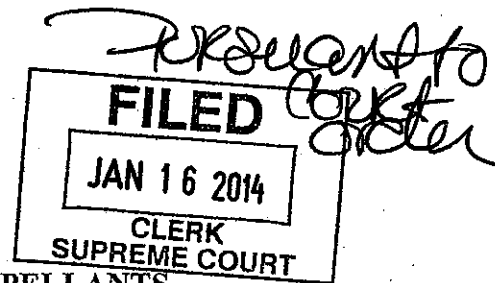


SUPREME COURT OF KENTUCKY
CASE NO: 2013-SC-000023-D



BULLITT COUNTY FISCAL COURT, ET AL.

APPELLANTS

vs.

Kentucky Court of Appeals
2011-CA-001798

BULLITT COUNTY BOARD OF HEALTH

APPELLEE

BRIEF FOR AMICI CURIAE ON BEHALF OF THE AMERICAN CANCER SOCIETY
CANCER ACTION NETWORK, THE AMERICAN HEART ASSOCIATION,
AMERICAN LUNG ASSOCIATION, THE AMERICAN LUNG ASSOCIATION OF THE
MIDLAND STATES, 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, TOBACCO CONTROL LEGAL CONSORTIUM, 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 27th day of December 2013: Judge Rodney D. Burress, PO Box 97, Shepherdsville, KY 40165; Monica Meredith Robinson, Bullitt County Attorney, 300 S. Buckman Street, Shepherdsville, KY 40165; Matthew 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. That ruling was reversed by the Kentucky Court of Appeals. The following *Amici Curiae* join together in submitting this brief to the Court in support of the Court of Appeals' ruling upholding the Board of Health regulation: the 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, Kentucky Nurses Association and the Tobacco Control Legal Consortium.

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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 Bullitt County Board of Health (BCBH) 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). Specifically, 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, more than 42,000 Americans died in 2006 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 and 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 Moreover, secondhand smoke caused approximately 7,333 deaths from lung cancer and 33,951 deaths from heart disease in 2006.⁸

The large number of communities throughout the entire United States with smoke-free laws or regulations like BCBH’s Regulation 10-01 reflects the seriousness of the public health risk posed by secondhand smoke and the need for BCBH to exercise its

² Max W, Sung H-Y, and Shi Y. Deaths from Secondhand Smoke Exposure in the United States: Economic Implications. *American Journal of Public Health*: November 2012, Vol. 102, No. 11, pp. 2173-2180. doi: 10.2105/AJPH.2012.30080

³ *Report of the Surgeon General* (2006), *supra* n. 1, at 65

⁴ *Report of the Surgeon General* (2006), *supra* n. 1, at 445

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 *Id*

⁸ Max W, Sung H-Y, and Shi Y. Deaths from Secondhand Smoke Exposure in the United States: Economic Implications. *American Journal of Public Health*: November 2012, Vol. 102, No. 11, pp. 2173-2180. doi: 10.2105/AJPH.2012.30080).

authority under KRS § 212.230(1)(c) to minimize this risk to its citizens.

B. Scientific Evidence Relating to Kentucky

Kentucky leads the nation in smoking prevalence (28.3% of adults),⁹ yet only 33.1% of the population is covered by 100% smoke-free non-hospitality workplace, restaurant, and bar laws.¹⁰ 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.¹¹ 7,800 Kentucky adults die each year from smoking and there are 107,000 "kids now under 18 and alive in KY who will ultimately die prematurely from smoking."¹² In 2009-10, Kentucky ranked 43rd among the states for overall secondhand smoke exposure, with 30% of adults reporting exposure in workplaces and 32.8% in public places over the previous 7 days before the survey.¹³ It follows that Kentucky would have similarly high death rates from exposure to secondhand smoke.

Studies from around the world have provided evidence of the reduced incidence

⁹ Centers for Disease Control and Prevention. (2013).

Kentucky 2012 Tobacco Use, Available at:

<http://apps.nccd.cdc.gov/brfss/display.asp?cat=TU&yr=2012&qkey=8161&state=KY>
Accessed 12/19/2013.

¹⁰ American Nonsmokers' Rights Foundation (2013, October). *Percent of U.S. State Populations Covered by 100% Smokefree Air Laws*. Available at <http://www.no-smoke.org/pdf/percentstatepops.pdf>. Accessed December 19, 2013.

¹¹ 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>.

¹² Tobacco-free Kids. *The Toll of Tobacco in Kentucky*. (2013, June, available at http://www.tobaccofreekids.org/facts_issues/toll_us/kentucky

¹³ Centers for Disease Control and Prevention, *Smoking and Tobacco Use, State Highlights*, Kentucky (2012), available at http://www.cdc.gov/tobacco/data_statistics/state_data/state_highlights/2012/states/kentucky/index.htm.

of heart attacks and hospitalizations after implementation of smoke-free air laws.¹⁴ As the Surgeon General has confirmed, smoke-free laws like the BCBH Regulation 10-01, have the substantiated benefits of creating healthy environments for employees and business patrons, reducing smoker and non-smoker deaths, reducing the number of youth who smoke, and reducing health care costs.¹⁵

It was with due consideration to such undeniable health risks to County residents, 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 educating the public on the dangers of secondhand smoke. It also considered 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. It also conducted a community norms survey relating to secondhand smoke and smoke-free policy, and

¹⁴ Tan CE & Glantz SA (2012). *Association Between Smoke-free Legislation and Hospitalizations for Cardiac, Cerebrovascular, and Respiratory Diseases: A Meta-Analysis*. *Circulation*, 2012;126:2177-2183, available at <http://circ.ahajournals.org/content/126/18/2177.full.pdf+html>

¹⁵ *Report of the Surgeon General* 649-50 (2006), *supra* n. 1, at <http://www.surgeongeneral.gov/library/secondhandsmoke/report/fullreport.pdf> and see American Cancer Society Cancer Action Network. *Savings Lives, Saving Money: A State-By-State Report on the Health and Economic Benefits of Comprehensive Smoke-Free Laws*. 26 (2011) (noting projected health care savings, reductions in deaths of smokers and non-smokers, and reduction in youth who smoke associated with making all Kentucky workplaces, restaurants and bars 100% smoke-free), available at <http://www.acscan.org/pdf/tobacco/reports/Smoke-free-laws-report-KY.pdf>

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 Order declaring the regulation “void and unlawful” and permanently enjoining its implementation. (*See* Order Granting Perm. Inj. at 13.) That decision was reversed by the Court of Appeals, the ruling this Court now reviews.

As demonstrated below and in the Brief for Appellee, 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 Regulation.

ARGUMENT

A. BCBH 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 IN PLACES OF EMPLOYMENT.

1. The Undisputed Medical and Scientific Evidence Confirms the Substantial Public Health Hazard Created by Secondhand 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 found that there is no

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.

risk-free level of exposure to secondhand smoke, and that even short-term exposure can potentially increase 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 lead to a "rapid and sharp increase in endothelial dysfunction and inflammation," which may cause cardiovascular events and trigger strokes.¹⁹

Irrefutable scientific evidence confirms that exposure to secondhand smoke causes excess deaths from lung cancer and cardiac illnesses. Regarding remedial measures, the 2006 Surgeon 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 the context of the scientific evidence that this Court must consider the authority of BCBH to implement Regulation 10-01.

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

¹⁸ *Id.* at 65.

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/reports/tobaccosmoke/executivesummary.pdf>

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

²¹ See Record, United States Department of Health Services, 12th Report on Carcinogens

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 more severe asthma attacks, pneumonia, and bronchitis. Secondhand 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

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

²³ U.S. Dep't of Health and Human Services, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General, Executive Summary*, 11 (2006), available at

<http://www.surgeongeneral.gov/library/reports/secondhandsmoke/executivesummary.pdf>

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

smoking, or *exposure to secondhand tobacco smoke*—are sufficient to substantially increase risk of cardiac events.²⁵

Moreover, the 2010 Surgeon General's Report 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 to *deprive the fetus of oxygen* by binding to hemoglobin.²⁶

Such a profound body of scientific evidence compelled the Board of Health to enact Regulation 10-01 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 and Bullitt County Share the Health and Fiscal Burdens Associated with Secondhand Smoke Exposure.

Unquestionably Kentucky shares in the health costs associated with exposure to secondhand smoke. Although Kentucky leads the nation in smoking prevalence (28.3% of adults),²⁷ 67% of Kentuckians are not covered by a comprehensive smoke-free law protecting them from exposure to secondhand smoke in enclosed public places, including all workplaces, restaurants, and bars.²⁸ Moreover, the economic consequences to the

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

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

²⁷ Centers for Disease Control and Prevention. (2013).

Kentucky 2012 Tobacco Use, Available at:

<http://apps.nccd.cdc.gov/brfss/display.asp?cat=TU&yr=2012&qkey=8161&state=KY>
Accessed 12/19/2013.

²⁸ American Nonsmokers' Rights Foundation (2013, October). *Percent of U.S. State Populations Covered by 100% Smokefree Air Laws*. Available at <http://www.no->

taxpayers of the Commonwealth cannot be minimized. Kentucky spends \$1.5 billion to treat sick smokers every year (\$487 million in Medicaid costs).²⁹ More than thirty-three percent (33.1%) of Kentucky's workers are exposed to secondhand smoke at work.³⁰ Liu *et al.*, used more comprehensive and accurate secondhand smoke assessments than previously available in the literature to focus on lifetime excess risk for cancer death, ischemic heart disease death, and asthma initiation, concluding that

Health risks for patrons and servers from secondhand smoke exposure in restaurants and bars alone are well above the acceptable level. Restaurants and bars should be a priority for governments' effort to create smoke-free environments and should not be exempt from smoking bans.³¹

At least four of the leading causes of deaths in Bullitt County are known to be associated with exposure to secondhand smoke. In 2011, for example, 21.3% of Bullitt County deaths were caused by heart disease, 28.8% by malignant neoplasms (cancer), 7.1% by chronic lower respiratory illness, and 4.5% by stroke.³² Bullitt County rates for cancer and chronic lower respiratory deaths exceed the national rates in those

smoke.org/pdf/percentstatepops.pdf . Accessed December 19,2013.

²⁹ Tobacco-free Kids. *The Toll of Tobacco in Kentucky*. (2013, June). Available at: http://www.tobaccofreekids.org/facts_issues/toll_us/kentucky

³⁰ American Nonsmokers' Rights Foundation (2013, October). *Percent of U.S. State Populations Covered by 100% Smokefree Air Laws*. Available at <http://www.no-smoke.org/pdf/percentstatepops.pdf> . Accessed December 19,2013.

³¹Liu R, Bohac DL, Gundel LA, Hewett MJ, Apte MG & SK Hammond. *Assessment of risk for asthma initiation and cancer and heart disease deaths among patrons and servers due to secondhand smoke exposure in restaurants and bars. Tob Control* Published Online First February 13, 2013. 1-7. doi:10-1136/tobaccocontrol-2012-050831.

³² 2011 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* and see *Leading Causes of Death in Bullitt County, Kentucky, 2011*, available at <http://www.mc.uky.edu/TobaccoPolicy/KCSP/LeadingCausesofDeath/LeadingCauses2011/BullittCounty2013.pdf>

categories.³³ Secondhand smoke exposure contributes significantly 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,” providing a succinct summary of the scientific and medical evidence supporting the regulation of environmental tobacco smoke (ETS)

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 15% decrease in heart attacks within the first two years.³⁵

³³ *Id.*, *Leading Causes of Death in Bullitt County, Kentucky, 2011*

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

³⁵ Tan CE & Glantz SA (2012). *Association Between Smoke-free Legislation and Hospitalizations for Cardiac, Cerebrovascular, and Respiratory Diseases: A Meta-Analysis*. *Circulation*, 2012;126:2177-2183, available at <http://circ.ahajournals.org/content/126/18/2177.full.pdf+html>

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 here provides undeniable health and economic benefits for its citizens.

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

The Court of Appeals properly applied this Court's directive to liberally construe public health laws and held that BCBH Regulation 10-01 is entirely within the authority granted by KRS 212.230(1)(c). *Bullitt County Board of Health v. Bullitt County Fiscal Court et al.*, No. 11-CI-00348, (Ky. App. 2012) Slip Opin., pp. 5-7, citing *Sanitation Dist. No. 1 v. Campbell*, 249 S.W. 2d 767, 770 (Ky. 1952). KRS 212.230(1)(c) provides:

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 health;

Id. (Emphasis added). The Court of Appeals correctly concluded that this legislative grant of power provided the Bullitt County Board of Health with the legal authority to promulgate the limited ban on smoking in public places that is embodied in Regulation 10-01. *Bullitt County Board of Health*, Slip Opin., pp. 5-6. It reached this conclusion by

³⁶Campaign for Tobacco Free Kids (2013, June). *The Toll of Tobacco in Kentucky*. http://www.tobaccofreekids.org/facts_issues/toll_us/kentucky

³⁷Hahn 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.

applying the letter and spirit of this Court's ruling in *Commonwealth v. Do, Inc.*, 674 S.W.2d 519 (Ky. 1984):

County boards of health, such as the Bullitt County Board of Health, like the Louisville & Jefferson County Board of Health in *Do*, are state subdivisions and 'through the powers delegated by [the legislature] *may require citizens to conform to its properly enacted regulations regarding public health.*'

Bullitt County Board of Health, Slip Opin., pp. 5-6, quoting *Commonwealth v. Do, Inc.*, 674 S.W.2d at 521. Rather than "seiz[ing] the legislative power of Bullitt Fiscal Court and the City Councils" as Appellants suggest,³⁸ the Board of Health is fulfilling its obligation to "protect the health of the public" as vested in it by KRS 212.230(1)(c). Thus, the Board of Health is not usurping legislative power. Rather it is clearly fulfilling its legislative mandate.

1. The Regulation Is Not Preempted

As they did below, Appellants argue 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.³⁹ Regarding preemption, 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) this Court 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 of

³⁸ Appellants' Brief p. 4

³⁹ Appellants' Brief pp. 15 *et seq.*

Appeals decision is compelled by this Court's ruling in *Lexington Fayette County Food and Beverage Ass'n* above.⁴⁰

2. The Regulation Is Constitutional

Additional support for the conclusion that the regulation at issue is not preempted is found in *Louisville & Jefferson County Board of Health v. Haunz*, 451 S. W.2d 407 (Ky. App. 1970). There 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 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

⁴⁰ KRS 65.165 was among the statutes the Court found did not reflect an intent to preempt the entire field of ban on smoking in public places. That statute remains restricted to governmental buildings. Nothing in the changes to the language in the KRS 65.165 would suggest a change of heart by the General Assembly to now preempt the field. Of course, if that were the intent, the General Assembly could surely have expressed such and chose not to do so. Nothing in that language would justify a reversal of this Court's holding in *Lexington Fayette County Food and Beverage Ass'n*. The Amici fully support the Board of Health's argument in its Brief of Appellee regarding this issue.

framework of the legislation, the purpose of which is to protect the public health.

Haunz. at 409.

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 response to the 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].” *Haunz* 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 Appellee, 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 Appellee, 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). 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).

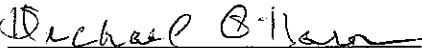
Given the scientific underpinning discussed above, there can be no question that BCBH's passage of Regulation 10-01 fully complied with KRS § 212.230(1)(c). *C.f. Lexington Fayette Cty. Food and Beverage Ass'n v. Lexington-Fayette Urban Cty. Gov't*, 131 S.W.3d 745, 749 (Ky. 2004) (affirming the implementation of a smoke-free ordinance by L-FCUG as well within authority delegated to it by law as a matter of public health).

The *Amici* submit this brief to inform the Court of the substantial 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 Appellee. That authority, together with the scientific evidence reviewed above, compels affirmance of the decision of the Court of Appeals 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 County citizens. The existing jurisprudence cited above and discussed in detail in the Brief for the Appellee leads to the conclusion that this Regulation was well within the power delegated to the BCBH by Kentucky Statutes. Appellant's argument to the contrary cannot withstand scrutiny under the scientific evidence and legal precedent discussed above. This Court should accordingly affirm.

Respectfully submitted,


Michael J. O'Hara