

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE NO: 2011-CA-001798

BULLITT COUNTY BOARD OF HEALTH
vs.

APPELLANT

From the Bullitt Circuit Court
The Honorable Rodney D. Burress, Judge
Case No: 11-CI-00348

BULLITT COUNTY FISCAL COURT, ET AL.

APPELLEES

BRIEF FOR AMICI CURIAE ON BEHALF OF THE AMERICAN CANCER SOCIETY, THE AMERICAN HEART ASSOCIATION, AMERICAN LUNG ASSOCIATION, AMERICANS FOR NONSMOKERS' RIGHTS, CAMPAIGN FOR TOBACCO-FREE KIDS, THE NATIONAL ASSOCIATION OF COUNTY AND CITY HEALTH OFFICIALS, THE NATIONAL ASSOCIATION OF LOCAL BOARDS OF HEALTH, FOUNDATION FOR A HEALTHY KENTUCKY, KENTUCKY HEALTH DEPARTMENTS ASSOCIATION, KENTUCKY PUBLIC HEALTH ASSOCIATION, KENTUCKY MEDICAL ASSOCIATION, KENTUCKY NURSES ASSOCIATION

Respectfully submitted,

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CERTIFICATION

The undersigned does hereby certify that copies of the Brief were served upon the following named individuals by first-class mail, postage prepaid, on this 6th day of February, 2012: Judge Rodney D. Burress, PO Box 97, Shepherdsville, KY 40165; Monica Meredith Robinson, Bullitt County Attorney, 300 S. Buckman Street, Shepherdsville, KY 40165; Norman Lemme, 275 Snapp Street, PO Box 285, Mt. Washington, KY 40047; Joseph J. Wantland, PO Box 515 Shepherdsville, KY 40165; Mark Edison, 216 S. Buckman Street, Shepherdsville, KY 40165; and Margaret A. Miller, Esq. and James T. Ams, Esq., 300 W. Vine Street, Suite 1100, Lexington, KY 40507.

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INTRODUCTION

In a suit initiated by the Bullitt County Fiscal Court and others, the Bullitt Circuit Court invalidated the Bullitt County Board of Health Regulation No. 10-01, which regulated smoking in public buildings and places of employment. The following *Amici Curiae* join together in submitting this brief to the Court in support of the Board of Health's appeal of that ruling: the American Cancer Society, American Cancer Society Cancer Action Network, American Heart Association, American Lung Association, American Lung Association of the Midland States, Americans for Nonsmokers' Rights, Campaign for Tobacco-Free Kids, National Association of County and City Health Officials, National Association of Local Boards of Health, Foundation for a Healthy Kentucky, Kentucky Health Departments Association, Kentucky Public Health Association, Kentucky Medical Association and Kentucky Nurses Association.

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STATEMENT OF THE CASE

County Boards of Health are generally empowered to “[a]dopt, except as otherwise provided by law, administrative regulations, not in conflict with the administrative regulations of the Cabinet for Health and Family Services necessary to protect the health of the people or to effectuate the purposes of this chapter or any other law relating to public health.” KRS § 212.230(1)(c). It was pursuant to this statutory directive that Regulation 10-01 was passed to regulate indoor smoking in public buildings, workplaces and other specified public areas. (*See* BCBH Regulation 10-01, Brief for Appellant, Appendix Tab B). More particularly, Regulation 10-01 was adopted to combat the health hazards directly linked to involuntary exposure to secondhand smoke.

A. Facts Relating to the Underlying Scientific Body of Evidence

Secondhand smoke is a combination of two forms of smoke from burning tobacco products: (1) smoke emitted when a smoker exhales and (2) smoke emitted by a burning cigarette, pipe or cigar between puffs. Secondhand smoke is considered a "Class A" carcinogen, a designation reserved for only those substances *known to cause cancer in humans*.

Secondhand smoke is similar to the mainstream smoke inhaled by the smoker in that it is a complex mixture containing many chemicals (including formaldehyde, cyanide, carbon monoxide, ammonia, and nicotine), many of which are known carcinogens. Exposure to secondhand smoke causes excess deaths in the U.S. population from lung cancer and cardiac related illnesses.¹

Sadly, approximately 50,000 Americans die each year as a result of exposure to

¹ U.S. Dep’t of Health and Human Services, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General*, Preface iii (2006) available at

<http://www.surgeongeneral.gov/library/secondhandsmoke/report/fullreport.pdf>

secondhand smoke.² The U.S. Surgeon General has declared there is no safe level of exposure to secondhand smoke.³

The BCBH Regulation 10-01 advances the statutory objective of “protect[ing] the health of the people” of Bullitt County based on the indisputable, significant health effects of secondhand smoke exposure summarized in this brief. Nonsmokers who are exposed to secondhand smoke at home or work increase their risks of developing *lung cancer* by 20–30%.⁴ Moreover, these same non-smokers increase their risk of developing *heart disease* by 25-30%.⁵

Even brief exposure to secondhand smoke affects coronary circulation in healthy young adults.⁶ For example, “[a] 30-minute exposure to secondhand smoke in a smoking room significantly reduced the coronary flow-velocity reserve in nonsmokers to a level similar to that seen in smokers before and after exposure to secondhand smoke.”⁷ In addition, where secondhand smoke does not itself trigger a myocardial infarction, it may increase its severity.⁸ Moreover, secondhand smoke causes approximately 3,400 deaths from lung cancer and 22,700 to 69,600 deaths from heart disease each year.⁹

The large number of communities throughout the entire United States with smoke-

² *Id.* at 8

³ *Id.* at 65.

⁴ *Report of the SurgeonGeneral* (2006), *supra* n. 1, at 443.

⁵ Institute of Medicine, *Secondhand Smoke Exposure and Cardiovascular Effects: Making Sense of the Evidence* 4 (2010).

⁶ Otsuka R, Watanabe H, Hirata K, et al. Acute effects of passive smoking on the coronary circulation in healthy young adults. *JAMA*. 2001; 286(4):436-441

⁷ *Secondhand Smoke*, *supra* n. 5, at 65

⁸ *Report of the SurgeonGeneral*(2006), *supra* n. 1, at 63.

⁹ California Environmental Protection Agency. *Identification of environmental tobacco smoke as a toxic air contaminant. Executive Summary* ES-13 (2005) available at <http://www.arb.ca.gov/regact/ets2006/app3exe.pdf>).

free laws or regulations similar to BCBH's Regulation 10-01 reflects the seriousness of the public health risk posed by secondhand smoke and the necessity for BCBH to exercise its authority under KRS § 212.230(1)(c) to minimize this risk and, thereby protect the health of the people.

B. Scientific Evidence Relating to Kentucky

Not surprisingly, Kentucky suffers the same devastating health effects of secondhand smoke. Although 26% of Kentuckians smoke,¹⁰ at least 66% are regularly exposed to secondhand smoke in enclosed workplaces as of October 2011.¹¹ Air quality studies in Lexington, Kentucky bingo halls before protection by smoke-free laws showed that workers and volunteers (as well as patrons) were exposed to indoor air pollution thirteen (13) times higher than a sample of hospitality venues protected by Lexington's law and almost seven (7) times the outdoor air quality standard.¹² During the years 2000 through 2004, over 7,800 Kentucky adults, 35 years and older, have died on average each year as a result of tobacco use. Indeed, Kentuckians have one of the highest "smoking attributable mortality rates" in the United States. Currently, Kentucky ranks 48th among the states for workplace

¹⁰ Centers for Disease Control and Prevention. *State-specific prevalence of cigarette smoking and smokeless tobacco use among adults—United States, 2009*. MMWR. Nov 5 2010; 59(43):1400-6. available at

<http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5943a2.htm>.

¹¹ Kentucky Center for Smoke-free Policy. *Smoke-free Ordinance Data Base*. (2011), available at <http://www.mc.uky.edu/tobaccopolicy/Ordinances/%25%20Smoke-Free%20Workplace%20Laws%20or%20Regulations%20-February%202012.pdf>. Accessed October 1, 2011.

¹² Hahn E, Lee K, Vogel S, Robertson H, Lee S. *Indoor Air Quality in Bingo Halls*, Lexington, Kentucky, 2, 5 (2008), available at <http://www.mc.uky.edu/tobaccopolicy/researchproduct/AQReportBingoLexington.pdf>.

exposure.¹³ It follows that Kentucky would have similarly high death rates from exposure to secondhand smoke.

Studies from around the world have now provided evidence for the reduced incidence of heart attacks and hospitalizations after implementation of smoke-free air laws.¹⁴ As the Surgeon General has confirmed, smoke-free laws, like the Regulation at issue here, have the substantiated benefit of creating healthy environments for employees and patrons of businesses, as well as reducing health care costs.¹⁵

It was with due consideration to these and other undeniable health risks to the residents of Bullitt County, examined in light of the scientifically proven benefits of smoke-free measures in public places and places of employment, that the BCBH Regulation 10-01 was passed.

C. Facts Relating to the Procedural History of the Case.

In 2010, the Bullitt County Board of Health initiated the process for adopting a regulation to protect the public health by regulating smoking in public places and places of employment. The BCBH held four public forums to educate the public on the dangers of

¹³ Centers for Disease Control and Prevention, *Smoking and Tobacco Use, State Highlights*, Kentucky (2010), available at http://www.cdc.gov/tobacco/data_statistics/state_data/state_highlights/2010/states/kentucky/index.htm.

¹⁴ Meyers DB, Neuberger JS, He J. *Cardiovascular Effect of Bans on Smoking in Public Places: A Systematic Review and Meta-analysis*. *J Am Coll Cardiol*, 2009; 54:1249-55, available at <http://www.sciencedirect.com/science/article/pii/S0735109709025121>; correction published at *J Am Coll Cardiol* 2009; 54:1902, available at <http://content.onlinejacc.org/cgi/reprint/54/20/1902-a.pdf>.

¹⁵ *Report of the Surgeon General* 649-50 (2006), *supra* n. 1, at *See also* AMERICAN CANCER SOCIETY, *SAVING LIVES, SAVING MONEY* 26 (2011) (noting projected health care savings associated with making all Kentucky workplaces, restaurants and bars 100% smoke-free), available at <http://www.acscan.org/pdf/tobacco/reports/acscan-smoke-free-laws-report.pdf>.

secondhand smoke and to listen to the comments of the community regarding the regulation of smoking. The BCBH, with the assistance of the University of Kentucky, conducted indoor air quality tests in various venues in Bullitt County. The BCBH also conducted a community norms survey relating to secondhand smoke and smoke-free policy, and shared the results at the public forums. The Regulation was read for the first time on February 15, 2011, for the second time on March 22, 2011, and passed by a vote of 7-2. It was scheduled to take effect September 19, 2011.

On September 15, 2011, the Bullitt Circuit Court entered a final appealable Order declaring the regulation “void and unlawful” and permanently enjoining its implementation. (*See* Order Granting Perm. Inj. at 13.) A timely Notice of Appeal was filed by BCBH.

As demonstrated below and in the Brief for Appellant, the BCBH adopted Regulation 10-01 to protect its citizens from the deadly effects of secondhand smoke, thus acting well within the authority delegated to it by KRS §212.230(1)(c). For that reason, the Organizations noted in the Introduction above now submit this Brief on behalf of the *Amici Curiae* in support of the appeal by BCBH.

The *Amici* submit herewith a discussion of the substantial body of scientific evidence that supports the actions of the Bullitt County Board of Health in adopting the restrictions on smoking in public places and workplaces that are embodied in Regulation 10-01. This undisputed body of scientific work summarized in this brief confirms the passage of this Regulation as being well within the directives afforded BCBH and Boards of Health throughout the Commonwealth under Kentucky Statutes to protect the public health of its citizens.

ARGUMENT

A. BCHD REGULATION 10-01 PROTECTS THE PUBLIC HEALTH AND WELFARE OF ITS CITIZENS BY DECREASING THE RISK OF DEATH AND DISEASE ARISING FROM EXPOSURE TO SECONDHAND SMOKE IN PUBLIC PLACES AND PLACES OF EMPLOYMENT.

1. The Undisputed Medical and Scientific Evidence Confirms the Substantial Public Health Hazard Created by Secondhand Tobacco Smoke.

The complex mixture of chemicals in secondhand smoke includes formaldehyde, cyanide, carbon monoxide, ammonia, and nicotine, many of which are known carcinogens.¹⁶ At least 250 of the chemicals contained in secondhand smoke “are known to be toxic or carcinogenic.”¹⁷ The 2006 Surgeon General’s Report discussed above concluded that there is no risk-free level of exposure to secondhand smoke, and even short-term exposure can potentially increase the risk of heart attacks.¹⁸ Further, the 2010 Surgeon General’s Report, *How Tobacco Smoke Causes Disease*, concluded that even low levels of secondhand smoke exposure can lead to endothelial dysfunction and inflammation, which may cause cardiovascular events and trigger strokes.¹⁹

The irrefutable scientific evidence confirms that exposure to secondhand smoke causes excess deaths from lung cancer and cardiac illnesses. Regarding remedial measures like that taken by BCBH with the Regulation at issue in this case, the 2006 Surgeon

¹⁶ U.S. Dep’t of Health and Human Services, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* Preface, iii (2006) available at

<http://www.surgeongeneral.gov/library/secondhandsmoke/report/fullreport.pdf>

¹⁷ *Id.* at 29.

¹⁸ *Id.* at 11.

¹⁹ U.S. Dep’t of Health and Human Services, *How Tobacco Smoke Causes Disease, The Biology and Behavioral Basis for Smoking Attributable Disease: A Report of the Surgeon General, Executive Summary* 3 (2010) available at

<http://www.surgeongeneral.gov/library/tobaccosmoke/report/executivesummary.pdf>

General's Report observes, "[f]ortunately, exposures of adults are declining as smoking becomes *increasingly restricted in workplaces and public places.*"²⁰ It is in this context, in light of the scientific evidence discussed below, that this Court must consider the authority of BCBH to pass and implement Regulation 10-01. It is important to note that the Circuit Court did not dispute the science underlying the public health concerns of the Board of health when it passed the challenged Regulation. Rather it reached its holding on what Appellant has demonstrated to be a misreading of the statute and applicable case law. (See generally, Brief for Appellant, pp. 4-21).

As noted, The United States Department of Health and Human Services has classified secondhand smoke, like asbestos, mustard gas, radon, and other deadly substances, as a "Class A" carcinogen, i.e., *a substance known to cause cancer in humans.*²¹ The 2006 Surgeon General's Report summarizes the most disturbing effects of secondhand smoke:

Estimated *annual excess deaths* for the total U.S. population are about 3,400 (a range of 3,423 to 8,866) from lung cancer, 46,000 (a range of 22,700 to 69,600) from cardiac-related illnesses, and 430 from SIDS. The agency also estimated that between 24,300 and 71,900 *low birth weight or preterm deliveries*, about 202,300 episodes of childhood asthma (new cases and exacerbations), between 150,000 and 300,000 cases of *lower respiratory illness* in children . . . occur each year in the United States as a result of exposure to secondhand smoke.²²

In addition to the massive death toll caused by secondhand smoke, many more non-smoking Americans contract disease and illness as a direct result of their exposure to this toxic brew of chemicals. Among children, secondhand smoke is associated with serious respiratory problems, including asthma attacks, pneumonia, and bronchitis. Secondhand

²⁰ *A Report of the Surgeon General* (2006), n. 16, Preface, iii.

²¹ See Record, United States Department of Health Services, 9th Report on Carcinogens.

²² *A Report of the Surgeon General* (2006) (emphasis added) *supra* n. 16, at 8.

smoke is a causative factor in SIDS and low birth weight.²³

The 2010 Report of the Surgeon General reached the following conclusions:

- The evidence on the mechanisms by which smoking causes disease indicates that there is no risk-free level of exposure to tobacco smoke.
- Inhaling the complex chemical mixture of combustion compounds in tobacco smoke causes adverse health outcomes, particularly cancer and cardiovascular and pulmonary diseases, through mechanisms that include DNA damage, inflammation, and oxidative stress.
- Low levels of exposure, including exposures to secondhand tobacco smoke, lead to a rapid and sharp increase in endothelial dysfunction and inflammation, which are implicated in acute cardiovascular events and thrombosis.²⁴

The 2010 Surgeon General's Report also reviewed the available scientific evidence regarding the effects of exposure to secondhand smoke on the human circulatory system.

Evidence reviewed on the acute and chronic effects of exposures on the functioning of multiple aspects of the circulatory system provides additional validation that cigarette smoking and *involuntary exposure to cigarette smoke are major causes of coronary heart disease, stroke, aortic aneurysm, and peripheral arterial disease*. Evidence in this report provides additional understanding that the risk does not increase in a linear fashion with increasing exposure, and *even low levels of exposure to tobacco—such as a few cigarettes per day, occasional smoking, or exposure to secondhand tobacco smoke—are sufficient to substantially increase risk of cardiac events*.²⁵

Moreover, the 2010 Surgeon General's Report also studied the adverse consequences to fetal and child development mentioned above.

Health professionals have long considered exposure to tobacco smoke harmful to reproduction, affecting aspects from fertility to *fetal and child development and pregnancy outcome*. Tobacco smoke contains thousands of compounds, some of which are *known toxicants to reproductive health*. Carbon monoxide is the toxicant in cigarette smoke that is found in the highest concentrations, and its major effect is

²³ U.S. Dep't of Health and Human Services, *Best Practices for Comprehensive Tobacco Control Programs* 11 (1999), available at <http://www.eric.ed.gov/PDFS/ED433332.pdf>.

²⁴ *Report of the Surgeon General, Executive Summary* (2010), *supra*, n.19, at 3.

²⁵ *Id.*, Executive Summary, at 5 (emphasis added).

to deprive the fetus of oxygen by binding to hemoglobin.²⁶

Such a profound body of scientific evidence compelled the Bullitt County Board of Health to enact Regulation 10-01 in order to protect Bullitt County's citizens from such clearly documented and avoidable public health risks. The Regulation unquestionably meets the Board of Health's mandate to implement appropriate measures to protect the health of its citizens. KRS §212.230(1)(c).

2. Kentucky Shares the Health and Fiscal Burdens Associated with Secondhand Smoke Exposure.

As mentioned in the Statement of Facts, there is no doubt that Kentucky shares in the health costs associated with exposure to secondhand smoke. As noted, although 26% of Kentuckians smoke,²⁷ at least 66% of Kentuckians are regularly exposed to secondhand smoke in enclosed public places.²⁸ Moreover, the economic consequences to the taxpayers of the Commonwealth cannot be minimized. Kentucky spends \$1.5 billion to treat sick smokers every year (\$487 million in Medicaid costs).²⁹ Thirty percent (30%) of Kentucky's blue collar workers are exposed to secondhand smoke at work.³⁰ Restaurant and bar workers have the greatest risk of developing lung cancer and heart disease compared to other

²⁶ *Id.*, Executive Summary, at 7 (emphasis added).

²⁷ Centers for Disease Control and Prevention. *State-specific prevalence of cigarette smoking and smokeless tobacco use among adults—United States, 2009*. MMWR Nov 5 2010; 59(43):1400-6.

²⁸ Kentucky Center for Smoke-free Policy. *Smoke-free Ordinance Data Base. 2011, October*. <http://www.mc.uky.edu/tobaccopolicy/Ordinances/Smoke-freeOrdinances.htm>.

²⁹ Ctrs. for Disease Control & Prevention, *Sustaining State Programs for Tobacco Control*, Data Highlights 2006, Table 4 at 16 (2006), available at http://www.cdc.gov/tobacco/data_statistics/state_data/data_highlights/2006/pdfs/dataHighlights06rev.pdf.

³⁰ Hahn E, Begley K, Rayens M, Riker C. *Workplace tobacco policy study 2008*. Lexington: University of Kentucky; May 2009.; and see <http://www.mc.uky.edu/tobaccopolicy/KentuckyDataReports/Workplace/Workplace2008/Workplace2008SummaryofKYHighlights.pdf>.

occupations.³¹

The leading causes of deaths in Kentucky known to be associated with exposure to secondhand smoke would necessarily draw the interest of any responsible Board of Health. In 2007, for example, 24% of deaths were caused by heart disease, 26% by malignant neoplasms (cancer), 7% by chronic lower respiratory illness, and over 5% by stroke.³² In fact, Kentucky rates for deaths from the above diseases exceed the national rates in each of those categories.³³ As discussed previously, secondhand smoke exposure contributes in a significant way to each of these chronic illnesses. In the absence of a comprehensive statewide law, Boards of Health in Kentucky must act as BCBH did to protect its citizens from such pernicious risks.

3. Enforcement of Clean Indoor Air Regulations Like Regulation 10-01 Have a Positive Impact on Both Employees and Employers.

a. Smoke-Free Work Environments Produce Healthier Employees.

In 2000, the Board of Directors of the American College of Occupational and Environmental Medicine (“ACOEM”) approved a position statement entitled, “Epidemiological Basis for an Occupational and Environmental Policy on Environmental Tobacco Smoke.” This position statement provides a succinct summary of the scientific and medical evidence supporting the regulation of environmental tobacco smoke (ETS) in the workplace and in places of public accommodation.

³¹ Shopland DR, Anderson CM, Burns DM, Gerlach KK. *Disparities in smoke-free workplace policies among food service workers*. J Occup Environ Med. Apr 2004; 46(4):347-56.

³² 2007 Vital Statistics Reports from the Kentucky Cabinet for Health and Family Services, *Age-adjusted and crude rates per 100,000 2007 population. Estimates reflect only Kentucky residents who died in Kentucky*.

³³ *Id.*; and see, National Center for Health Statistics Kentucky Fact Sheet, available at (<http://www.cdc.gov/nchs/pressroom/states/KY.pdf>), age-adjusted rates.

ETS is frequently encountered in the work place -- where it is no safer than in other environments and where it presents hazards to exposed workers and others Implementation of policies to prevent workplace ETS can be highly effective, entailing low costs and yielding primary and secondary benefits to employers and employees. ACOEM strongly supports an increase in the scope and effectiveness of policies and efforts to protect against exposure to ETS in the workplace and elsewhere. To that end, ACOEM supports voluntary, regulatory and legislative initiatives to eliminate ETS from the workplace, including public spaces such as bars, casinos, restaurants, schools, daycare centers, and public transportation.³⁴

On the average, communities that implement effective prohibitions on smoking in public places will experience a 14% decrease in heart attacks within the first year.³⁵

b. Smoke-free Environments Save Money

As mentioned, Kentucky spends \$1.5 billion to treat sick smokers every year (\$487 million in Medicaid costs).³⁶ After implementing its smoke-free ordinance, Lexington saved an estimated \$21 million per year in healthcare costs, a savings attributable to fewer adults smoking after the smoke-free law took effect.³⁷ Thus, the Regulation at issue has undeniable and abundant health and economic benefits for its citizens.

B. BCBH REGULATION 10-01 IS WELL WITHIN THE STATUTORY AUTHORITY DELEGATED TO KENTUCKY BOARDS OF HEALTH.

KRS § 212.230 provides in relevant part:

³⁴ American College of Occupational and Environmental Medicine, Position Statement, July 30, 2000.

³⁵ Meyers DB, Neuberger JS, He J. *Cardiovascular effect of bans on smoking in public places: A systematic review and meta-analysis*. J Am Coll Cardiol, 2009; 54:1249-55, available at <http://www.sciencedirect.com/science/article/pii/S0735109709025121>; published erratum appears in J Am Coll Cardiol 2009; 54:1902, available at <http://content.onlinejacc.org/cgi/reprint/54/20/1902-a.pdf>.

³⁶Centers for Disease Control & Prevention, *Sustaining State Programs for Tobacco Control*, Data Highlights 2006, Table 4 at 16 (2006), available at http://www.cdc.gov/tobacco/data_statistics/state_data/data_highlights/2006/pdfs/dataHighlights06rev.pdf.

³⁷ Hahn EJ, Rayens MK, Butler KM, Zhang M, Durbin E, Steinke D. *Smoke-free laws and adult smoking prevalence*. Prev Med. Aug 2008; 47(2):206-9.

County, city-county, and district boards of health shall: ...

- (c) Adopt, except as otherwise provided by law, administrative regulations not in conflict with the administrative regulations of the Cabinet for Health and Family Services *necessary to protect the health of the people* or to effectuate the purposes of this chapter or any other law relating to public health³⁸

The Court below incorrectly concludes that the legislature has preempted the field of smoking regulation and has not authorized Boards of Health to pass the smoking restrictions embodied in the Regulation at issue. Regarding preemption, the Court in *Lexington Fayette County Food and Beverage Ass'n v. Lexington-Fayette Urban County Government*, Ky., 131 S.W.3d 745, 750-751 (Ky., 2004) held that an ordinance banning smoking in public buildings was neither expressly nor impliedly preempted by state law. Moreover, the plain meaning of KRS § 212.230 fully supports BCBH's authority to adopt regulations necessary to protect the public health. The Court erred in holding that BCBH was legislating without proper authority.

The Circuit Court incorrectly applied numerous cases in which a Board of Health's adoption of a regulation has been upheld as within the grant of statutory authority. In *Louisville & Jefferson County Board of Health v. Haunz*, 451 S. W.2d 407 (Ky. App. 1970), the plaintiff contended that regulations adopted by the Board of Health were unconstitutional because the board was effectively enacting legislation. The trial court granted a motion to enjoin enforcement of a sanitary code adopted by the county Board of Health. The Court of Appeals reversed.

Appellee also relies on a number of other cases, all of which, in effect, hold that for administrative rules and regulations to be valid, they must be within the authority conferred upon the administrative agency and they also must be within the

³⁸ KRS § 212.230 (emphasis added).

framework of the policy which the legislature has sufficiently defined.

[T]he rationale of the authorities cited by each of the parties to this appeal is that an administrative agency of government may not validly legislate under the guise of making operational rules and regulations. However, we find that such is not the case here and, hence, there is no merit in appellee's objections to the subject rules and regulations.

We are of the opinion that the regulations contained in the Sanitary Code are valid and are *reasonably necessary to protect the health and welfare of the inhabitants of Jefferson County*; that the regulations were adopted pursuant to enabling legislation; that sufficient safeguards are provided in the Sanitary Code to protect the public and to afford those affected by the code with 'due process of law' and that the regulations are within the framework of the legislation, the purpose of which is to protect the public health.

Id. at 409-10

Just as the regulations addressed in *Haunz* were adopted pursuant to enabling legislation and were within the framework of the legislation, the Regulation adopted by the BCBH was adopted under the framework of KRS Chapter 212. In the instant case, the BCBH has adopted the Regulation pursuant to KRS § 212.230(1)(c) in the face of overwhelming scientific evidence reviewed above. That evidence leads to the inescapable conclusion that Regulation 10-01 was indeed “reasonably necessary to protect the health and welfare of the inhabitants of [Bullitt County].” *Id.* at 410.

The provisions of KRS § 212.230 were cited with approval by the Court in *Haunz*. Further, as explained in more detail in the Brief for Appellant, the language of KRS § 212.350 is similar to the language found in KRS § 212.230. Moreover, KRS § 212.350 expressly states that a board of health operating under KRS § 212.350 "shall . . . be vested with all of the functions, obligations, powers, and duties now being exercised by the county board of health," which would include the provisions of KRS § 212.230.

It is clear from the holding in *Haunz* and the provisions of KRS § 212.230(1)(c) that the BCBH has properly adopted the Regulation under a valid grant of statutory authority. As explained by Appellant, the authority of BCBH, as a County Health Board, to pass the regulation at issue derives from the police power of the Commonwealth as lawfully delegated to the Board by KRS § 212.230(1)(c). *Commonwealth v. Do, Inc.*, 674 S.W.2d 519, 521 (Ky. 1984). *See also* Brief for Appellant at 4-7. Appellants correctly note that the authority bestowed on BCBH by virtue of this statutory provision is sufficient in itself to permit the implementation of Regulation 10-01, as the regulation protects the public health of the County's residents. *Barnes v. Jacobsen*, 417 S.W.2d 224, 227 (Ky. 1967).

Given the scientific underpinning discussed above, there can be no question that BCBH's passage of Regulation 10-01 fully complied with KRS § 212.230(1)(c). *C.f.* *Lexington Fayette Cty. Food and Beverage Ass'n v. Lexington-Fayette Urban Cty. Gov't*, 131 S.W.3d 745, 749 (Ky. 2004) (affirming the implementation of a smoke-free ordinance by the Lexington-Fayette Urban County Government as well within the delegation of power set out in set out in by KRS § 212.230(1)(c)).

The *Amici* submit this brief to inform the Court of the substantial and compelling body of scientific evidence that compelled passage of Regulation 10-01 as a measure to protect the public health. The *Amici* fully support and adopt the legal authority submitted in the Brief for Appellant. That authority, together with the scientific evidence reviewed above, mandates reversal of the decision of the Circuit Court, with instructions to dissolve the injunction and permit immediate implementation of this critical public health regulation.

CONCLUSION

The discussion above provides overwhelming scientific support for the conclusion that Regulation 10-01 was an important, necessary measure designed to protect and promote the health of the citizens of Bullitt County. The existing jurisprudence cited above and discussed in detail in the Brief for the Appellant necessarily leads to the conclusion that this Regulation was well within the power delegated to the BCBH by Kentucky Statutes. The decision of the Circuit Court to the contrary cannot withstand scrutiny of this Court and should be reversed with a directive to the lower court to immediately lift its injunction and permit implementation of Regulation 10-01.

Respectfully submitted,

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