

ORIGINAL

SUPREME COURT OF OHIO

ALVIN D. JACKSON, M.D.,

: Case No. 2011-0019

Plaintiffs-Counterclaim Defendant-Appellant,

v.

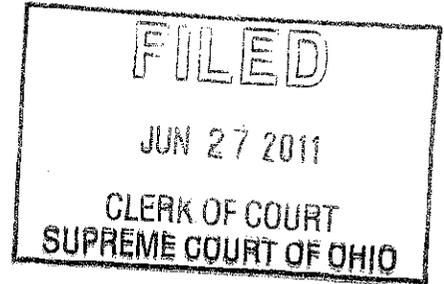
BARTEC, INC., dba ZENO'S VICTORIAN  
VILLAGE, et al.,

Defendants-Counterclaim Plaintiffs-  
Cross Claim Plaintiffs-Appellants,

v.

RICHARD CORDRAY,

Cross Claim Defendant-Appellee.



JOINT MERIT BRIEF OF *AMICI CURIAE*  
OHIO LIBERTY COUNCIL,  
OHIO FREEDOM ALLIANCE  
and  
COALITION OPPOSED TO ADDITIONAL SPENDING & TAXES

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**Proposition of Law:**  
Because individual rights in private property are declared to be “inviolable” in the Ohio Constitution, such rights are afforded significantly greater respect, protection and preeminence than under the United States Constitution and that a claimed exercise of police powers by the State of Ohio is insufficient to regulate or infringe upon such rights. .... 10

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## INTEREST OF *AMICI CURIAE*

### Ohio Liberty Counsel

Conceived as a way to connect all liberty-minded groups and individuals in Ohio to communicate and jointly engaged on issues and activities, the **Ohio Liberty Council** was initially formed in June 2009 as the result of a collaborative effort by local tea-party groups, 912 groups, the Ohio Freedom Alliance and the Campaign for Liberty. Today, the Ohio Liberty Council is a statewide coalition of 58 grassroots groups and is organized as a non-profit corporation under the law of Ohio and section 501(c)(4) of the Internal Revenue Code.

The organizational mission of the Ohio Liberty Council is succinctly stated as seeking “to unite, inform, and empower Ohio freedom-loving groups and citizens to affect policy in favor of liberty.” In support of this mission, some of the declared principles guiding the Ohio Liberty Council include:

- Governments are instituted to secure rights inherent to human beings, including the right to life, liberty and the pursuit of happiness.
- Governments derive their just powers from the consent of the governed and, thus, if the people have not granted a power to the government through the Constitution, then the government does not have the power or authority to act.
- Limited government is essential to the protection of liberty, and the checks and balances established by our Constitution are essential to limited government.
- Private property and free markets are essential to our prosperity and individual freedom.

The Ohio Liberty Council is organized solely by grassroots volunteers. Thus, this litigation raises issues at the core of the mission and principles of the Ohio Liberty Council. Specifically, from the perspective of the Ohio Liberty Council, this litigation raises key issues going to the scope and limitations (if any) by which the government acts upon and attempts to regulate

individuals' freedoms and liberties through unelected and unaccountable governmental bureaucrats and, specifically, how such efforts directly impact individuals' fundamental rights including the right to own, possess and enjoy private property.

### Ohio Freedom Alliance

Formed in March 2008, the **Ohio Freedom Alliance** is a non-partisan political organization dedicated to education and action at the grassroots level in the State of Ohio. The Ohio Freedom Alliance focuses upon action and policies that advance liberty, individual rights, limited government, sound monetary reform, and a strong economy in Ohio. In support of this mission, the declared principles guiding the Ohio Liberty Council include:

- Our rights are granted to us by our Creator and are therefore an integral part of our humanity. Any attempt by any individual or group of individuals to take away these rights is immoral and contrary to the laws of nature.
- It is only in an environment of freedom that man is capable of achieving his full potential. A society that maximizes freedom will also maximize prosperity, peace and justice.
- Voluntary action is ethical and it is the growing state that is the negation of freedom and liberty.

Thus, due to its commitment to the protection of individual rights and the promotion of freedom, the Ohio Freedom Alliance has a strong interest in this Court's ruling on the scope and authority of the State of Ohio to regulate, control or eviscerate individuals' fundamental rights.

### Coalition Opposed to Additional Spending & Taxes

Founded in 1999, the Coalition Opposed to Additional Spending & Taxes ("COAST") originally focused upon opposing higher taxes and unjustifiable spending by governmental officials in both the City of Cincinnati and Hamilton County. Since that time, the focus of COAST has expanded, both in terms of mission and geography, so that its efforts now include

serving as a check upon the unlimited and arbitrary abuse of power by public officials at all levels of government throughout the State of Ohio.

COAST has saved taxpayers in southwest Ohio literally billions of tax dollars. Two notable accomplishments came from coalitions with a broad spectrum of other groups. In 2003, COAST joined Alternatives to Light Rail Transit ("ALRT") to defeat a one-cent sales-tax increase to fund a multi-billion dollar light rail system. In 2007, after a one-half-cent-sales-tax increase was imposed without a public vote, COAST joined with the NAACP, the Green Party, the Libertarian Party, Cincinnati Progressive Action, and others to collect over 56,000 signatures in 42 days to place the issue on the ballot which, ultimately, defeated the tax.

COAST has for several years been involved in prominent litigation which has served to check or prohibit illegal or improper governmental action. For example, in 2002, COAST was successful in obtaining a settlement in a federal lawsuit against the Cincinnati Public Schools wherein the school board agreed to never again use school resources to aid political campaigns; in 2007, COAST was successful in its challenge the constitutional violations by the Hamilton County Sheriff to advocate in support of a tax levy. Additionally, COAST successfully stopped the unlawful transfer of tax dollars to a local film commission when the specific statutory purposes for which the subject tax dollars could be used did not include such a transfer.

Thus, with respect to this litigation, COAST views the case as but another battle to control the continual and unlimited effort by unelected governmental bureaucrats to expand the reach of governmental regulation into the daily lives of people, which naturally results in a continual deterioration of the fundamental individual rights of life, liberty and property which formed the basis for our country and our state.

## STATEMENT OF THE CASE AND FACTS

Amici refer to and accept the procedural and factual background as set forth in the Appellants' Merit Brief.

### INTRODUCTION

*All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.*

-- Ohio Constitution, Article I, Section 1

*Private property shall ever be held inviolate . . . .*

-- Ohio Constitution, Article I, Section 19

*Experience hath shewn, that even under the best forms [of government,] those entrusted with power have, in time, and by slow operations, perverted it into tyranny.*

-- Thomas Jefferson

Bit by bit during the last century, the administrative state has continually expanded its grasp and control over the lives and daily activities of the people -- directly impacting and restricting the fundamental right of the individual to life, liberty and property. Through the ever-expanding administrative state, the freedom and liberty of the citizens of this state and of this nation, including the fundamental right to possess and enjoy property, have slowly, but surely, been eroded.

In addition to the erosion of individual freedom and liberty, the presence and continual expansion of the administrative state has also resulted in further distancing the governed from their governors. For with the continual rise and ever-creeping expansion of the administrative state, people are no longer governed by their chosen representatives, but rather by unelected administrative bureaucrats. Yet, in adopting the Ohio Constitution and declaring that “[t]he legislative power of the state shall be vested in a general assembly,”<sup>1</sup> the people of the State of Ohio held true to the republican principles underlying the establishment of this state and nation, *i.e.*, that our form of government can be defined as “that form of government under which the people act through their chosen representatives.”<sup>2</sup> For “all power is inherent in the people, and the government has such sovereign power as the people have conferred upon it.”<sup>3</sup>

With respect to the Smoke Free Act, unelected bureaucrats in the Ohio Department of Health (the “ODH”) have impermissibly sought to control an individual’s fundamental interest in the use and enjoyment of property through the imposition of strict liability upon the property owners and to do so, not because of the act or omission of the proprietor, but, rather, due to the actions of third parties and in direct disregard of the sacrosanct and inviolate nature of property rights recognized in Ohio. Through unelected bureaucrats, such as those at ODH, ever-increasing control is being imposed upon the ability of individuals to fully enjoy and exercise their unalienable rights of life, liberty and property. Yet, in Ohio, an individual’s rights in and to property are not only considered to be fundamental, but the Ohio Constitution acknowledges and

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<sup>1</sup> Ohio Const. art. II, sec. 1.

<sup>2</sup> *Hile v. City of Cleveland* (1923), 107 Ohio St. 144, 151, 141 N.E. 35.

<sup>3</sup> *Fidelity & Cas. Co. v. Union Savings Bank Co.* (1928), 119 Ohio St. 124, 127, 162 N.E. 420.

ensures that significantly greater protection is afforded to the protection of such fundamental property rights than that which is mandated by the United States Constitution.

Reversal of the decision of the Tenth District Court of Appeals is warranted and necessary (i) in order to protect the republican form of government and the constitutional principle of separation of powers whereby laws which govern our activities are enacted by elected legislators rather than by unelected and unaccountable bureaucrats in the executive branch of government; and (ii) in order to protect the original and fundamental right of private property, the protection of which is given broad and extensive protection in the Ohio Constitution. For this Court has recognized that an individual's rights of private property are anterior to the formation of government itself and that the protection of the individual's rights of private property is one of the basic *raison d'être* for the formation and existence of government itself.<sup>4</sup> This Court now has the opportunity to return these basic and fundamental principles to the primacy where these principles rightfully belong.

### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

Proposition of Law: The adoption by the Ohio Department of Health of a policy imposing strict liability against business proprietors for alleged violations of the Smoke Free Act lacks a statutory basis or statutory authority under the Act and, as such, violates the doctrine of separation of powers required by the Ohio Constitution.

In contrast to a parliamentary system of government, in a government premised upon separation of powers (such as the government of the State of Ohio), a hierarchical chain of command from the legislative branch to unelected bureaucrats responsible for rulemaking does not exist. While supposedly guided by legislative enactments and mandates, these unelected

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<sup>4</sup> *City of Norwood v. Horney*, 110 Ohio.St.3d 353, 362, 2006-Ohio-3799 ¶36 (quoting *Bank of Toledo v. Toledo* (1853), 1 Ohio St. 622, 632).

bureaucrats have, through the years, been afforded greater and greater unchecked power to adopt rules and regulations which, in turn, have been given the effect of law.<sup>5</sup> And in the exercise of such authority, these unelected bureaucrats directly and unduly impact, limit and restrict the fundamental rights of life, liberty and property.

In *Whitman v. American Trucking Associations, Inc.*, the United States Supreme Court provided a succinct overview of the constitutionality of the delegation of legislative powers to administrative rule-making bodies:<sup>6</sup>

In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, §1, of the Constitution vests “[a]ll legislative Powers herein granted ... in a Congress of the United States.” This text permits no delegation of those powers, and so we repeatedly have said that when Congress confers decisionmaking authority upon agencies Congress must “lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.”

And the same principles apply in Ohio for “[i]t is firmly established that the General Assembly cannot delegate its legislative power and that any attempt so to do is unconstitutional.”<sup>7</sup>

But administrative rulemaking has been allowed in this state, provided that such rule-making “is to facilitate the administrative agency’s placing into effect the policy declared by the General Assembly in the statutes to be administered by the agency.”<sup>8</sup> But in order for such

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<sup>5</sup> *Kroger Grocery & Baking Co. v. Glander* (1948), 149 Ohio St. 120, 125, 77 N.E.2d 921 (“[a]n administrative rule, ‘ . . . issued pursuant to statutory authority, has the force and effect of law unless it is unreasonable or is in clear conflict with statutory enactment governing the same subject matter’”).

<sup>6</sup> *Whitman v. American Trucking Associations, Inc.* (2001), 531 U.S. 457, 472 (internal citation omitted and quoting *J. W. Hampton, Jr., & Co. v. United States* (1928), 276 U. S. 394, 409).

<sup>7</sup> *Belden v. Union Central Life Ins. Co.* (1944), 143 Ohio St. 329, 342, 55 N.E.2d 629, 635; accord *Redman v. Ohio Dept. Of Indus. Relations* (1996), 75 Ohio.St.3d 399, 404 (“the General Assembly cannot delegate its essential legislative power to administrative bodies or officers”).

<sup>8</sup> *Doyle v. Ohio Bur. of Motor Vehicles* (1990), 51 Ohio St.3d 46, 47, 554 N.E.2d 97 (quoting *Carroll v. Dept. of Adm. Servs.* (1983), 10 Ohio App.3d 108, 110, 460 N.E.2d 704).

administrative rules to comport with the constitutional mandate of separation of powers, the General Assembly must “establish a policy and fix the standards for guidance of administrative agencies” from which such administrative rules are promulgated.<sup>9</sup>

With respect to this case, *amici* do not contend that delegated authority is *per se* unlawful under the Ohio Constitution – examination of that issue may be appropriate on another day in a different case. But “[w]hen legislative power is delegated to administrative officials[,] it is constitutionally required that *adequate guides and standards* be established by the delegating legislative body so that the administrative officials, appointed by the executive and not elected by the people, will not legislate, but will find and apply facts in a particular case in accordance with the policy established by the legislative body.”<sup>10</sup> Furthermore, “[a]n agency exceeds its grant of authority when it creates rules that reflect a public policy not expressed in the governing statute.”<sup>11</sup> For an administrative agency “may enforce but may not declare public policy.”<sup>12</sup> But, unfortunately, that is what has occurred in this case, *i.e.*, the ODH has adopted and implemented a public policy that lacks any statutory authority, but, instead, has elected to take upon itself to expand the scope and application of the Smoke Free Act so as to violate the fundamental constitutional principle of separation of powers.

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<sup>9</sup> *Belden v. Union Central Life Ins. Co.* (1944), 143 Ohio St. 329, 55 N.E.2d 629 (syllabus ¶3).

<sup>10</sup> *In re Handy* (2000), 171 Vt. 336, 344-45, 764 A.2d 1226, 1236 (emphasis added)(quoting *Gino’s of Maryland, Inc. v. City of Baltimore* (1968), 250 Md. 621, 244 A.2d 218, 229).

<sup>11</sup> *McFee v. Nursing Care Mgt. of Am., Inc.*, 2010-Ohio-2744, 126 Ohio St.3d 183, 931 N.E.2d 1069 ¶25.

<sup>12</sup> *State ex rel. Curtis v. DeCorps* (1938), 134 Ohio St. 295, 298, 16 N.E.2d 459.

For in this case, following a bench trial, the trial court issued its decision which included the following factual findings:<sup>13</sup>

The Court will . . . make a short statement of the facts that are pertinent to its decision. At trial the following facts were brought forward: (1) The Department of Health has in the past implemented a policy of strict liability for violations of the SmokeFree Act in regards to property owners . . . ; [and] (2) In the case of Defendants, the Department of Health implemented this [strict liability] policy and cited Defendants for violations of the SmokeFree Act without regard to whether Defendants were actually permitting smoking to occur on the premises . . .

The first factual finding by the trial court, *i.e.*, that the ODH has implemented a policy of strict liability against business proprietors for violations of the Smoke Free Act, is at the heart of one of the issues presented by this appeal. For, as is well-established, “[a]dministrative regulations cannot dictate public policy but rather can only develop and administer policy already established by the General Assembly.”<sup>14</sup>

Yet, through its adoption and implementation of a policy of strict liability against property owners for violations of the Smoke Free Act, the ODH has impermissibly, *i.e.*, unconstitutionally, engaged in a legislative function of expanding the scope and reach of the Smoke Free Act. For the adoption of a policy of strict liability is a prerogative that is within the exclusive constitutional domain of the General Assembly, not unelected and unaccountable bureaucrats. Left unabated by this Court, the ODH will inevitably continue to enforce its unconstitutional policy of strict liability against business owners throughout the State of Ohio and, in so doing, exceed its proper role in our constitutional form of government.

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<sup>13</sup> Trial Court Decision, Feb. 19, 2010, at p. 2.

<sup>14</sup> *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 773 N.E.2d 536, 2002-Ohio-4172 ¶41.

Proposition of Law: Because individual rights in private property are declared to be “inviolable” in the Ohio Constitution, such rights are afforded significantly greater respect, protection and preeminence than under the United States Constitution and that a claimed exercise of police powers by the State of Ohio is insufficient to regulate or infringe upon such rights.

In addition to the separation of powers doctrine, this appeal raises another fundamental constitutional issue. Specifically, the expansive protection afforded to individual’s rights in private property which have long been recognized, embraced and respected in Ohio. Within the Ohio Constitution, this protection of such a fundamental right is contained in Article I, Section 19: “Private property shall ever be held inviolable, but subservient to the public welfare.”

In *City of Norwood v. Horney*,<sup>15</sup> this Court described “the rights related to property, *i.e.*, to acquire, use, enjoy, and dispose of property” as being “among the most revered in our law and traditions. Indeed, property rights are integral aspects of our theory of democracy and notions of liberty.”<sup>16</sup> Thus, this Court recognized that not only are property rights consideration to be “fundamental rights” in Ohio, but also acknowledged that Ohio has adopted the “Lockean notions of property rights,”<sup>17</sup> *i.e.*, that “[t]he right of private property is an original and fundamental right, existing anterior to the formation of the government itself” such that “it was one of the primary and most sacred objects of government to secure and protect.”<sup>18</sup> Thus, this Court appropriately recognized that the language utilized in the Ohio Constitution relative to

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<sup>15</sup> 110 Ohio.St.3d 353, 2006-Ohio-3799.

<sup>16</sup> *Id.* at 363, 2006-Ohio-3799 ¶37.

<sup>17</sup> *Id.* at 362, 2006-Ohio-3799 ¶36.

<sup>18</sup> *Id.* (quoting *Bank of Toledo v. Toledo* (1853), 1 Ohio St. 622, 632).

property rights “reinforced the sacrosanct nature of the individual’s ‘inalienable’ property rights, Section 1, Article I, which are to be held forever ‘inviolable.’ Section 19, Article I.”<sup>19</sup>

It is beyond cavil that “Ohio has always considered the right of property to be a fundamental right.”<sup>20</sup> And, as such, statutes, such as the Smoke Free Act, which impose “restrictions upon the use of private property, in derogation of private property rights, must be strictly construed.”<sup>21</sup> Yet, by its ruling in this case, the Tenth District Court of Appeals failed to even consider the arguments made with respect to the fundamental constitutional rights at stake; and in prior cases dealing with the Smoke Free Act, the Tenth District failed to recognize or appreciate that, in Ohio, individual rights in property are considered sacrosanct, inalienable and inviolate, *i.e.*, fundamental, such that the continuation of the ODH’s trampling upon private property rights will continue unabated.<sup>22</sup>

In *Norwood*, this Court expressly reaffirmed “that the Ohio Constitution confers on the individual fundamental rights to property that may be violated only when a greater public need *requires* it.”<sup>23</sup> In this case and with respect to the Smoke Free Act, there has never been a showing that some greater public need *requires* the violation or infringement upon private

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<sup>19</sup> *Id.* at 363, 2006-Ohio-3799 ¶37; *see also Moore v. City of Middletown*, 2010-Ohio-2962 ¶38 (recognizing that in *Norwood*, the Supreme Court “found that the Ohio Constitution contains greater protection of private property rights than the United States Constitution”).

<sup>20</sup> *Norwood*, 110 Ohio.St.3d at 363, 2006-Ohio-3799 ¶38; *accord U.S. Bank, N.A. v. Stewart*, 2007-Ohio-5669 ¶80 (“[t]he right of property is considered a fundamental right”).

<sup>21</sup> *State v. Lilliock* (1982), 70 Ohio St.2d 23, 26; *accord Saunders v. Zoning Dep’t* (1981), 66 Ohio St.2d 259, 261, 421 N.E.2d 152 (“[r]estrictions on the use of real property by ordinance, resolution or statute must be strictly construed”).

<sup>22</sup> *E.g., Deer Park Inn v. Ohio Dep’t of Health*, 185 Ohio App.3d 524, 924 N.E.2d 898, 2009-Ohio-6836 ¶¶15-20 (notwithstanding Ohio Constitution’s broader protection of private property rights and prior court decisions declaring such rights to be fundamental, court declared, with respect to Smoke Free Act, that “no fundamental right is implicated” and, accordingly, applied rational basis test to Act).

<sup>23</sup> *Norwood*, 110 Ohio.St.3d at 363 n.16, 2006-Ohio-3799 ¶136 n.16 (emphasis added).

property rights effectuated by the Act. Without such a showing, the ODH cannot satisfy the well-established strict scrutiny standard reiterated by this Court in *Norwood* in order to constitutionally apply the Smoke Free Act against private businesses and the owners thereof.

### CONCLUSION

This case raises two important and critical constitutional issues, *viz.*, the diffusion of governmental power through the separation of powers doctrine and the foundation of individual freedom and liberty arising from rights in private property. Both of these issues implicate questions regarding the proper relationship between the people and their government. Thus, resolution of this appeal necessitates addressing the question of who ultimately possesses sovereignty over the other. The ODH has sought to expand the scope and reach of the Smoke Free Act through its unconstitutional imposition of strict liability against owners of private businesses. Additionally, because the ODH has not (and cannot) establish that a greater public need requires the violation of an individual's fundamental rights to property, the efforts by the ODH to impose any regulations pursuant to the Smoke Free Act is an affront to the Ohio Constitution. Accordingly, the decision of the Tenth District Court of Appeals should be reversed and this Court should restrain the unconstitutional efforts of the ODH.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was or will be served upon the following via ordinary mail, postage prepaid on the 27th day of June 2011.

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