

**IN THE TENTH DISTRICT COURT OF APPEALS
FRANKLIN COUNTY, OHIO**

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BOARD OF TRUSTEES OF THE
TOBACCO USE PREVENTION AND
CONTROL FOUNDATION, *et al.*,

Plaintiffs-Appellees,

v.

KEVIN BOYCE,
TREASURER OF STATE, *et al.*,

Defendants-Appellants.

:
: CASE NO. 09 AP 0768
:
: (Regular Calendar)
:
: Trial Court No. 08 CV 005363
:
: JUDGE FAIS

ROBERT G. Miller, Jr., *et al.*,

Plaintiffs-Appellees,

v.

STATE OF OHIO, *et al.*,

Defendants-Appellants.

:
: CASE NO. 09 AP 0769
:
: (Regular Calendar)
:
: Trial Court No. 08 CV 07691
:
: JUDGE FAIS

**MOTION OF THE AMERICAN HEART ASSOCIATION,
THE AMERICAN HEART ASSOCIATION GREAT RIVERS AFFILIATE,
THE AMERICAN LUNG ASSOCIATION, THE AMERICAN LUNG ASSOCIATION OF
THE MIDLAND STATES, THE AMERICAN CANCER SOCIETY,
THE AMERICAN CANCER SOCIETY: OHIO DIVISION,
THE AMERICAN CANCER SOCIETY CANCER ACTION NETWORK,
THE CAMPAIGN FOR TOBACCO-FREE KIDS, AND
THE OHIO STATE MEDICAL ASSOCIATION
FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF APPELLEES**

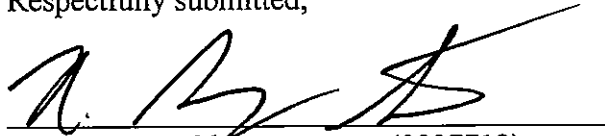
Pursuant to Ohio App. R. 17, The American Heart Association, The American Heart Association Great Rivers Affiliate, The American Lung Association, The American Lung Association Of The Midland States, The American Cancer Society, The American Cancer Society: Ohio Division, The American Cancer Society Cancer Action Network, The Campaign

For Tobacco-Free Kids, and the Ohio State Medical Association (collectively, “*Amici Curiae*”), hereby move the Court for leave to file a brief as *Amici Curiae* in the above-captioned case. A copy of the brief, conditionally filed with this motion for leave pursuant to Ohio App. R. 17, is attached.

Amici Curiae are voluntary and professional health organizations dedicated to building healthier lives, free of heart disease and stroke, improving lung health, eliminating cancer, and protecting children through education, promotion of public and private policies, advocacy, and research in Ohio. *Amici Curiae* submit this brief to apprise the Court of the devastating impact that tobacco use has on the lives and health of Ohioans, as well as on Ohio’s economy, the important public health successes of the Ohio Tobacco Use Prevention and Control Foundation (“Foundation”), and the projected damages and consequences to Ohio caused by dismantling the program.

For the foregoing reasons, *Amici Curiae* respectfully request that the motion for leave to file the accompanying brief be granted.

Respectfully submitted,



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Kids, and the Ohio State Medical Association

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Motion Of The American Heart Association, The American Heart Association Great Rivers Affiliate, The American Lung Association, The American Lung Association Of The Midland States, The American Cancer Society, The American Cancer Society: Ohio Division, The American Cancer Society Cancer Action Network, The Campaign For Tobacco-Free Kids, and the Ohio State Medical Association For Leave To File Brief As Amici Curiae In Support Of Appellees was served via U.S Mail, postage paid, this 29th day of September 2009:

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**IN THE TENTH DISTRICT COURT OF APPEALS
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Defendants-Appellants.	:	

***AMICUS BRIEF* SUPPORTING
AFFIRMANCE OF JUDGMENT BELOW
ON BEHALF OF:
THE AMERICAN HEART ASSOCIATION
THE AMERICAN HEART ASSOCIATION GREAT RIVERS AFFILIATE
THE AMERICAN LUNG ASSOCIATION
THE AMERICAN LUNG ASSOCIATION OF THE MIDLAND STATES
THE AMERICAN CANCER SOCIETY
THE AMERICAN CANCER SOCIETY: OHIO DIVISION
THE AMERICAN CANCER SOCIETY CANCER ACTION NETWORK
THE CAMPAIGN FOR TOBACCO-FREE KIDS
THE OHIO STATE MEDICAL ASSOCIATION**

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici, voluntary and professional health organizations, submit this brief to apprise the Court of: (1) the devastating impact that tobacco use has on the lives and health of Ohioans as well as on Ohio's economy; (2) the important public health successes of the Ohio Tobacco Use Prevention and Control Foundation ("Foundation"); and (3) the clear legislative intent to create the Foundation's corpus as a trust beyond the reach of the normal appropriations processes.

THE AMERICAN HEART ASSOCIATION AND THE AMERICAN HEART ASSOCIATION GREAT RIVERS REGIONAL AFFILIATE

Founded in 1924, the American Heart Association is the nation's oldest and largest voluntary health organization dedicated to building healthier lives, free of heart disease and stroke. The American Heart Association's involvement in advocacy and education on tobacco prevention and control is longstanding and stems from the fact that smoking is a major cause of cardiovascular disease, including heart attack, stroke and peripheral vascular disease.

Smokers' risk of developing coronary heart disease is 2-4 times that of nonsmokers. Cigarette smoking is a powerful independent risk factor for sudden cardiac death in patients with coronary heart disease; smokers have about twice the risk of nonsmokers. Cigarette smoking also acts with other risk factors to greatly increase the risk for coronary heart disease.

In addition, an estimated 35,000 nonsmokers die from coronary heart disease each year because of exposure to secondhand smoke. Reflecting the American Heart Association's expertise in tobacco control, the legislation that created the Ohio Tobacco Use Prevention and Control Foundation required that one member of the Foundation's Board of Trustees be appointed by the governor from a list of three individuals recommended by the American Heart Association. Am. Sub. S.B. No. 192, Sec. 183.04(D).

THE AMERICAN LUNG ASSOCIATION AND THE AMERICAN LUNG ASSOCIATION OF MIDLAND STATES AFFILIATE

The American Lung Association (ALA) in Ohio is the premier organization working to save lives by improving lung health through education, advocacy, and research in Ohio. The ALA is the oldest voluntary health organization in the United States and has been fighting for the lung health of all Americans since 1904.

Today, the American Lung Association fights to reduce smoking, find cures for lung disease, and clean the air we breathe. The ALA provides proven programs and resources to keep kids off tobacco and help smokers quit. Reflecting the American Lung Association's expertise in tobacco control, the legislation that created the Ohio Tobacco Use Prevention and Control Foundation required that one member of the Foundation's Board of Trustees be appointed by the governor from a list of three individuals recommended by ALA. Am. Sub. S.B. No. 192, Sec. 183.04(E).

THE AMERICAN CANCER SOCIETY, OHIO DIVISION AND THE AMERICAN CANCER SOCIETY CANCER ACTION NETWORK

The American Cancer Society (ACS) is the nationwide community-based voluntary health organization dedicated to eliminating cancer as a major health problem through research, education, advocacy and service. Research conducted by ACS was instrumental in establishing the original link between tobacco use and cancer, and nationwide its volunteers and advocates work to further tobacco control policies.

The American Cancer Society Cancer Action Network (ACS CAN), the nonprofit, nonpartisan advocacy affiliate of the American Cancer Society, supports evidence-based policy solutions designed to eliminate cancer as a major health problem.

Smoking accounts for an estimated 30% of all cancer deaths and 87% of lung cancer deaths. Smoking is associated with increased risk for cancer of the cervix, esophagus, kidney

and renal pelvis, larynx, lung and bronchus, oral cavity and pharynx, pancreas, stomach, urinary bladder and acute myeloid leukemia. In Ohio, an estimated 7,454 cancer deaths annually can be attributed to smoking.

Reflecting ACS's expertise in tobacco control, the legislation that created the Ohio Tobacco Use Prevention and Control Foundation required that one member of the Foundation's Board of Trustees be appointed by the governor from a list of three individuals recommended by the American Cancer Society. Am. Sub. S.B. No. 192, Sec. 183.04(C).

THE CAMPAIGN FOR TOBACCO-FREE KIDS

The Campaign for Tobacco-Free Kids is a 501(c)(3) nonprofit organization that works to promote public and private policies to prevent and reduce tobacco use and its harms, especially among children. As an important part of that work, the Campaign tries to ensure that states use their tobacco settlement funds effectively to address smoking-caused disease, prevent tobacco use among youth, and reduce smoking-caused harms and costs.

Founded in 1996, the Campaign for Tobacco-Free Kids has over 100 member organizations, including health, civic, corporate, youth, and religious groups dedicated to reducing tobacco use and its harms among children and others. For more than a decade the Campaign has played a key role in encouraging states and localities to increase their tobacco tax rates (which directly reduces tobacco use and harms, especially among youth, pregnant women, and lower income communities), implement strong smoke-free laws, support strong state tobacco prevention programs, and take other effective actions to reduce tobacco use and its many harms and costs.

THE OHIO STATE MEDICAL ASSOCIATION

The Ohio State Medical Association (OSMA) is a non-profit professional association founded in 1835, and is comprised of approximately 20,000 physicians, medical residents, and

medical students in the State of Ohio. The OSMA's membership includes most Ohio physicians engaged in the private practice of medicine, in all specialties. The Ohio State Medical Association strives to improve public health through education, to encourage interchange of ideas among members, and to maintain and advance the standards of practice by requiring members to adhere to the concepts of professional ethics.

Reflecting the OSMA's expertise in tobacco control, the legislation that created the Ohio Tobacco Use Prevention and Control Foundation required that one member of the Foundation's Board of Trustees be appointed by the governor from a list of three individuals recommended by the Ohio State Medical Association. Am. Sub. S.B. No. 192, Sec. 183.04(G).

ARGUMENT

I. TOBACCO USE HAS DEVASTATING HEALTH AND FISCAL CONSEQUENCES FOR OHIO, BUT THESE CONSEQUENCES CAN BE AVOIDED

A. TOBACCO IS A LEADING CAUSE OF DEATH AND DISEASE IN OHIO

Each year, 18,600 Ohio citizens die prematurely from tobacco-related causes, while more than twenty times that number suffer debilitating diseases caused by tobacco use.¹ As part of the approximately ninety percent of all smokers who begin as teenagers or younger,² 15,700 Ohio kids become new addicted smokers each year.³ They join the 1.76 million Ohio adults who are already nicotine addicts.⁴

¹ Department of Health and Human Services Centers for Disease Control and Prevention, State Tobacco Activities Tracking and Evaluation STATE System, Tobacco Control Highlights Report: Ohio, 2008, http://apps.nccd.cdc.gov/statesystem/statehilite.aspx?dir=epi_report&ucName=UCProfileRpt_2007&state=OH&year=2008&outputtype=htmlreport508.

² Campaign for Tobacco-Free Kids; Substance Abuse and Mental Health Services (SAMSA), Calculated based on data in 2006 *National Household Survey on Drug Use and Health*, <http://www.oas.samhsa.gov/nsduh.htm>.

³ Campaign for Tobacco-Free Kids: Estimate based on U.S. Dept of Health & Human Services (HHS), "*Summary Findings from the 2008 Nat'l Survey on Drug Use and Health*,"

<http://www.oas.samhsa.gov/nsduh/2k8nsduh/tabs/Sect4peTabs10to11.pdf>, with the state share of the national number allocated through the formula in U.S. Centers for Disease Control & Prevention (CDC), "Projected Smoking-Related Deaths Among Youth-United States," *Morbidity & Mortality Weekly Report (MMWR)*

Tobacco use causes more deaths, disability, and excess costs than accidents (including vehicular), AIDS, alcohol use, homicides, suicides, and drug abuse combined.^{5,6} Tobacco use is a major cause of heart attack, stroke, peripheral vascular disease, fifteen distinct and lethal cancers, emphysema, chronic bronchitis, premature birth and sudden infant death syndrome, as well as scores of other diseases.⁷ Tobacco causes one in five deaths in Ohio and results in more than 200,000 years of potential life lost in this state annually.⁸

B. TOBACCO USE COSTS OHIO AND ITS CITIZENS BILLIONS OF DOLLARS EVERY YEAR

Tobacco use costs the citizens of Ohio over \$9 billion annually in excess healthcare costs and lost productivity.⁹ Of this enormous sum, \$4.9 billion is attributable to lost work output and productivity, while over \$4.3 billion is for increased healthcare costs. With Medicaid recipients smoking at much higher rates than the rest of the adult population,¹⁰ tobacco use costs Ohio's Medicaid program \$1.4 billion every year.¹¹ Thus, tobacco control and Medicaid cost control are

45(44):971-74, November 8, 1996 [based on state young adult smoking rates as updated in CDC, *Sustaining State Programs for Tobacco Control, Data Highlights, 2006*].

⁴ Behavioral Risk Factor Surveillance System, CDC, 2008, Ohio, "Adults who are current smokers;" (20.1%) multiplied by the 2008 adult population of Ohio (8,755,553) = 1,759,862
<http://apps.nccd.cdc.gov/BRFSS/display.asp?cat=TU&yr=2008&qkey=4396&state=OH>;
<http://www.census.gov/popest/states/asrh/SC-EST2008-01.html>.

⁵ US tobacco related deaths: 2004:436,000, "Average annual number of smoking related deaths, 2000–2004." Source: *MMWR* 2008; 57(45):1226–1228.

⁶ Other listed deaths: Accidents:121,599, AIDS:12,113, Suicide:33,300, Homicide:18,020, Alcohol related:22,073, Drug related: 38,396 Heron MP, Hoyert DL, Murphy SL, Xu JQ, Kochanek KD, Tejada-Vera B. Deaths: Final data for 2006. National vital statistics reports; vol 57 no 14. Hyattsville, MD: National Center for Health Statistics, 2009.

⁷ CDC: Tobacco data: Health Effects of Smoking.

http://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking/index.htm.

⁸ Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses -- United States, 2000 -- 2004 *MMWR* 2008; 57(45):1226–1228.

⁹ *Ibid* (1)

¹⁰ National Center for Health Statistics, National Health Interview Survey, 2007 (adults age 18-65, Medicaid population). See also American Lung Association, *Helping Smokers Quit: State Cessation Coverage 2008*. Overall smoking rate from CDC, "Cigarette Smoking Among Adults -- United States, 2007," *MMWR* Vol. 57 No. 45, November 14, 2008.

¹¹ CDC, Data Highlights 2006 [and underlying CDC data/estimates; CDC's STATE System average annual smoking attributable productivity losses from 1997-2001 (1999 estimates updated to 2004 dollars); see also CDC, "State-Specific Smoking-Attributable Mortality and Years of Potential Life Lost -- United States, 2000-2004," *MMWR*, 58(2), January 22, 2009; Zhang, X., *et al.*, "Cost of Smoking to the Medicare Program, 1993," *Health Care Financing Review* 20(4): 1-19, Summer 1999; Office of Management & Budget, *The Budget for the United States*

inexorably linked. The average Ohio household pays \$625 in state and federal taxes related to smoking-caused government expenditures annually.¹²

C. INVESTMENTS IN YOUTH PREVENTION AND ADULT CESSATION PROGRAMS SAVE LIVES AND DOLLARS

Decades of research have taught us a great deal about how to prevent youth from starting to smoke and how to help adults quit.¹³ The Foundation invested in these evidence-based strategies in Ohio from its inception in 2000 through its demise in June of 2008 to the enormous benefit of Ohio. Between 2000 and 2008, Ohio high school smoking rates dropped by 41% and middle school smoking (the chief target of the Foundation's youth prevention campaign) dropped by 64%.¹⁴ The elimination of these programs will, over the next decade, result in 56,200 more Ohio kids becoming addicted to tobacco. Of these, one-third -- or 18,100 of our young people -- will die prematurely from tobacco-related disease.¹⁵

While youth smoking prevention bears fruit over the long term, the health benefits of adult smokers quitting tobacco begin immediately. The risk of heart attack drops 50% within one year, lung function frequently improves or stabilizes, and cancer risk begins a gradual decline.

However, 93% of smokers who quit on their own, without benefit of evidence-based cessation programs, will be back smoking again within a year.¹⁶ From 2000 to 2008, the lifespan of the Foundation, adult smoking in Ohio declined 23%, a drop significantly faster than the rest

Government - Fiscal Year 2000, Table S-8, January 1999; Leistikow, B., *et al.*, "Estimates of Smoking-Attributable Deaths at Ages 15-54, Motherless or Fatherless Youths, and Resulting Social Security Costs in the United States in 1994," *Preventive Medicine* 30(5): 353-360, May 2000. CDC, "Medical Care Expenditures Attributable to Smoking — United States, 1993," *MMWR* 43(26): 1-4, July 8, 1994.

¹² *Ibid*

¹³ U.S. Centers for Disease Control, *Best Practices for Comprehensive Tobacco Control Programs – 2007*, http://www.cdc.gov/tobacco/tobacco_control_programs/stateandcommunity/best_practices.

¹⁴ Ohio Youth Tobacco Survey 2008 and 2000, Ohio Department of Health.

¹⁵ Tauras, JA, *et al.*, "State Tobacco Control Spending and Youth Smoking," *American Journal of Public Health (AJPH)* 95(2):338-44, February 2005 [and related data and projections from the authors]. Farrelly, MC, *et al.*, "The Impact of Tobacco Control Programs on Adult Smoking," *AJPH* 98(2), February 2008 [and related data and projections provided by the authors].

¹⁶ Smoking Cessation With and Without Assistance, A Population-Based Analysis, *American Journal of Preventive Medicine*, Volume 18, Issue 4, Pages 305-311, S. Zhu, T. Melcer, J. Sun, B. Rosbrook, J. Pierce.

of the US and 49% faster than the average of the states contiguous to Ohio.¹⁷ This decline in smoking means more than 540,000¹⁸ fewer smokers in Ohio, which translated to roughly 143,100 premature deaths averted in the long term and 1,431,000 years of potential life gained statewide.¹⁹

The Foundation achieved these results through aggressive outreach to smokers and health care providers, as well as an historic collaboration with health insurers that heretofore had been reluctant to cover cessation services. These immensely successful and lifesaving efforts have now been largely dismantled. We fear that declines in the smoking rate are flattening, and that we can expect a rebound in smoking rates, both in Ohio and nationally, as many states have cut tobacco control programs.

In addition to saving lives, reductions in smoking rates lead to decreases in healthcare costs, which improves state budgets and helps employers. Nationwide, every percentage point drop in smoking rates results in about \$30 billion in future healthcare cost reductions (over the lifetimes of those who quit or do not start). A third to a half of those savings would be in reduced government expenditures (i.e., through the Medicaid and Medicare programs).²⁰ In

¹⁷ Behavioral Risk Factor Surveillance System (BRFSS) CDC 2000-2008. Ohio: 26.3%-20.1%, Indiana: 26.9%-26.0%, West Virginia: 26.1%-26.5%, Pennsylvania: 24.3%-21.3%, Kentucky: 30.5%-25.2%, Michigan: 24.2%-20.4%. U.S. data from the National Health Interview Survey, 2000-2007. Ibid (3)

¹⁸ Ibid (2) Decline from 26.3% to 20.1% of adult smokers times 8,755,533 Ohio adults equals more than 542,900 fewer smokers.

¹⁹ Ibid (3) On average, an adult smoker who dies from smoking illness loses 10 years of potential life, hence 450,000 fewer smokers equates to 143,100 premature deaths averted and 1,431,000 years preserved.

²⁰ Hodgson, TA, "Cigarette Smoking and Lifetime Medical Expenditures," *Milbank Quarterly*, 70(1): 81-115, 1992. See also Campaign for Tobacco-Free Kids factsheet, Health Costs of Smokers vs. Former Smokers vs. Non-Smokers and Related Savings From Quitting, <http://tobaccofreekids.org/research/factsheets/pdf/0327.pdf>. For government, private sector, and household shares, see CDC, "Medical Care Expenditures Attributable to Smoking -- United States, 1993," *MMWR* 43(26): 1-4, July 8, 1994, www.cdc.gov/mmwr/preview/mmwrhtml/00031830 [private health insurance pays for a third of all smoking-caused health costs]; Employee Benefit Research Institute, Sources of Health Insurance and Characteristics of the Uninsured: Analysis of the March 2008 Current Population Survey, EBRI Issue Brief #321, September 2008, http://www.ebri.org/publications/ib/index.cfm?fa=ibDisp&content_id=3975 [employment-based health insurance covers 62 percent of non-elderly (elderly covered mostly by Medicare)]. Employers, on average, cover 80% of the premiums paid for employer-based private health insurance. Kaiser Family Foundation, "Average Single Premium Per Enrolled Employee for Employer-Based Health Insurance, 2006,

addition, a single percentage point drop in smoking results in approximately \$6 billion in savings to employer-based private health insurance payments.²¹ For each smoker who quits in response to new tobacco control measures, total healthcare costs over the next five years would drop, on average, by approximately \$2,400.²²

II. THE OHIO TOBACCO USE PREVENTION AND CONTROL FOUNDATION WAS SPECIFICALLY DESIGNED AS A TRUST OUT OF THE REACH OF THE STATE'S APPROPRIATION PROCESS IN ORDER TO SAVE LIVES

The public record clearly shows that Ohio intentionally – and wisely – created the Tobacco Use Prevention and Control Endowment Fund as a trust, with its assets out of the reach of the state's appropriation process.

Forty-six states entered into the historic Master Settlement Agreement with the tobacco companies in November, 1998. Ohio shortly turned to the question of how to spend the billions of dollars that it would receive as a result of the settlement.²³ The process began with Governor Taft who, in his March 9, 1999, State of the State address called for the creation of a bipartisan

<http://www.statehealthfacts.org/comparebar.jsp?ind=270&cat=5> [citing Agency for Healthcare Research & Quality, 2006 Medical Expenditure Panel Survey (MEPS)].

²¹ Ibid

²² Hodgson, TA, *Milbank Quarterly*, 70(1): 81-115, 1992. See Campaign for Tobacco-Free Kids Factsheet, Health Costs of Smokers vs. Former Smokers vs. Non-Smokers, <http://tobaccofreekids.org/research/factsheets/pdf/0327.pdf>

²³ The language of the Master Settlement Agreement indicates that its intent was that a significant amount of the payments to each of the states would be allocated to promote public health and prevent and reduce smoking and other tobacco use, especially among youth. The final "Whereas" clause in the Agreement states that the settling states and the manufacturers participating in the agreement "have agreed to settle their respective lawsuits and potential claims pursuant to terms which will achieve for the Settling States and their citizens significant funding for the advancement of public health, the implementation of important tobacco-related public health measures, including the enforcement of the mandates and restrictions related to such measures. . ." [Master Settlement Agreement, November 23, 1998, Section I, page 2, available online at <http://www.naag.org/backpages/naag/tobacco/msa>, accessed September 23, 2009.] Other Whereas clauses state that the lawsuits underlying the Settlement Agreement were commenced by the states "in order to further the Settling States' policies regarding public health, including policies adopted to achieve a significant reduction in Smoking by Youth," and confirm that the "Settling State officials believe that entry into this Agreement and uniform consent decrees with the tobacco industry is necessary in order to further the Settling States' policies designed to reduce Youth smoking, to promote the public health and to secure monetary payments to the Settling States." [Master Settlement Agreement, Section I, pages 1-2.] Indeed, when the Master Settlement Agreement was formally approved by Ohio, the state Attorney General who signed the agreement said, "The reason we got in this fight was to protect public health and prevent underage smoking." [Ludlow, R., "Ohio Hops Aboard Tobacco Train: Remaining States Have Until Friday to OK Deal," *The Cincinnati Post*, November 20, 1998].

task force to make recommendations to him and the General Assembly on how to best use the MSA dollars. The Tobacco Settlement Task Force (Task Force) held 14 public meetings, heard from 60 witnesses and held several deliberative meetings. The Final Report of the Governor's Tobacco Task Force to Governor Taft and the Leadership and Members of the Ohio General Assembly was approved by the task force on September 29, 1999, and the formal report issued on Oct. 6, 1999.²⁴

The Task Force recommended, and the legislature enacted, the creation of seven separate funds. "Two of the...Funds (the Tobacco Use Prevention and Cessation Trust Fund and the Southern Ohio Agricultural and Community Development Trust Fund) should be used to fund charitable foundations . . . and that the foundation governing boards have the responsibility of deciding what mix of principal and interest they should use to carry out their missions. For the five other... funds . . .the Governor and the General Assembly should decide as part of the budgeting process what mix of principal and interest would be used." *Id.* at 10. Later in its report, the Task Force reiterated the idea that the foundation's endowment should be separated from the state's general revenue. "The assets of the Foundation should be held outside of the State Treasury." *Id.* at 14.

The 123rd General Assembly adopted many of the Task Force's recommendations when it approved Senate Bill 192, including the establishment of the Foundation. Section 183.04 provides, "There is hereby created the Tobacco Use Prevention and Control Foundation, the general management of which is vested in a Board of Trustees." Continuing in section 183.08 (A): "There is hereby created the Tobacco Use Prevention and Control Endowment Fund, which shall be in the custody of the state *but shall not be a part of the State Treasury.* . . . The

²⁴ Final Report of the Governor's Tobacco Task Force to Governor Taft and the Leadership and Members of the Ohio General Assembly, October 6, 1999.

Foundation is the trustee of the endowment fund. Disbursements 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.” (emphasis added). And, finally in section 183.08 (B): “The Foundation shall be self-sustaining and should not expect to receive funding from the state beyond the amounts appropriated to it from the Tobacco Use Prevention and Cessation Trust Fund.”

The Task Force recommendations and the enabling legislation both intended and provided that the Tobacco Use Prevention and Control Foundation’s endowment be separate from the State Treasury. To emphasize this independence, the legislation specifically grants the only authority to spend money in the Endowment fund to the Foundation’s Board of Trustees. The unequivocal intent was to insulate the money so it would only be used for the express purpose of tobacco prevention and cessation programs.

The structure of the legislation reinforces the intent of the legislature to shield these tobacco control funds from being used for other purposes. As noted above, when the General Assembly passed the legislation creating the Foundation, the Endowment Fund, and the Tobacco Use Prevention and Cessation Trust Fund, it enacted the recommendations of the task force to create other funds into which other settlement dollars would be paid. The purposes of these other funds included law enforcement improvements, public health priorities, biomedical research and technology, educational facilities, education technology, and agricultural and community development. These other funds were, unlike the tobacco Endowment Fund, explicitly created *within* the State Treasury. *See, e.g.*, R.C. §183.10 (creating “in the State Treasury” the law enforcement improvements fund); R.C. §183.18 (creating “in the State Treasury” Ohio’s public health priorities fund); R.C. §183.19 (creating “in the State Treasury” the biomedical research and technology transfer fund); R.C. §183.26 (creating “in the State

Treasury” the education facilities fund); R.C. §183.28 (creating “in the State Treasury” the education technology fund).

Only the settlement proceeds intended for agricultural and community development were treated like the funds set aside for tobacco control. For both purposes, the General Assembly created a “trust fund” within the State Treasury to which a certain percentage of settlement dollars would be transferred annually, but also created an “endowment fund” *outside* the State Treasury. *See* R.C. §§ 183.01(A); 183.01(C), 183.16, 183.08. In the uncodified provisions of S.B. 192, the 123rd General Assembly, at Section 6, not only appropriated \$234,861,033 of the then existing MSA monies to the trust fund for tobacco use prevention within the State Treasury but, in the same statutory provision, directed the Director of the Department of Health to “disburse” all of those monies to the Endowment Fund, created by Section 183.08, that “shall not be a part of the State Treasury.”

While funds in the State Treasury funds could be (and often were) reappropriated for other purposes, here the 123rd General Assembly intentionally transferred all of the tobacco cessation program monies out of an internal “fund” to an outside “endowment fund.” As such, the endowment fund monies were transferred outside the State Treasury and the reach of the State to reappropriate them for other purposes.

This structure makes abundant sense. The tobacco settlement dollars were meant to compensate the state for tobacco-related health costs and to reduce youth smoking. Accordingly, the General Assembly drafted legislation to ensure that funds from the settlement for the important purposes of reducing smoking rates and mitigating the adverse economic impact of reduced tobacco production in Southern Ohio could not later be diverted for other purposes.

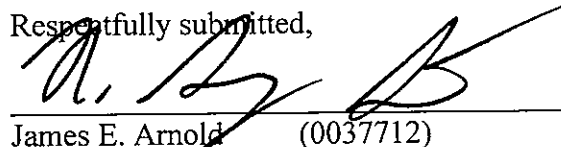
Clearly, Governor Taft and the enacting General Assembly intended to dedicate funds to the tobacco control endowment fund, free from future political and appropriations processes.

It is also important to point out that only a relatively small portion of Ohio's MSA payments was dedicated to the Foundation. Although the state acknowledges receiving to date approximately \$10.1 billion in MSA payments,²⁵ and although Senate Bill 192's allocation plan would have sent \$1.2 billion of MSA funds to the Foundation's endowment, only the first two payments were disbursed to the endowment outside the State Treasury, totaling approximately \$330 million. Ohio has spent the remaining nearly \$9.3 billion on other purposes. Only the remainder of the \$330 million disbursed to the endowment fund – less than 3.5% of the MSA settlement receipts – is at issue here.

III. CONCLUSION

The Amici, representing the health interests of millions of Ohioans and others intent on protecting Ohio's children from tobacco addiction and aiding those already addicted to overcome their dependence, urge the court to protect the trust funds wisely dedicated to tobacco prevention and control. To do otherwise will both jeopardize the lives and health of hundreds of thousands of Ohio citizens, including thousands of Ohio children, and thwart the intent of the enacting General Assembly.

Respectfully submitted,



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²⁵ Brief of Appellants Ohio Attorney General Richard Cordray and the State of Ohio, p. 7.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Amicus Brief Of The American Heart Association, The American Heart Association Great Rivers Affiliate, The American Lung Association, The American Lung Association Of The Midland States, The American Cancer Society, The American Cancer Society: Ohio Division, The American Cancer Society Cancer Action Network, The Campaign For Tobacco-Free Kids, and the Ohio State Medical Association For Leave To File Brief As Amici Curiae In Support Of Appellees was served via U.S Mail, postage paid, this 29th day of September 2009:

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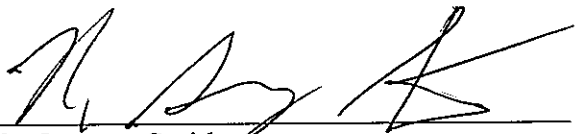
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