

IN THE SUPREME COURT OF OHIO

D.A.B.E., INC., *et al.*,

Plaintiffs/Respondents,

-vs-

TOLEDO - LUCAS COUNTY BOARD OF
HEALTH, *et al.*

Defendants/Petitioners.

* Case No. 01-1407

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* On Issues of State Law Certified By The
* United States District Court, Northern
* District of Ohio, Western Division

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* United States District Court Case
* No. 3:01 CV-7334

* (Judge David A. Katz)

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**BRIEF AMICI CURIAE
IN SUPPORT OF DEFENDANTS/PETITIONERS**

SUBMITTED BY AMERICAN CANCER SOCIETY
AMERICAN HEART ASSOCIATION
AMERICAN LUNG ASSOCIATION
AMERICAN MEDICAL ASSOCIATION
OHIO ACADEMY OF FAMILY PHYSICIANS
OHIO STATE MEDICAL ASSOCIATION
OHIO STATE RADIOLOGICAL SOCIETY AND
OHIO STATE UNIVERSITY COLLEGE OF MEDICINE AND PUBLIC HEALTH

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INTEREST OF AMICI CURIAE

Amici Curiae filed this brief pursuant to Rule VI Section 6 of the Rules of Practice of the Supreme Court of Ohio as applied to certified questions from federal court. The undersigned, members of the medical and public health community in Ohio and the United States, urge this Court to uphold the regulations issued by the Lucas County Regional Health District and the Toledo-Lucas County Board of Health (the “District”) as a matter of public policy. A ruling which upholds the regulations issued by the District, protects the lives of Ohioans, particularly restaurant, bar and lounge employees, is consistent with the rule of law in Ohio and preserves Ohio’s economic resources.

This case is a matter of life and death. Environmental tobacco smoke, more commonly known as second-hand smoke, kills people because second-hand smoke is toxic.¹ When non-smokers breathe in second-hand smoke, carcinogens penetrate the mucus membranes of the eyes that line the inner surface of the eyelids and the forepart of the eyeball, causing the eyes to water, itch and redden.² Second-hand smoke causes sore throat and descends into the lungs, causing itching and coughing.³ In just thirty minutes, second-hand smoke causes coronary circulation to decrease, narrowing the pathways to the heart.⁴ Narrowed pathways to the heart may lead to stroke or heart attack.⁵ Children who inhale second-hand smoke suffer from bronchitis, asthma and middle ear infection more often than children who aren't exposed to such carcinogens.⁶ Breathing second-hand smoke may lead to lung cancer and, ultimately, death.⁷ The amici, listed alphabetically, share a common interest in offering what assistance they can to this Court as it

¹ California Environmental Protection Agency, *Health Effects of Exposure to Environmental Tobacco Smoke*. 227-260 (1997).

² *Id.*

³ California Environmental Protection Agency, *supra* note 1 at 231.

⁴ Stanton A. Glantz. *Even a Little Secondhand Smoke is Dangerous*. J. Am. Med. Ass'n. 462-463 (2001).

⁵ *Id.*

⁶ Dennis R. Ownby, Christine C. Johnson, and Edward L. Peterson, *Passive Cigarette Smoke Exposure of Infants: Importance of Nonparental Sources*. Am. J. Dis. Child. (2000).

considers this important case concerning the exposure of Ohioans to the detrimental effects of second-hand smoke.

Amicus American Cancer Society, Inc. and American Cancer Society, Ohio Division, Inc. (collectively, “ACS”) is the nationwide community-based voluntary health organization dedicated to eliminating cancer as a major health problem through research, education, advocacy and service. With approximately 2.2 million volunteers, including over 50,000 leading physicians and oncology specialists, and many victims of tobacco-caused cancer and their family members, ACS is the most broadly based, highly respected, volunteer-based cancer nonprofit in the world. ACS consists of a National Society, 17 Divisions, and over 3,400 Units located throughout the United States and in every state of the Union. ACS is dedicated to the elimination or, at least, control of cancer, and has been a leader in research on the relationship between tobacco use and exposure and cancer. ACS devotes substantial resources to those suffering from cancer caused by tobacco and joins this brief on behalf of the National Home Office and its Ohio Division.

Amicus American Heart Association (“AHA”) is a nonprofit health organization whose mission is to reduce disability and death from cardiovascular disease and stroke. Nationwide, AHA has grown to include more than 22.5 million volunteers and financial supporters who carry out its mission in communities across the country. Tobacco use prevention remains a top priority for AHA because more than 400,000 people die each year from smoking-related diseases. Nearly half of these deaths are attributable to tobacco-related, cardiovascular disease.

Amicus American Lung Association (“ALA”), a nonprofit corporation with chapters in Ohio and throughout the country, has been fighting lung disease and promoting lung health since 1901. ALA has long been active in research, education and public policy advocacy regarding the

⁷ California Environmental Protection Agency, *supra* note 1 at 1-14.

adverse health effects of tobacco products. Because cigarette smoking is a major cause of chronic obstructive lung disease, ALA's goals include preventing and reducing tobacco use, particularly among young people, and providing programs to teach children and adults about managing asthma.

Amicus American Medical Association ("AMA"), an Illinois nonprofit corporation, is an association of approximately 280,000 physicians who practice throughout the United States.⁸ The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these still remain its core purposes. Its members practice in all fields of medical specialization, and it is the largest medical society in the United States. The AMA has long opposed tobacco use based on the massive body of scientific evidence that tobacco is addictive and kills smokers.

Amicus Ohio Academy of Family Physicians, ("OAFP") is a professional, nonprofit medical association of more than 4,300 family physicians, family practice residents, and medical students. The mission of the OAFP is to shape health care in Ohio through advocacy, empower the specialty of family practice through leadership, and facilitate achievement of professional excellence and satisfaction.

Amicus Ohio State Medical Association ("OSMA") is a nonprofit association of approximately 15,000 physicians, residents and students in the State of Ohio. OSMA's membership includes most of the Ohio physicians who are engaged in the private practice of medicine, including all specialties. OSMA's purposes are to improve public health through education, encourage an interchange of ideas among members, and maintain and advance the standards of medical practice by requiring members to adhere to its standards of professional

⁸ The AMA is participating in this brief on behalf of the American Medical Associations/State Medical Society Litigation Center ("Litigation Center"). The Litigation Center was formed in 1995 as a coalition of the AMA and private, voluntary, non-profit state medical societies to represent the views of organized medicine in the courts.

ethics. OSMA members confront the effects of tobacco smoke on Ohioans daily and joins this brief in an attempt to continue positive movement toward eradicating preventable forms of cancer and respiratory ailments from the lives of Ohioans.

Amicus Ohio State Radiological Society (“OSRS”) is a nonprofit professional organization of approximately 900 physicians, physicists, and residents in the State of Ohio. The purpose of the OSRS is to advance the science of radiology and to improve radiologic services to Ohio’s patients and medical community. OSRS encourages continuing education for radiologists to maintain the delivery of quality medical services and supports adherence to high medical and ethical standards in the practice of radiology.

Amicus Ohio State University College of Medicine and Public Health (“OSU”) is an academic unit of The Ohio State University dedicated to the preparation of women and men for leadership and prominence in the field of public health. OSU advances public health knowledge through scholarship and service and is a resource for professionals, organizations and agencies in Ohio and throughout the nation. OSU trains and educates health care professionals in the evaluation and treatment of illnesses, including those caused by childhood disease, water borne pollutants and other environmental contaminants such as second-hand smoke. In this regard, OSU is fully aware of the effects of tobacco smoke, both primary and secondary, on the health of Ohioans. OSU joins in this brief as an attempt to eliminate one of the most preventable causes of devastating chronic disease.

Amici have no financial interest in this case. Amici seek to promote public health by decreasing the incidents of illness and deaths caused by second-hand smoke.⁹ Amici want Ohioans to breathe easier in public whether they dine out, stop at a pub or go bowling. Amici

⁹ Further information on smoking and health, and on the activities of the various amici in respect to smoking and health, may be found at the following sites on the world wide web: American Cancer Society, <http://www.cancer.org/>; American Heart Association, <http://www.americanheart.org/>; American Lung Association,

want local Boards of Health to be able to ensure that public workplace employees can breathe non-toxic air as they carry out their assigned duties. We encourage this Court to affirm this goal as a matter of public policy.

SUMMARY OF ARGUMENT

Because second-hand smoke plays such a significant role in the incidence of tobacco related cancer, cardiovascular disease, lung disease and other respiratory maladies, local Boards of Health are uniquely situated to adopt regulations to protect their citizens from its devastating impact. The data included in this brief offer compelling examples of the scientific research documenting the detrimental consequences of exposure to second-hand smoke. Second-hand smoke related illnesses drain the local and State economy through premature deaths and rising healthcare and insurance costs. Reducing the incidence of the illnesses caused by second-hand smoke will save hundreds of lives each year and improve the economic landscape of Ohio. Moreover, despite claims to the contrary, businesses will not lose revenue by enforcing smoking regulations such as imposed in Lucas County. In fact, businesses may actually *increase* revenue by banning smoking.

Finally, amici submits that the District properly exercised its constitutional police powers in attempting to regulate the transmission of second-hand smoke in public workplaces in the same way that it may properly regulate noise pollution from automobiles and recreation centers. In light of these policy and legal arguments, the Court should uphold the District's authority to ban smoking in public workplaces consistent with its mandate to protect the health and welfare of its citizens.

ARGUMENT

I. LOCAL HEALTH DISTRICTS MUST BE ALLOWED TO PROTECT THEIR CITIZENS FROM KNOWN HEALTH HAZARDS.

A. SECOND-HAND SMOKE KILLS PEOPLE.

Approximately 48 million adults smoke cigarettes.¹⁰ Tobacco use is the single leading cause of preventable death in the United States.¹¹ More than 400,000 people die each year from tobacco related illnesses, such as cancer, respiratory illnesses, and heart disease.¹² The fact that tobacco kills has been understood for almost half a century.¹³ In the past two decades, the public has become increasingly aware that second-hand smoke from cigarettes, pipes and cigars also kills non-smokers. In 1986, the Surgeon General confirmed these long held suspicions when he concluded:

1. Involuntary smoking is a cause of disease, including lung cancer, in healthy nonsmokers.
2. The children of parents who smoke compared with the children of nonsmoking parents have an increased frequency of respiratory infections, increased respiratory symptoms, and slightly smaller rates of increase in lung function as the lung matures.
3. The simple separation of smokers and nonsmokers within the same air space may reduce, but does not eliminate, the exposure of nonsmokers to environmental tobacco smoke. (Emphasis supplied).¹⁴

¹⁰ See American Cancer Society, *Cancer Prevention & Early Detection Facts & Figures 2001*, 5 (2001) citing National Center for Chronic Disease Prevention and Health Promotion, *National Health Interview Survey* (1998).

¹¹ Id. See also, S.A. Glantz and W. Parmley. Passive Smoking and Heart Disease. 83 *Circulation* 1-12 (1991); Aubrey E. Taylor, Douglas C. Johnson and Houmayoun Kazemi. Environmental Tobacco Smoke and Cardiovascular Disease, A Position Paper from the Council on Cardiopulmonary and Critical Care, 84 *Circulation* 699-7021 (1992); Stanton A. Glantz and William W. Parmley, Passive Smoking and Heart Disease, Mechanism and Risk, 273 *J. Am. Med. Ass'n.* 1047-1053 (1995).

¹² American Cancer Society, *supra* note 10 at 4.

¹³ See generally U.S. Department of Health, Education & Welfare, *Report of the Advisory Committee to the Surgeon General, Smoking and Health* (1964).

¹⁴ See U.S. Department of Health and Human Services. *The Health Consequences of Involuntary Smoking: A Report of the Surgeon General* 7 (1986).

Studies rank second-hand smoke as the third leading cause of preventable death in the United States after active smoking and alcohol use.¹⁵ It is beyond reasonable debate that second-hand smoke poses a significant health risk to individuals who are forced to inhale this toxin.

B. SECOND-HAND SMOKE IS LINKED TO HEART DISEASE.

Second-hand smoke causes an estimated 35,000 to 62,000 deaths each year due to ischemic heart disease.¹⁶ Ischemic heart disease is often caused by the narrowing of the coronary arteries which results in one of four clinical syndromes: (1) myocardial ischemia, or chest pain, (2) severe chest pains which may produce myocardial infarction, or heart attack, (3) scarring of the heart and/or heart failure, and (4) sudden cardiac death.¹⁷

When non-smokers inhale second-hand smoke, the arteries may begin to narrow in as little as thirty minutes.¹⁸ In a recent study conducted by a team of researchers in Japan to determine the acute effects of second-hand smoke on coronary circulation, 15 healthy non-smokers and 15 active smokers without symptoms of disease were exposed to second-hand smoke in various trials between September 2000 and November 2000. None of the men had a history of high blood pressure or high cholesterol. After using a non-invasive technique to assess the coronary flow velocity reserve (CFVR), or blood flow, in the participants prior to and after the exposure to second-hand smoke, researchers found that the CFVR in non-smokers was abruptly reduced after exposure to the smoke. The authors wrote that this abrupt reduction provides direct evidence of the harmful effects of second-hand smoke on coronary circulation in non-smokers. The abrupt reduction in CFVR may be a sign that brief exposure to second-hand smoke contributes to endothelial dysfunction, an early process of arteriosclerosis, or hardening of the arteries.¹⁹ The

¹⁵ See generally U.S. Environmental Protection Agency. *Indoor Air Facts: Environmental Tobacco Smoke* (1989).

¹⁶ California Environmental Protection Agency, *supra*, note 1.

¹⁷ See David Rayner, *Cardiovascular Pathology*, www.med.ualberta.ca/Imp/000p0057.htm#3 (1995).

¹⁸ Glantz, *supra* note 4 at 462-463.

¹⁹ Glantz, *supra* note 4 at 462-463. See also M.R. Law, J.K. Morris and N.J. Wald. *Environmental Tobacco Smoke Exposure and Ischaemic Heart Disease: An Evaluation of the Evidence*. 315 *BMJ* 973-980 (1997).

authors recommended that communities continue to pass regulations requiring smoke-free workplaces, restaurants and bars.²⁰ Ohioans should not be forced to suffer from heart disease when its cause may be avoided. The District should not be emasculated by special interests seeking to frustrate efforts to regulate deadly pollutants.

C. STUDIES LINK SECOND-HAND SMOKE TO LUNG CANCER.

Tobacco use causes cancer of the lung, mouth, larynx, pharynx, esophagus, pancreas, kidney, bladder, and uterine cervix.²¹ Smoking rates for Ohioans have consistently been among the highest in the country particularly among women of childbearing age.²² The American Cancer Society estimates that, in 2001, 172,000 cancer deaths will be attributable to tobacco use; 157,400 of them will be from lung cancer.²³

Second-hand smoke contains over 4,000 chemicals and 43 carcinogens including formaldehyde, cyanide, arsenic, carbon monoxide, methane, benzene, and radioactive polonium 210.²⁴ Because these carcinogens are unfiltered, the levels of carcinogens in second-hand smoke are up to 100 times higher than smoke inhaled by active smokers.²⁵ Using these findings, the California Environmental Protection Agency concluded that second-hand smoke is responsible for at least 3,000 deaths each year due to lung cancer.²⁶

The increased risk of lung cancer is most notably found in situations where non-smokers are exposed to second-hand smoke for prolonged periods of time.²⁷ In one American Cancer

²⁰ Glantz, *supra* note 4 at 462-463; Law et al., *supra* note 19 at 973-980. *See also* Ichiro Kawachi, Graham Colditz, Frank Spezier et al., *A Prospective Study of Passive Smoking and Coronary Heart Disease*, 95 *Circulation* 2374-2379 (1997) (demonstrates link between exposure to second-hand smoke and heart disease in women).

²¹ *See* American Cancer Society, *supra* note 10 at 5.

²² American Cancer Society, Ohio Division, Inc. *Ohio Cancer Facts & Figures 2001*, 32 (2001).

²³ American Cancer Society, *supra* note 10 at 4.

²⁴ U.S. Environmental Protection Agency *supra* note 15 at 1-3.

²⁵ *Id.*

²⁶ California Environmental Protection Agency, *supra* note 1 at ES-vii.

²⁷ Victor M. Cardenas, Michael J. Thun, Harland Austin, Cathy A. Lally, W. Scott Clark, Raymond S. Greenberg and Clark W. Heath, Jr., *Environmental Tobacco Smoke and Lung Cancer Mortality in the American Cancer Society's Prevention Study II*, 8 *Cancer Causes and Control*, 57-64 (1997)(lung cancer risk for never smoking women increases by twenty percent.).

Society cancer prevention study, researchers found that non-smoking women married to men who smoked at some point during the marriage had a twenty percent higher death rate from lung cancer than those married to men who never smoked.²⁸

Prolonged exposure to unfiltered second-hand smoke plays a significant role in the incidence of lung cancer in the workplace, particularly in the food-service industry, which includes bars and restaurants.²⁹ A review of published studies on indoor air quality and lung cancer risk in food-service workers confirms this.³⁰ The review, which includes a variety of reports including tobacco industry funded studies, demonstrates that levels of second-hand smoke are twice as high in restaurants and up to six times as high in bars, than the levels found in office workplaces or other businesses. The author of the study notes:

Public health efforts to regulate smoking in bars and restaurants can no longer focus only on protecting the patron. Food-service workers must be afforded the same public health protection as other workers. To protect these workers from the hazards of ETS, smoking should be prohibited in bars and restaurants. (Emphasis supplied).³¹

International research has reached similar conclusions. In a study conducted in Finland to estimate the magnitude of the risk of mortality due to second-hand smoke exposure in the workplace, researchers calculated the proportion of fatalities in Finland in 1996 that were due to occupational exposure to second-hand smoke. Using the calculation and comparing their figures with other studies on the link between second-hand smoke in the workplace and lung cancer, researchers determined that men and women who were exposed to second-hand smoke at work faced a 25 percent greater risk of lung cancer than those who worked in a smoke-free

²⁸ Cardenas, et al., *supra* note 27 at 62.

²⁹ *Id.*

³⁰ M. Siegel. *Involuntary Smoking in the Restaurant Workplace: A Review of Employee Exposure and Health Effects*. 270 J. Am. Med. Ass'n. 490-493 (1993). See also Mark D. Eisner, Alexander K. Smith, and Paul D. Blanc, *Bartenders' Respiratory Health After Establishment of Smoke-Free Bars and Taverns*, 280 J. Am. Med. Ass'n. 1909-14 (1998) (respiratory health of bartenders in San Francisco improved after the City passed smoking bans in bars and restaurants.).

³¹ Siegel, *supra* note 30 at 490-493..

environment.³² Authors of the study recommended a reduction in second-hand smoke in the workplace as a powerful means of reducing the burden of respiratory and cardiovascular diseases.³³ Cancer should not be forced on restaurant, bar employees or non-smokers.³⁴ The District should have the authority to regulate such harmful substances in public workplaces.

D. SECOND-HAND SMOKE IS RESPONSIBLE FOR A NUMBER OF RESPIRATORY DISEASES, ESPECIALLY AMONG CHILDREN.

Infants and children exposed to second-hand smoke are more likely to develop pneumonia, bronchitis, asthma and middle ear infection.³⁵ A review of a number of studies on the effects of smoking on children's respiratory health confirms this. For example, 10,672 births in Israel were studied over a three-year period. Children of mothers who reported they smoked during this period had a 27.5 percent greater hospital admission rate for pneumonia and bronchitis than children of non-smoking mothers.³⁶ Children followed in London for a similar period of time also experienced an increased frequency of bronchitis and pneumonia during their first year of life when one or both of their parents smoked.³⁷ A similar study followed over 3,600 children during the first five years of life. The children of mothers who smoked had a 70 percent greater chance of hospitalization for a respiratory illness than children of nonsmoking mothers.³⁸ Researchers made similar findings when they studied 1,144 infants and their families in the greater Washington, D.C. area. Maternal smoking was linked to an "excess frequency" of acute

³² Markku M. Nurminen and Maritta S. Jaakkola, *Mortality From Occupational Exposure to Environmental Tobacco Smoke in Finland*, 43 J. Env't'l. Occup. Med. 687-693 (2001).

³³ Nurminen et al., *supra* note 27 at 687.

³⁴ The Court should note that the District considered the welfare of restaurant and bar employees as well as the general public when it issued its regulations. Notwithstanding the potential tort liability, which could result by failing to protect these employees, restaurant and bar employees should be able to work in a healthy environment.

³⁵ California Environmental Protection Agency, *supra* note 1 at 38-44.

³⁶ *Id.* at 38-42.

³⁷ *Id.* at 42.

³⁸ *Id.*

bronchitis cases, tracheitis, and laryngitis.³⁹ Similar links were established between parental smoking and incidents of childhood asthma and chronic middle ear infections.⁴⁰

Second-hand smoke is also linked to an estimated 1,900 to 2,700 cases of sudden infant death syndrome annually and an estimated 300,000 premature births per year.⁴¹ Simply put, second-hand smoke is hazardous to children. Admittedly, many of the studies linking second-hand smoke to children are based on parental smoking that takes place at home. However, recent studies show that efforts to protect children from second-hand smoke should extend beyond the home.⁴² Indeed, children often frequent restaurants, bowling alleys and other public places with their parents. Children should not be forced to inhale smoke in public places.⁴³

E. SECOND-HAND SMOKE HURTS OHIO'S ECONOMY.

Tobacco is the most lethal product that is lawfully sold in the United States, and tobacco-related illnesses represent the most devastating public health epidemic of our century.⁴⁴ Each year, an estimated 430,000 people die from smoking related illnesses - more than those who die from AIDS, homicide, suicide, alcohol use, illegal drug use, fires and auto accidents combined. Smoking is responsible for almost 90 percent of lung cancer deaths, 80 percent of chronic obstructive pulmonary disease (e.g., emphysema) deaths, 30 percent of all cancer deaths and 20 percent of all deaths from cardiovascular disease.⁴⁵ Over the 30-year period from 1964 to 1994, approximately 10 million Americans died from smoking and countless others suffered

³⁹ California Environmental Protection Agency, *supra* note 1 at 38-44. See also D.M. Mannino, M. Siegel, C. Husten, D. Rose and R. Etzel. *Environmental Tobacco Smoke Exposure and Health Effects in Children: Results from the Interview Survey*. 5 *Tobacco Control*, 13-18(1996).

⁴⁰ California Environmental Protection Agency *supra* note 1 at 43-49, 58-59.

⁴¹ *Id.* at 6.

⁴² Ownby, et al., *supra* note 6.

⁴³ The regulations issued by the District protect children from second-hand smoke in public. Moreover, regulations aimed at promoting smoke free public places may also encourage smokers to stop smoking altogether. Lucas County restaurants, bars and other public places should be smoke free.

⁴⁴ See American Lung Association, *Lung Disease Data 1998-1999*, 18-23 (1998).

⁴⁵ American Lung Association, *supra* note 44 at 18-23.

debilitating illness and disease.⁴⁶ However, it is not just smokers who suffer.⁴⁷ The true costs of smoking are borne by smokers, individuals who purchase insurance, taxpayers, businesses, governments, healthcare providers and non-smokers. The effect on the American health care system is staggering.⁴⁸

This economic injury from smoking is estimated to be at least \$120 billion annually - \$73 billion in direct health care costs (hospital care, medications, physician and other professional care) for the adult population (representing 11.8 percent of total U.S. adult medical expenditures), plus another \$47 billion in indirect costs such as lost productivity.⁴⁹ In 1993, Medicaid costs related to smoking in Ohio alone were estimated at over \$597 million dollars.⁵⁰ Everyone bears the financial consequences of smoking in the form of higher premiums, higher taxes, and diverted medical resources.⁵¹

The healthcare system in the U.S. is based on public and private insurance, and the cost of insurance, the extent of coverage, and the range of coverage depend on many factors, including incidence of disease. The leading avoidable cause of disease in the United States is tobacco use. Second-hand smoke is the third ranking preventable cause of disease. If the incidence of avoidable diseases is reduced, costs are reduced, and insurance coverage becomes more

⁴⁶ See Centers for Disease Control and Prevention, Office on Smoking and Health, at <http://www.cdc.gov> (1994). See also American Lung Association, *Lung Disease Data 2000; Blueprint for a Tobacco Free Ohio: A Statewide Tobacco Use Prevention Plan* (1999).

⁴⁷ See American Academy of Pediatrics, Committee on Environmental Health, *Environmental Tobacco Smoke: A Hazard to Children*, 99 Pediatrics, 639 (1997).

⁴⁸ See Donald W. Garner, *Cigarettes and Welfare Reform*, 26 Emory L.J. 270, 275 (1977) ("The protectors of the commonwealth have yet to appreciate the fact that the price of cigarettes covers only a part of their cost and that the nonsmoking public pays dearly for the resulting disease, disability, and death.... If the cigarette manufacturers were made to pay the welfare costs occasioned by smoking, they would have an economic incentive which is now lacking to market a less dangerous product.")

⁴⁹ See Leonard S. Miller, et. al., *State Estimates of Total Medical Expenditures Attributable to Cigarette Smoking*, 1993, in 113 U.S. Dept. Health and Human Services Pub. Health Rep. 447-458 (1998). These estimates do not include the cost of such conditions as burns suffered in smoking-related fires (\$0.5 billion), or complications arising from smoking during pregnancy (\$4 billion). See generally U.S. Treasury Department, *The Economic Costs of Smoking in the United States and the Benefits of Comprehensive Tobacco Legislation* (1998); See also, American Cancer Society, *supra* note 10 at 1-5.

⁵⁰ American Lung Association, *supra* note 46 at 7.

affordable. The District's regulations move toward the goal of reducing the incidence of smoking related illnesses. Such reduction allows the State of Ohio to preserve resources normally earmarked for treatment of those illnesses. Consumers who are not affected by second-hand smoke are logically more productive and more able to contribute to Ohio's economy. Healthier children have a better chance to participate in Ohio's economy because they have fewer absences from school and fewer physical inhibitors early in life. In short, a residual benefit of affirming the District's authority is the positive impact it will have on Ohio's economy.

F. A SMOKING BAN WILL NOT HURT BUSINESSES.

A common but unfounded attack on smoking bans in public places is the notion that businesses will suffer from lost revenue. However, an extensive study of this issue over a seven-year period revealed that there was no loss in revenue when municipalities issued smoking bans.⁵² Researchers gathered data from the California State Board of Equalization and Colorado State Department of Revenue on taxable sales from 1986 through 1993 for 15 cities where smoking bans were issued by city ordinances. Total restaurant sales were analyzed as a fraction of total retail sales and restaurant sales and compared with cities of similar populations where there were no smoking bans. The smoking bans did not show a significant impact on restaurant sales.⁵³ In fact, in two cities, retail sales to restaurants increased.⁵⁴ Businesses will not lose revenue due to smoking bans.

⁵¹ See Jon D. Hanson and Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 Yale L.J. 1163, 1224 et seq. (1998).

⁵² See Stanton A. Glantz and Lisa R. A. Smith, *The Effect of Ordinances Requiring Smoke-Free Restaurants on Restaurant Sales*, 84 Am. J. Pub. Health, 1081-1085 (1994); See also, Mervyn Susser, *Editorial: Goliath and Some Davids in the Tobacco Wars*, 87 Am. J. Pub. Health, 1593-1594 (1997) (noting a follow up study by the same researchers which continues to reveals the same results).

⁵³ Glantz et al., *supra* note 52 at 1083.

II. LOCAL GOVERNMENT MAY REGULATE PUBLIC HEALTH ISSUES UNDER ITS POLICE POWER.

This Court should, as federal courts considering similar regulations have done, uphold the regulations issued by the District as a valid exercise of its police power. In Operation Badlaw, Inc. v. Licking County General Health District Board of Health, 866 F. Supp. 1059, 1066 (S.D. OH 1992) (Smith, J.), the District Court held that regulations promulgated by the Licking County Board of Health, which banned smoking in public places, were a valid exercise of local authority. Operation Badlaw, Inc. argued that the regulations issued by the Board of Health were an overbroad exercise of its police power. The Court disagreed, explaining:

In passing the regulations, both Boards made specific findings that second-hand smoke is both a danger and a nuisance to nonsmokers and that smoking causes damage to merchandise and fires. They further found that nonsmokers are often unable to protect themselves from second-hand smoke, and that certain non-smoking members of the public, such as persons with cardiovascular or respiratory diseases, were at a higher level of risk. These findings were based, at least in part, upon the opinions of the Surgeon General of the United States...

Assuming that second-hand smoke is a hazard, the regulations bear some rational relationship to minimizing the effects of that hazard. (Emphasis supplied). Operation Badlaw, Inc. 866 F. Supp. at 1066.

The regulations issued by the District clearly bear a rational relationship to its effort to protect citizens from a toxic airborne pollutant. See Cookies Diner v. Columbus Bd. Of Health, 5 Ohio Misc. 3d 65 (1994). See also City of Tucson v. Grezaff, 23 P. 3d 675, 680 (2001) ("Regulation of smoking in restaurants is a matter of local concern."); Accord, Tri-Nel Management, Inc. v. Board of Health of Barnstable, 433 Mass. 217, 741 N.E. 2d 37, 42-43 (2001) (recognizing "ill effects of tobacco use, particularly when it involves minors, as a legitimate municipal health concern justifying municipal regulation of tobacco products"); Oregon Restaurant Association v. City of Corvallis, 166 Or. App. 506, 999 P. 2d 518, 519-20 (2000) (Indoor Clean Air Act did

⁵⁴ *Id.* The Court should also note that smoking bans improve the respiratory health of bartenders. See Eisner, et al., *supra* note 30 at 1909-14.

not preempt municipal ordinance prohibiting smoking in enclosed public spaces within the city when no inconsistency or conflict existed between the Act and ordinance).

The regulations currently before this Court are analogous to a local regulation addressing noise pollution, which this Court affirmed. In State v. Dorso, 4 Ohio St. 3d 60,61, 446 N.E. 2d 449, 452-453 (1983), this Court upheld the right of local governments to regulate noise pollution as a lawful exercise of police power, stating:

Neither party to the instant action disputes the municipality's right to regulate, through the lawful exercise of its police power, "loud musical noises." Such regulation by necessity involves the reasonable circumscription of the rights of individuals for the greater benefit of the commonwealth. Thus, it is proper for a municipality to demand that a party adapt his behavior to even such facts as wind direction and velocity so as not to interfere with the public's assertion of a superior prerogative. Dorso, 4 Ohio St. 3d at 64, 446 N.E. 2d at 453.

See also, City of Tiffin v. McEwen, 130 Ohio App. 3d 527, 531, 720 N.E. 2d 587, 589 (1998), in

which the Ohio Court of Appeals held:

In order to be a valid exercise of the city's police powers, an ordinance "must directly promote the general health, safety, welfare or morals and must be reasonable, the means adopted to accomplish the legislative purpose must be suitable to the end in view, must be impartial in operation, must have a real and substantial relation to such purpose and must not interfere with private rights beyond the necessities of the situation." Teegarden v. Foley (1957), 166 Ohio St. 449, 2 O.O.2d 462, 143 N.E.2d 824 . . .

the ordinance directly promotes the general welfare and safety of the community by reducing noise pollution...[and] the ordinance has a real and substantial relation to the purpose of reducing noise pollution... In short, it seems clear that the ordinance is meant to protect the entire community and that it does not unreasonably restrict private rights to further that goal. (Emphasis supplied). McEwen, 130 Ohio App. 3d at 532, 720 N.E. 2d at 590.

The regulations issued in Lucas County, similarly, involve a reasonable circumscription of the rights of individuals for the greater benefit of the public health and they bear a real and substantial relation to the purpose of eliminating airborne pollutants from public workplaces. Accordingly, the regulations should be affirmed.

IV. CONCLUSION

The District must not be restrained from exercising reasonable authority to protect the health and welfare of its citizens. Second-hand smoke kills people and severely diminishes the quality of life of children and others with respiratory problems. Second-hand smoke also depletes Ohio's economic capacity and harms long-term business interests. The amici support the District's narrowly tailored and rational efforts to regulate second-hand smoke and its devastating effects in areas within its jurisdictional control. This Court should affirm the right of local authorities to take such reasonable steps to save lives and promote a healthier Ohio.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies that a copy of the foregoing were sent to Louis E. Tosi, Esq., counsel for plaintiffs/respondents, Shumaker, Loop & Kendrick, LLP, North Courthouse Square, 1000 Jackson, Toledo, Ohio 43262-1573 and Julia R. Bates, Lucas County Prosecuting Attorney, counsel for defendants/petitioners, 700 Adams Street, Suite 250, Toledo, Ohio 43624 by regular mail, postage prepaid, on this 29th day of November, 2001.

Danny R. Williams