were not merely "appropriated" to the Department of Health but, in addition, the Department of Health "disburse[d]" them "outside the state treasury." In short, they were expressly and unconditionally "disbursed" outside the state treasury, subject only to further disbursement by the trustees for the purposes of tobacco use prevention and cessation research and programs.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The Retroactivity Clause of the Ohio Constitution, Article II, Section 28, prohibits the General Assembly from divesting the equitable trust estate of, and depleting the previously disbursed monies held in, the 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, Section 10, and the Ohio Constitution, Article II, Section 28, by substantially impairing pre-existing trust rights and obligations.

Amici adopt and incorporate the arguments in support of the first two propositions of law set forth in Appellants' Memorandum in Support of Jurisdiction.

CONCLUSION

The constitutional questions and matters of public and great general interest presented by this appeal warrant - indeed, compel - this Court's review. *Amici* therefore request the Court to accept jurisdiction of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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