

ORIGINAL

THE SUPREME COURT OF OHIO

Board of Trustees of the Tobacco Use Prevention and Control Foundation et al.,
Plaintiffs-Appellants,
v.
Kevin L. Boyce, Treasurer of State et al.,
Defendants-Appellees,
Case No. 2010-0118
On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
Court of Appeals Case Nos. 09AP-768, 09AP-785, 09AP-832

Robert G. Miller, Jr., et al.,
Plaintiffs-Appellants,
v.
State of Ohio et al.,
Defendants-Appellees.
On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
Court of Appeals Case Nos. 09AP-769, 09AP-786, 09AP-833

AMICUS BRIEF OF THE OHIO DENTAL ASSOCIATION, OHIO OPTOMETRIC ASSOCIATION, OHIO STATE CHIROPRACTIC ASSOCIATION, AND OHIO ASSOCIATION OF COMMUNITY HEALTH CENTERS IN SUPPORT OF APPELLEES

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INTRODUCTION AND STATEMENT OF INTEREST OF *AMICI CURIAE*

Under the State budget adopted in July 2009, the General Assembly allocated \$129 million to continue to fund optional Medicaid services to Ohioans. The funds allocated for this purpose came from the State's 1998 Master Settlement Agreement with the tobacco industry. Amici Curiae herein represent dentists, optometrists, chiropractic physicians, and other providers of optional Medicaid services. They come before this Court to inform the Court of how the funds designated for optional Medicaid services are used, the significant harm Ohio will suffer if these funds are eliminated, and the need for expeditious resolution to avoid dismantling of the current distribution system for these services.

In coming before this Court, Amici Curiae recognize that there are many worthy programs and uses to which the funds at issue could have been allocated. Despite the trial court's decision suggesting the contrary, the question before the Court is not which of the competing programs or uses is most deserving of the funds at issue. The question is: Who has the authority to make this decision? The Tenth District Court of Appeals ("Tenth District") correctly held that the legislature -- and specifically the 127th General Assembly -- had the authority to allocate the funds at issue. The Ohio Constitution, applicable case law and statutes, and the historical practice of the General Assembly all support the conclusion reached by the Tenth District -- the 127th General Assembly had the authority to repeal the statutes that created the Ohio Tobacco Use Prevention and Control Endowment Fund ("Endowment Fund") and to reallocate the remaining funds.

Amici Curiae have an interest in this matter because the General Assembly has prudently allocated approximately \$129 million from the dissolved Endowment Fund to dental, vision, chiropractic, and other optional Medicaid services in order to provide such services to Ohioans

with no other health care options. *Amici Curiae's* members provide these optional Medicaid services to Ohio's most vulnerable and medically underserved populations. Appellants seek to eliminate this funding for optional Medicaid services. The elimination of such funding would cripple many of *Amici Curiae's* members who rely on Medicaid funding because of their strong commitment to serving Ohio's poor, would cost the State millions more dollars in lost matching federal funds, and could potentially lead to a public health crisis.

The Ohio Dental Association (ODA) has more than 5,500 member dentists, which represents approximately 80% of Ohio's practicing dentists. More than 30% of Ohio dentists participate in the dental Medicaid program as providers, performing over half a million emergency dental procedures per year on behalf of Ohio Medicaid recipients. The ODA and its member dentists regularly advocate before the Ohio General Assembly for continued funding for the optional adult dental Medicaid program.

The Ohio Optometric Association (OOA) represents 1,400 primary eye care doctors. The OOA promotes high quality optometric care for the residents of Ohio, serves as an advocate for its patients and members, and serves as the principal resource for public health information regarding the eyes and vision. Over 1,000 of Ohio's optometrists serve as Medicaid providers to poor and medically underserved Ohioans through Ohio's participation in optional Medicaid vision programs. The vast majority (approximately 90%) of primary eye care provided to Medicaid recipients is done through optometrists, including the diagnosis and treatment of diseases.

The Ohio State Chiropractic Association (OSCA) represents nearly one-half of the 2,200 licensed chiropractic physicians in Ohio. Chiropractic physicians are located in both urban and rural areas across Ohio and have been partners with the state in providing quality, cost-effective

care to Ohio's poorest population for a number of years. Many chiropractic clinics are largely dependent on treating Medicaid patients because of their desire to serve economically disadvantaged communities. Without Ohio's participation in optional Medicaid chiropractic programs and services, many members of the OSCA would be unable to serve the neediest of Ohio's citizens.

The Ohio Association of Community Health Centers (OACHC) is the professional trade association representing all of Ohio's 36 Federally Qualified Health Centers (FQHC) and FQHC Look-Alikes (more commonly referred to as Community Health Centers). With locations in more than 155 communities across the state, they serve as the family doctor and health care home to over 420,000 Ohioans and provide high-quality, affordable primary and preventive health care services regardless of insurance status. As a result, OACHC's members and their patients are significantly dependent upon Ohio's continued participation in the optional Medicaid programs at issue for the provision of key services, and in some cases for their ability to provide any services at all.

Amici Curiae urge the Court to affirm the decision of the Tenth District Court of Appeals. This decision is legally correct and gives appropriate deference to the General Assembly as the arbiter of public policy in Ohio. And, the Court is urged to do so expeditiously to minimize damage to providers of optional Medicaid services and the populations they serve.

I. ARGUMENT

A. **The General Assembly is Vested with the Power and Responsibility Over Appropriation of State Funds.**

In an ideal world, unlimited funding would be available both for the programs related to tobacco use prevention and for the important health care programs that are now designated to receive the funds at issue, such as optional Medicaid services and the SCHIP program. But in

the real world, where hard decisions about the allocation of limited resources must be made, our democratic system of government calls for such decisions to be made by representatives of the people. The Ohio Constitution and this Court's precedent make clear that allocating state funds to competing uses is exclusively a legislative function. Ohio Const., Art. II, Sections 1 and 22; *State v. Medbury* (1857), 7 Ohio St. 522.

The Tenth District's decision correctly recognizes the General Assembly's constitutional and plenary authority to create, amend, and repeal laws. The trial court's decision, on the other hand, disregarded the General Assembly's plenary authority and, instead, supplanted *its own policy judgment* about how Ohio should allocate scarce financial resources. While the Ohio Constitution vests the sole authority and responsibility for the appropriation of state treasury dollars in the General Assembly (Ohio Const., Art. II, Sections 1 and 22), the trial court's decision turned that fundamental principle on its head. In doing so, the trial court relied almost entirely on a policy disagreement with the legislature's appropriation of state monies. The end result was a permanent injunction that insulated approximately \$230 million from the General Assembly (including \$129 million that the General Assembly had allocated to optional Medicaid services). Instead of the General Assembly being able to allocate these funds as it deemed appropriate, the trial court appointed itself as the appropriate governmental body to allocate them. The trial court's decision was legally wrong and invaded the province of the General Assembly.

It is a bedrock principle of Ohio law that appropriating money is a legislative function. *State v. Medbury* (1857), 7 Ohio St. 522. And, “[t]he choice of how to fund a specific program – through regular biennial appropriations or the creation of a custodial account – is left to the General Assembly’s discretion.” Tenth District’s Opinion, ¶33. It is undisputed that the

Endowment Fund was a custodial account. But, there is nothing inherent in the creation of a custodial account that protects it forever from any further action by the General Assembly. See *id.* Appellants have presented no authority to support their position that once the General Assembly statutorily creates a custodial account, the account cannot be amended, dissolved, or reallocated. Nor can they in light of firmly established Ohio law.

Article II, Section 1 of the Ohio Constitution provides that the General Assembly's legislative power is plenary; the General Assembly can pass any law so long as it is not constitutionally prohibited. See *State ex rel Jackman v. Cuyahoga Cty. Court of Common Pleas* (1967), 9 Ohio St.2d 159, 162. This constitutional provision guarantees that the General Assembly's legislative power "will be ample to authorize the enactment of a law." Tenth District Opinion, ¶34 (citing *State ex rel. Poe v. Jones* (1894), 51 Ohio St. 492, 504). Just as the General Assembly has the authority to enact a law, it has the authority to repeal a law previously enacted. *Bank of Toledo v. Toledo* (1853), 1 Ohio St. 622, 666.

The legislative power, implies a power not only of making laws, but of altering and repealing them. As the circumstances either of the State itself, or of the several individuals which compose it, are changed, such claims and such duties as might once be beneficial, may become useless burdensome, or even hurtful. If, therefore, the legislative power could not change the rules which it prescribes, so as to suit them to the circumstances of the body politic, and of the members of that body, it could not answer the purposes for which it was established, it could not at all times settle their claims and their duties in such a manner, as is most conducive to the good of the whole, and of the several individuals which make up that whole.

Id. (quoting Rutherford's Institutes of Natural Law, 270).

The General Assembly properly exercised such authority when it repealed the statutes that created and provided for the administration of the Endowment Fund and reallocated the funds as it deemed appropriate. These actions are quintessential exercises of legislative authority that should not be overturned by a court.

It is well established that under Ohio's system of governance, "[i]t is not [] the role of this court [or any court] to function as the Supreme General Assembly." *State ex rel. Ohio AFL-CIO v. Voinovich* (1994), 69 Ohio St.3d 225, 246 (Resnick, J. concurring). Indeed, this Court has specifically recognized that permitting claims like the one now before it, which "could permit the [trial court] to order an appropriation of funds by judicial mandate[,] would usurp the power vested in the General Assembly under the Constitution." *Sorrentino v. Ohio Nat'l Guard* (1990), 53 Ohio St.3d 214, 218.

Further, the Ohio Constitution prohibits one General Assembly from binding a later General Assembly. *State ex rel. Public Institutional Bldg. Auth. v. Griffith* (1939), 135 Ohio St. 604, 619-620 ("A future general assembly may revoke this grant and divert these funds to other purposes. *** Who knows what demands for public revenues and public funds may be more pressing [in the future]"); *State ex rel. Foreman v. Brown* (1967), 10 Ohio St.2d 139, 158-59 (Schneider, J., concurring) ("one General Assembly cannot make a binding promise that the next General Assembly will not change the law"); *State ex rel. Youngstown v. Jones* (1939), 136 Ohio St. 130, 136 (A legislature has no power to bind successive legislatures.)

In sum, the 123rd General Assembly statutorily created a custodial account and mechanism for administering funds for the purpose of tobacco cessation and prevention programs. Years later, the 127th General Assembly determined that the funds remaining in the custodial account were needed for other purposes, so it repealed the statutes that created the custodial account for tobacco purposes and reallocated the remaining funds. In doing so, the General Assembly properly exercised its constitutional legislative power.

B. If Reinstated, the Trial Court’s Injunction Would Have Dramatically Adverse Consequences for Ohio’s Medically Underserved Populations, for Health Care Providers Who Serve Those Populations, and for the State at Large.

Appellants seek to reinstate the trial court’s permanent injunction. This Court should reject this notion. Notwithstanding the legal error of its decision, the trial court also relied substantially on several flawed conclusions of policy and fact about the costs and benefits of the legislature’s use of state funds. The trial court specifically rested its decision, in part, upon the conclusion that “the State has reasonable and equally effective alternative means of funding” to serve its purposes. Trial Court Ruling, ¶ 227. In addition, the trial court made the sweeping assertion that harm resulting from a failure to enjoin the State “far outweighs any harm to the State if relief is granted,” and rendered its policy opinion that the injunction “actually benefits the State and the public....” Id. at ¶ 255. Regardless of the dubious merit of these assertions with respect to the economic stimulus Jobs Fund—the original disputed appropriation of the dollars at issue—it is abundantly clear that a loss of the present appropriation for optional Medicaid services would cause significant harm to the State and its citizens.¹

The General Assembly’s decision to fund various health services programs, including optional Medicaid dental, vision, and chiropractic programs, with monies previously allocated to the Endowment Fund is not merely legally proper, but is a considered and prudent allocation of scarce state funds. The General Assembly was undoubtedly aware of the adverse consequences of cutting such funding, which include (1) cutting off critical health services to Ohio’s poor and medically underserved populations, (2) penalizing providers of Medicaid optional services who generously serve such populations and hindering their ability to do so in the future, and (3)

¹ The funds at issue were not allocated to optional Medicaid services until after the trial court conducted an evidentiary hearing. At the time of the evidentiary hearing, the funds had been allocated to an economic stimulus Jobs Fund.

costing the State millions more dollars in emergency care costs and lost matching federal funds than even the full amount of the appropriation itself. These same consequences would arise if a permanent injunction were reinstated.

If the Tenth District's decision is reversed and the injunction against the State reinstated, critical health care services will be severely limited or completely eliminated due to lack of funding. No other available funds for optional Medicaid services have been identified. The lack of any other available funds for optional Medicaid services, puts the status of optional Medicaid programs across the State in complete limbo. Needless to say, this places providers of such services in a difficult position as they must choose, in the very near future, whether (1) to continue providing services and risk never being paid for them, (2) alter their practices and not see Medicaid patients, or (3) move their practices to more economically stable locations (perhaps outside of Ohio).

If no funds for optional Medicaid services are available, the impact -- in lost services to poor and indigent patients, in lost dollars for clinics and providers who depend on Medicaid dollars for their survival, and in lost health and wellbeing around the State -- will be direct, immediate, and, in many cases, irreversible.

C. Loss of the Funds Allocated by the General Assembly to Optional Medicaid Services Would be Devastating to Poor and Medically Underserved Populations.

If the Tenth District's decision is reversed, the most significant harm will be inflicted on Ohioans who depend upon optional Medicaid programs for primary health care services. The numbers of Ohioans that depend on such services are significant. For example,

- approximately one million adult Medicaid recipients were eligible to receive a vision benefit in 2008;
- approximately 250,000 extractions, 250,000 restorations and 20,000 root canals have been provided annually to low-income adults through Ohio's dental Medicaid program,

which constitutes over half a million procedures performed as a result of pain, infection and decay; and

- over 420,000 Ohioans received treatment at Ohio's Community Health Centers, which exist in more than 155 communities across the state and serve as the family doctor and health care home to those they serve.

Preventing the use of funds designated for such services would deny health care to millions of Ohioans across the state and risks a public health crisis. Access to dental care, for example, is of particular concern because oral health care is integral to overall health. A recent report from the U.S. Surgeon General warned that there is a "silent epidemic" of untreated oral disease that restricts activities at school, work, and home, and diminishes the quality of life for low-income Americans. Former Surgeon General Dr. David Satcher concluded that the lack of access to oral care has a disproportionate impact on racial and ethnic minorities and medically compromised individuals. Even more, life-threatening cancers of the mouth and throat are detected in three Ohioans every day.² Without access to a dentist and dental coverage through the adult dental Medicaid program, this situation is sure to worsen.

Similarly, eliminating optional Medicaid services under which primary eye doctors provide care would have significant adverse consequences. Medical conditions relating to eye care, including those as simple as red eye or infection, when untreated can result in conditions as severe as blindness. Even more, diabetic eye patients, e.g., whose condition is not followed in a primary care setting can progress more rapidly into blindness because of diabetic retinopathy. Further, symptoms often referred to as floaters, diminished vision, halos, flashes, or temporary loss of side vision are often indicative of a detached retina or more severe eye conditions that if untreated could result in permanent vision loss and even blindness. In short, the inability of

² Oral Health and Access to Dental Care for Ohioans, 2007, Ohio Department of Health.

optometric doctors to treat underserved populations through optional Medicaid services would be detrimental to the eye health of Ohio's poor.

Eliminating necessary funding for chiropractic physicians under Medicaid optional services only limits the Medicaid recipients' ability to seek the most cost-effective, drugless, non-surgical health care treatment. As evidence supporting the effectiveness of chiropractic continues to emerge, health care consumers are turning in large numbers to chiropractic care — a form of health care aimed primarily at enhancing a patient's overall health and well-being without the use of drugs or surgery. Maintaining a commitment to optional Medicaid chiropractic services is essential to providing underserved Ohioans with more cost-effective, natural, and less-invasive medical treatments designed to promote complete and overall health.

Moreover, vision and dental care are important pieces of Ohio's Community Health Centers' holistic approach to prevention and wellness. For example, over the past 3 years, Ohio's Community Health Centers have added 40 full-time dental staff, producing an additional 48,000 dental visits. Patients now go directly to Community Health Centers when they have dental needs instead of delaying care. Currently there are 36 Community Health Center locations that provide onsite dental services to more than 132,000 Ohioans each year through over 320,000 patient visits. The two largest patient populations seen in these dental clinics are Medicaid and the uninsured. Dismantling the Adult Dental Medicaid Program will not only cripple their ability to address the needs of adult Medicaid patients, but all patients that access dental care services.

The significance of these programs to Ohioans without the means otherwise to pay for health services cannot be gainsaid. The public health consequences that the elimination of these programs would create cannot be underestimated. The General Assembly has considered the

evidence, weighed the costs and benefits, and recognized that, particularly in a time of enormous economic turmoil, the best allocation of the state funds at issue is for optional Medicaid services.

D. Preventing the General Assembly from Allocating the Funds at Issue will Penalize and Discourage Health Care Providers' Participation in Optional Medicaid Programs.

The current health care delivery system operates on the premise that Ohio is and will continue to be a participant in a number of optional Medicaid programs. That expectation was reinforced by the legislature's appropriation of a portion of the dissolved Endowment Fund to continuing those programs. Of course, Ohio may cease to participate in such programs at any time, but it is precisely that decision that the General Assembly has declined to make. And with good reason—the costs of eliminating those programs have repercussions beyond the immediate term. Indeed, not only does the trial court's decision threaten the health and wellbeing of significant populations of the State, but it also punishes those who have provided optional Medicaid services in good faith and could force some to withhold such services, or even cease practicing altogether, in the future.

Amici Curiae's members who provide optional Medical services have established practices that rely, in small or large part, on the expectation that the appropriation of the General Assembly will properly compensate them for services rendered to patients who otherwise would not be able to pay for care. But if the funds the General Assembly has designated for optional Medicaid services are not soon made available, many dentists, optometrists, chiropractics, and other providers of optional Medicaid services will be punished for spending up front capital or otherwise committing resources to treat the poor with an expectation of reimbursement. Such health care providers will have little reason to believe that it is either wise or economically feasible to participate in such programs in the future.

Without optional Medicaid programs, offices located in low-income rural areas of Ohio may be forced to close. This would be devastating for rural areas which have few providers of optional Medicaid services because loss of a provider's office will mean the elimination of access to services for all members of the community, not just adult Medicaid recipients. Additionally, medical and dental education in Ohio would suffer, since significant numbers of the patients who present to the various clinics and teaching facilities around the State are adult Medicaid recipients. Students will lose these learning opportunities and the schools will lose the Medicaid reimbursements related to any optional Medicaid services they provide.

This is also true of Community Health Centers, who exist for the express purpose of serving communities that lack an alternative health care provider to which the poor have access. Elimination of optional Medicaid services will force Community Health Centers to ration care and cut services across all patient populations (not just adult Medicaid patients), reduce staff in areas already in desperate need for providers, and/or close dental and vision clinics altogether. Community Health Centers are essential to the populations they serve and if deprived of the ability to provide regular, continuous care and preventive services to those who would otherwise go without, the effect will be felt throughout the health care system, from patients to doctors and beyond.

Once clinics and individual providers are forced to stop participating in optional Medicaid programs or to close up shop altogether, the switch cannot simply be flipped to bring them back. Cessation of these programs has permanent repercussions that are not easily remediable, and each day the funds are enjoined the greater the risk that another doctor or another clinic will decline to provide a needy patient with optional Medicaid services, downsize

its workforce, or close its doors for lack of funding—and we will all pay the price when they are gone.

E. The General Assembly’s Allocation to Medicaid Optional Services Prudently Maximizes Ohio’s Limited Financial Resources

There are at least two ways in which the trial court’s decisions threaten to cost Ohio millions of dollars above and beyond the ticket price of the appropriated funds. First, participation in optional Medicaid programs, like mandatory Medicaid, results in significant contributions to the State from the federal government. As set forth below, a failure to fund these programs will not simply mean a loss of the \$129 million designated by the State; it will force Ohio to forego additional millions that the federal government would contribute to the treatment and care of its poorest citizens. Second, because many of the optional Medicaid programs at issue involve preventative and primary care health services, optional Medicaid ultimately saves the State health care costs that would have to be paid down the road if various health conditions are not addressed in the early stages.

A state is free to include in a state medical assistance plan any optional Medicaid services it chooses, but it is not required to do so. See, 42 C.F.R. § 440.225. However, states are reimbursed for payment of optional services at the same rate as they are for mandatory services. See, 42 U.S.C. § 1396d(b); *id.* The “federal medical assistance percentage,” or FMAP, is the calculated (according to a statutory formula) percentage of the cost of care and services provided in the course of participation in Medicaid programs that will be paid by the federal government to a given participating state. *Id.* For fiscal year 2010, effective October 1, 2009, Ohio’s FMAP is 63.42%. See 2010 FMAP Notice, Department of Health and Human Services, FR Doc. E8-28233, filed 11-25-08 (<http://aspe.hhs.gov/health/fmap10.htm>).

This means that for whatever Ohio spends on qualifying optional Medicaid services, like the ones described above, the federal government will contribute 63.42% of the total. Or, put another way, the \$129 million dollars in optional Medicaid funding that the General Assembly has appropriated (which would constitute Ohio's contribution of 36.58% of the total) could actually yield a full \$352+ million worth of services for medically underserved and poor Ohioans. Thus, the trial court's injunction not only affects the \$129 million allocated by the General Assembly to optional Medicaid services, but also has the effect of forcing Ohio to forego another \$223+ million in possible federal funding that could be used to serve the same patient populations to an even greater degree.

Additionally, the General Assembly's decision to allocate funds to optional Medicaid services recognizes that paying for primary care services to underserved populations now will ultimately save money in the long run for Ohio. Every emergency room visit that is avoided, every day in which an Ohioan stays on the job instead of taking medical leave, every minor health condition that is treated before it becomes a major health concern, is money that will be saved. For example, an emergency room visit for an abscessed tooth can exceed \$300. But, if an abscessed tooth were treated in a dental office, the cost to Medicare for these services would be approximately one-fourth the cost of the emergency room visit. Moreover, most hospitals are not equipped to provide dental treatment, so patients may get prescriptions for pain medication and antibiotics despite the fact that the underlying oral condition remains untreated.

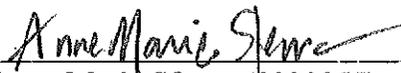
In sum, the General Assembly has the constitutional power and right to allocate Ohio's scarce financial resources. The prudence of such allocation should not be second-guessed by a court acting as policymaker. Given the trial court's conclusion that the injunction it issued "actually benefits the State and the public," it is important to understand that harm has been

inflicted on the State now that the funds at issue have been allocated to optional Medicaid services, as opposed to the Jobs Fund. Similarly, given the trial court's reliance on weighing costs and benefits as the basis for its decision, it is imperative to recognize the dramatic cost savings that result from participation in the optional Medicaid programs in the long run. The conclusion is unavoidable that whatever the costs associated with removing funds from the Endowment Fund, the General Assembly made an informed judgment that eliminating optional Medicaid was just too costly of a proposition. This Court should respect that judgment.

II. CONCLUSION

Amici Curiae respectfully request this Court to affirm the decision of the Tenth District Court of Appeals, and to render its decision as expeditiously as possible given the urgent need to use the funds at issue for optional Medicaid services.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing AMICUS BRIEF OF THE OHIO DENTAL ASSOCIATION, OHIO OPTOMETRIC ASSOCIATION, OHIO STATE CHIROPRACTIC ASSOCIATION, AND OHIO ASSOCIATION OF COMMUNITY HEALTH CENTERS IN SUPPORT OF APPELLEES was sent via regular U.S. mail, postage prepaid this

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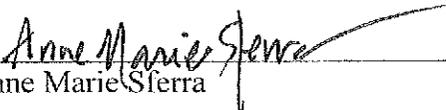
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