

IN THE SUPREME COURT OF OHIO

ORIGINAL

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

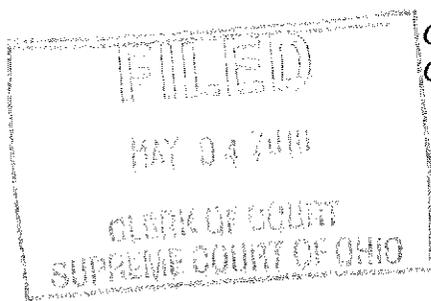
**AMICUS BRIEF OF CITIZENS' COMMISSION TO PROTECT THE TRUTH
 IN SUPPORT OF PLAINTIFFS-APPELLANTS ROBERT G. MILLER, JR.,
 DAVID W. WEINMANN AND AMERICAN LEGACY FOUNDATION**

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Citizens' Commission to Protect the Truth ("the Commission") respectfully submits this memorandum in support of Plaintiffs-Appellants Robert G. Miller, Jr. and David W. Weinmann and also in support of Plaintiff-Appellant American Legacy Foundation ("Legacy") in their appeal from the Ohio Court of Appeals, Tenth Appellate District's decision entered December 31, 2009. The Commission specifically submits that this Court should reverse the court of appeals' decision and reinstate the trial court's permanent injunction protecting the existing funds of the Ohio Tobacco Use Prevention and Control Endowment Fund ("Endowment Trust") for their dedicated trust purposes.

STATEMENT OF INTEREST OF *AMICI CURIAE*

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 Legacy'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. VI, § 6 to urge the Supreme Court to reverse the court of appeals' decision and reinstate the trial court's permanent injunction protecting the existing funds of the Endowment Trust for their dedicated trust purposes.

STATEMENT OF FACTS

I. Background Facts

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

Despite the tremendous strides that have been made in the field of youth smoking prevention and tobacco 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, or nearly one out of every five deaths.² There are more deaths "caused each year by tobacco use than by all deaths from human immunodeficiency virus (HIV), illegal drug use, alcohol use, motor vehicle

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, http://www.cdc.gov/tobacco/data_statistics/sgr/2004/index.htm. U.S. Dept. of Health and Human Svcs., Ctrs. for Disease Control and Prevention, *Health Effects of Cigarette Smoking* (2009), http://cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking/.

injuries, suicides, and murders combined.”³ Tobacco use costs more than \$157 billion in annual health-related economic losses.⁴

Approximately one in five adults in the United States smoke cigarettes.⁵ Nearly 80% of adult smokers first become regular smokers before age 18, and 90% become regular smokers before they turn twenty.⁶

Ohio is not immune from the toll that smoking inflicts on public health and state finances. Although progress has been made in reducing smoking rates, the continued impact of smoking in Ohio, particularly upon youth, should not be underestimated: approximately 18,500 people die each year in Ohio because of their smoking; more than 10,000 youth have lost at least one parent to a smoking-caused death; 15,700 youth become new, addicted smokers every year; nearly 20% of high school students smoke, and over 20% of adults smoke.⁷ Given current smoking levels, approximately 293,000 of the youth alive today in the state will die prematurely

³ U.S. Dept. of Health and Human Svcs., Ctrs. for Disease Control and Prevention, *Health Effects of Cigarette Smoking* (2009), http://cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking/.

⁴ 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.

⁵ 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.

⁶ 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>.

⁷ Campaign for Tobacco-Free Kids, et al., *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 12 (2008), <http://www.tobaccofreekids.org/pressoffice/ohioreport2008.pdf>. Campaign for Tobacco-Free Kids, *The Toll of Tobacco in Ohio* (2010), <http://tobaccofreekids.org/reports/settlements/toll.php?StateID=OH>.

from smoking.⁸ As for the economic impact, the state suffers over \$4.8 billion in smoking-caused productivity losses every year.⁹ Moreover, tobacco use costs the citizens of Ohio more than \$4.3 billion on smoking-caused health care costs annually, and \$1.4 billion of this amount is covered by the state Medicaid program.¹⁰ 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. Tobacco Prevention and Cessation Programs Supported by the Endowment Trust Have Proven Effective

The impact of efforts enabled by the Endowment Trust in Ohio is enormous; programs supported by the Endowment Trust 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 Trust-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:

⁸ 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 12 (2008), <http://www.tobaccofreekids.org/pressoffice/ohioreport2008.pdf>.

⁹ Campaign for Tobacco-Free Kids, *The Toll of Tobacco in Ohio* (2010), <http://tobaccofreekids.org/reports/settlements/toll.php?StateID=OH>.

¹⁰ Campaign for Tobacco-Free Kids, *The Toll of Tobacco in Ohio* (2010), <http://tobaccofreekids.org/reports/settlements/toll.php?StateID=OH>. 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.

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 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).

Legacy, in turn, has a long history of successfully combating tobacco use amongst the nation's children and teens.¹¹ Legacy launched its **truth**® campaign, the largest youth smoking prevention campaign in the country, in 2000. Legacy's nationwide **truth**® campaign is an extraordinary public health story. A rigorous, peer-reviewed article published in one of the most respected public health publications in the United States demonstrates that from its 2000 inception to 2002, **truth**® was responsible for 22% of the overall decline in youth smoking – a decrease which represents approximately 300,000 fewer young smokers.¹² A subsequent study found that the decrease in the number of youth who initiated smoking as a result of **truth**® during the period of 2000–2002 “will avert future healthcare costs of roughly \$1.9 billion (and perhaps ranging as high as \$5.4 billion).”¹³ The **truth**® campaign's successes are unassailable.

Tobacco use in Ohio (and across the country) remains a deadly epidemic that exacts a heavy toll on public health and states' economies. Investments in effective youth smoking prevention campaigns to prevent people from starting to smoke and programs to help

¹¹ Legacy has committed to use funds from the Endowment Trust “to undertake a number of new responsibilities in connection with smoking cessation and prevention programs for the benefit of Ohioans.” Order Granting Preliminary Injunction ¶ 77 (citation omitted).

¹² See Matthew C. Farrelly, et al., *Evidence of a Dose-Response Relationship Between 'truth' Antismoking Ads and Youth Smoking Prevalence*, 95 AM. J. PUB. HEALTH 425, 429 (2005).

¹³ David R. Holtgrave, et al., *Cost-Utility Analysis of the National truth® Campaign to Prevent Youth Smoking*, AM J. PREV. MED. 36(5), 385-88 (2009).

those who already smoke to quit are essential. These investments help to stem the tide of this epidemic and 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 Trust'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.

II. Facts of the Case

The Commission adopts and incorporates the Facts section set forth in Appellants Robert G. Miller, Jr., David W. Weinmann, and American Legacy Foundation's Merits Brief.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

In their Merits Brief, Appellants Robert G. Miller, Jr., David W. Weinmann, and Legacy present three propositions of law. Specifically, Appellants propose that (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 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' Merits Brief. 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 Merits Brief.

CONCLUSION

For the reasons set forth above, the Commission respectfully requests that the Supreme Court reverse the court of appeals' decision and reinstate the trial court's permanent injunction protecting the existing funds of the Endowment Trust for their dedicated trust purposes.

Dated: May 4, 2010

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