

STATE OF MICHIGAN
IN THE COURT OF APPEALS
(ON APPEAL FROM THE GENESEE COUNTY CIRCUIT COURT)

RPF OIL COMPANY
A Michigan corporation,

Plaintiff-Appellee

MCOA No. 344735

Case No. 17-109107-CZ
Judge Judith A. Fullerton

v.

GENESEE COUNTY and GENESEE
COUNTY HEALTH DEPARTMENT
Individually, Jointly and severally,

Defendants-Appellants

BRIEF OF AMICI CURIAE PUBLIC HEALTH AND MEDICAL GROUPS

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STATEMENT OF JURISDICTION

This is an appeal of right filed on July 23, 2018.

QUESTIONS PRESENTED

- I. DOES TOBACCO USE EXACT A TERRIBLE TOLL IN DISEASE AND DEATH, ACROSS THE NATION AND IN MICHIGAN?

Amici say Yes.

- II. WILL THE TOBACCO 21 ORDINANCE REDUCE USE OF DEADLY, ADDICTIVE TOBACCO PRODUCTS IN GENESEE COUNTY, PARTICULARLY AMONG YOUNG PEOPLE, where:

- A. Smoking Initiation Starts with Young People Under 21, Who Are Particularly Vulnerable to Nicotine Addiction;
- B. The Vulnerability of the Young to Nicotine Addiction and Tobacco Use Is Exacerbated by Tobacco Industry Marketing, Which Has Long Targeted Youth and Young Adults;
- C. The Tobacco 21 Regulation Will Reduce the Availability of Tobacco Products to Young People Under 18 by Limiting Access by Older Teens Within Their Social Circle; and
- D. The Tobacco 21 Regulation Will Reduce the Prevalence of Tobacco-Related Disease and Death in Genesee County?

Amici say Yes.

BRIEF OF *AMICI CURIAE* PUBLIC HEALTH AND MEDICAL GROUPS

Pursuant to this Court’s order of February 21, 2019, *amici* respectfully submit this brief in support of Genesee County’s appeal of the lower court judgment striking down the County’s regulation prohibiting the sale of tobacco products to persons under 21 (Tobacco 21 Regulation).

The central issue in this case is whether the Tobacco 21 Regulation is preempted by Michigan’s Age of Majority Act, MCLO 722.52. Contrary to the principle, expressly articulated in the Michigan Constitution, that local lawmaking authority is to be “liberally construed in [localities’] favor,” Const. 1963, art 7, §§22, 34, appellee maintains that the Age of Majority Act deprived Genesee County of the authority to enact the Tobacco 21 Regulation, even though (1) unlike other state statutes which explicitly displace local laws, the Age of Majority Act makes no reference to any such preemptive effect; (2) the text of the Age of Majority Act indicates that its effect is to supersede previously existing state laws which had previously set 21 as the age of majority, not to bar localities from setting age limits higher than 18 for activities which implicate the safety or health of young people; and (3) the extensive legislative history of the Age of Majority Act reveals no intent whatsoever to displace local government ordinances or regulations. Put simply, the contention that the intent of the Age of Majority Act was to preempt local laws rests on the thinnest of reeds.

The *amici* maintain that far greater support for an intended preemptive effect of the Age of Majority Act should be required by this Court, *particularly in light of the important public health benefits of the Tobacco 21 Regulation for the Genesee County community and particularly for its young people*. The purpose of this brief *amicus curiae* is to ensure that the Court has a full understanding of those public health benefits.

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici include the following national, Michigan and Genesee County public health and medical organizations and entities, each of which works, on a daily basis, to protect the public from the devastating harms caused by tobacco products: African American Tobacco Control Leadership Council; American Cancer Society Cancer Action Network; American Heart Association; American Indian Veterans of Michigan, Inc.; American Lung Association; Campaign for Tobacco-Free Kids; ChangeLab Solutions; Genesee County Medical Society; Genesee County Prevention Coalition; Genesee Health Plan; Hurley Medical Center; Michigan Academy of Family Physicians; Michigan Association for Local Public Health; Michigan Association of Preventive Medicine and Public Health Physicians; Michigan Chapter of the American Academy of Pediatrics; Preventing Tobacco Addiction Foundation; SMART Coalition; South Eastern Michigan Indians, Inc.; Tobacco Control Legal Consortium; Tobacco-Free Michigan; Trinity Health; and Truth Initiative. A description of the *amici* is included in the Appendix to this Brief.

Each of the *amici* has a strong interest in the implementation of tobacco control policies that will prevent the initiation of tobacco use by young people and save lives. Raising the minimum age for the sale of tobacco products is such a policy. A landmark 2015 Report of the Institute of Medicine (now the National Academy of Medicine) of the National Academy of Science (IOM Report) concluded that raising the minimum age for tobacco sales “will reduce tobacco initiation, particularly among adolescents 15 to 17 years of age, will improve health across the life span, and will save lives.”¹ To date, seven states and at least 430 localities across the

¹ Institute of Medicine, *Public Health Implications of Raising the Minimum Age of Legal Access to Tobacco Products*, Washington, D.C.: The National Academies Press (2015), at 259. <http://nationalacademies.org/HMD/Reports/2015/TobaccoMinimumAgeReport.aspx>.

country have raised the tobacco sale age to 21 to protect the public health. The Tobacco 21 Regulation will bring those public health benefits to Genesee County. The *amici* have an interest in enhancing this Court’s understanding of the public health benefits of the Regulation under attack and in assuring its timely implementation.

SUMMARY OF ARGUMENT

The use of tobacco products exacts a terrible toll in disease and death nationally, in the State of Michigan, and in Genesee County. The Tobacco 21 Regulation is a science-based policy that will help to protect this community from the scourge of tobacco-related disease and mortality.

Implementation of the Tobacco 21 Regulation will reduce the use of tobacco products, particularly cigarettes, because virtually all initiation of smoking begins before age 21; indeed, if individuals do not begin smoking before that age, it is unlikely they ever will. Moreover, adolescents are particularly vulnerable to the addictive effects of nicotine and can begin to evidence signs of nicotine dependence with even minimal exposure to tobacco products. Most teen smokers end up smoking into adulthood, even though they did not intend to continue smoking. Delaying the age when young people first begin using tobacco can reduce the risk that they will transition to regular or daily tobacco use.

The tobacco industry has long recognized that its long-term profitability depends on addicting young people and its marketing has long targeted adolescents and young adults. Policies that limit youth access to tobacco products, like the Tobacco 21 Regulation, help prevent young people from being victimized by this predatory marketing.

Raising the minimum age for tobacco sales also will make youth in the age group 18-20 less available as sources of tobacco products for younger children, thus making acquisition of tobacco products more difficult. In turn, this helps to reduce and delay initiation of tobacco use

among children below the age of 18. With the minimum legal sale age set at 21, legal purchasers would be less likely to be in the same social networks as high school students and therefore less able to sell or give them cigarettes.

Based on its thorough review of the available evidence, the Institute of Medicine has found that national implementation of 21 as the minimum tobacco products sale age would substantially reduce smoking prevalence and smoking-related mortality over time, as well as immediately improving the health of adolescents and young adults. Given the absence of any express indication, in the statutory text or the legislative history, that the Age of Majority Act was enacted to preempt local laws and regulations, Genesee County should not be required to sacrifice such significant public health benefits.

ARGUMENT

I. TOBACCO USE EXACTS A TERRIBLE TOLL IN DISEASE AND DEATH, ACROSS THE NATION AND IN MICHIGAN

Each day, more than 300 children under the age of 18 become regular, daily smokers and almost one-third will eventually die from smoking.² The 2014 Report of the Surgeon General projected that, if current trends continue, 5.6 million of today's youth will die prematurely from a smoking-related illness.³

Tobacco use remains the leading cause of preventable death in the United States, killing more than 480,000 people each year.⁴ Indeed, smoking kills more Americans than alcohol, AIDS,

² Campaign for Tobacco-Free Kids, *Toll of Tobacco in the United States*, February 12, 2019, http://www.tobaccofreekids.org/facts_issues/toll_us, derived from U.S. Dept of Health & Human Services (HHS), "Results from the 2017 National Survey on Drug Use and Health: Detailed Tables," <https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHDetailedTabs2017/NSDUHDetailedTabs2017.pdf>); HHS *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*, Fact Sheet, A13.

³ U.S. Department of Health and Human Services, *The Health Consequences of Smoking: 50 Years of Progress. A Report of the Surgeon General* (2014), at 1 (Executive Summary) (2014 SG Report). <https://www.surgeongeneral.gov/library/reports/50-years-of-progress/exec-summary.pdf>.

⁴ *Id.* at 11.

car accidents, illegal drugs, murder and suicides *combined*.⁵ Cigarette smoke contains over 7,000 chemicals, at least 69 of which are known carcinogens.⁶ Smoking impacts nearly every organ of the body; more than 87% of lung cancer deaths, 61% of all pulmonary disease deaths, and 32% of all deaths from coronary heart disease are attributable to smoking and exposure to secondhand smoke.⁷

In addition to this staggering toll of premature mortality, millions of Americans suffer from debilitating medical conditions throughout their lives due to smoking. As of 2014, more than 16 million Americans were living with a disease caused by smoking.⁸

Although much progress has been made in recent years in reducing smoking prevalence, the continuing devastating impact of smoking on the nation's health is due, in large part, to the highly addictive nature of nicotine in tobacco products. Most smokers want to quit, but are unable to. The 2015 National Health Interview surveys revealed that 68% of adult smokers wanted to stop smoking and over 55% made an attempt to quit during the past year, but only 7.4% recently stopped smoking.⁹

Michigan communities are suffering greatly from tobacco-related disease and death. Every year, tobacco takes the lives of approximately 16,200 Michigan residents;¹⁰ 213,000 Michigan

⁵ Centers for Disease Control and Prevention (CDC), *Health Effects of Cigarette Smoking* (2018), https://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking/index.htm.

⁶ U.S. Department of Health and Human Services (HHS), *How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking Attributable Disease: A Report of the Surgeon General*, HHS, U.S. Centers for Disease Control and Prevention (CDC), National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2010, at iii. https://www.ncbi.nlm.nih.gov/books/NBK53017/pdf/Bookshelf_NBK53017.pdf.

⁷ *Id.* at 2 (Executive Summary).

⁸ 2014 SG Report at A36.

⁹ Centers for Disease Control and Prevention. "Quitting Smoking Among Adults - United States, 2000–2015." *MMWR. Morbidity and Mortality Weekly Report* 65 (2017) at 1457. <https://www.cdc.gov/mmwr/volumes/65/wr/pdfs/mm6552a1.pdf>.

¹⁰ Centers for Disease Control and Prevention, *Best Practices for Comprehensive Tobacco Control Programs—2014*, http://www.cdc.gov/tobacco/stateandcommunity/best_practices/at_100.

children alive today ultimately will die from smoking,¹¹ or one in every ten Michigan kids now under 18.¹² Every year, smoking costs the state nearly \$9.4 billion in direct healthcare expenses and lost productivity.¹³ Smoking continues at unacceptably high levels in Michigan communities, including among young people. Across the State, 19.3% of Michigan adults smoke;¹⁴ a survey in Genesee County revealed that over 29% of its residents smoke every day.¹⁵ Over 14% of Michigan high school students smoke cigarettes or cigars;¹⁶ indeed, every year approximately 28,100 Michigan young people under 18 will try cigarettes for the first time; 4,400 will become daily smokers.¹⁷

Moreover, young people in Michigan and across the country are now faced with a new tobacco-related threat: the rapid spread of sleek, highly concealable and highly-addictive e-cigarette products into our high schools and middle schools. In recent months, both the Commissioner of the U.S. Food and Drug Administration¹⁸ and the U.S. Surgeon

¹¹ *Id.*

¹² Tobacco 21 Regulation, Section 1003 (Purpose and Findings).

¹³ Centers for Disease Control and Prevention, Best Practices for Comprehensive Tobacco Control Programs 2014, http://www.cdc.gov/tobacco/stateandcommunity/best_practices/index.htm at 100, adjusted for inflation and updated to 2009 dollars; Giovino, Gary A., et al. "Cigarette smoking prevalence and policies in the 50 states: an era of change—the Robert Wood Johnson Foundation ImpacTeen Tobacco Chart Book." *Buffalo, NY: University at Buffalo, State University of New York* (2009), at 46, Table 4, adjusted for inflation and updated to 2009 dollars.

¹⁴ Centers for Disease Control and Prevention, Behavioral Risk Factor Surveillance System 2017 online data, http://nccd.cdc.gov/STATESystem/rdPage.aspx?rdReport=OSH_State.CustomReports

¹⁵ Tobacco 21 Regulation, Section 1003 (Purpose and Findings).

¹⁶ Kann, Laura. "Youth Risk Behavior Surveillance—United States, 2017." *MMWR. Surveillance Summaries* 67 (2018) at Table 87.

https://www.cdc.gov/healthyyouth/data/yrbs/2017_tables/tobacco_use.htm#t87_down.

¹⁷ Campaign for Tobacco-Free Kids, *Toll of Tobacco in Michigan*, February 15, 2019, http://www.tobaccofreekids.org/facts_issues/toll_us/michigan (derived from U.S. Dept of Health & Human Services (HHS), "Results from the 2017 National Survey on Drug Use and Health: Detailed Tables," <https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHDetailedTabs2017/NSDUHDetailedTabs2017.pdf> and U.S. Department of Health and Human Services (HHS), *The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General*, 2014, <http://www.surgeongeneral.gov/library/reports/50-years-of-progress/>, at 693.

¹⁸ Statement from FDA Commissioner Scott Gottlieb, M.D. on the agency's continued efforts to address growing epidemic of youth e-cigarette use, including potential new therapies to support cessation (November 2, 2018). <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm624927.htm>.

General¹⁹ have declared e-cigarette use by adolescents to be an “epidemic”. Published data from the 2018 National Youth Tobacco Survey (NYTS) shows that from 2017 to 2018, there was a 78% increase in current e-cigarette use among high school students and a 48% increase among middle school students,²⁰ an increase that FDA Commissioner Scott Gottlieb called “astonishing.”²¹ The NYTS showed that, as of 2018, more than 3.6 million U.S. youth, including 1 in 5 high school students and 1 in 20 middle school students, currently use e-cigarettes.²²

According to the Surgeon General, this epidemic is largely due to the appeal to young people of JUUL, which efficiently delivers a highly-addictive nicotine aerosol, with minimal exhaled aerosol, reduced odor, small size and similarity in appearance to a USB flash drive, making it easy to conceal from parents and teachers.²³ Due to JUUL and similar products, the epidemic of youth e-cigarette use is, in FDA Commissioner Gottlieb’s words, “an epidemic of addiction.”²⁴ The Surgeon General has warned that “[n]icotine exposure during adolescence can harm the developing brain,” impacting “learning, memory and attention.”²⁵ Moreover, according to a 2018 report of the National Academy of Sciences, Engineering and Medicine, there is “substantial evidence” that e-cigarette use increases the

¹⁹ Surgeon General’s Advisory on E-Cigarette Use Among Youth (December 18, 2018) (SG Advisory). <https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf>.

²⁰ CDC, “Use of Electronic Cigarettes and Any Tobacco Product Among Middle and High School Students – United States, 2011-2018,” *Morbidity and Mortality Weekly Report (MMWR)*, 67(45): 1276-1277. <https://www.cdc.gov/mmwr/volumes/67/wr/pdfs/mm6745a5-H.pdf>.

²¹ Statement from FDA Commissioner Scott Gottlieb, M.D., on proposed new steps to protect youth by preventing access to flavored tobacco products and banning menthol in cigarettes (November 15, 2018).

²² MMWR, at 1276.

²³ SG Advisory, at 1-2.

²⁴ Statement from FDA Commissioner Scott Gottlieb, M.D., on new steps to address epidemic of youth e-cigarette use” (September 12, 2018). <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm625884.htm>.

²⁵ SG Advisory, at 1.

risk of using cigarettes and other combustible tobacco products among youth and young adults.²⁶

As the discussion below demonstrates, the Tobacco 21 Regulation is a science-based policy that is urgently needed to protect Genesee County residents, and particularly the community's young people, from the scourge of tobacco-related disease and mortality.

II. THE TOBACCO 21 REGULATION WILL REDUCE USE OF DEADLY, ADDICTIVE TOBACCO PRODUCTS IN GENESEE COUNTY, PARTICULARLY AMONG YOUNG PEOPLE

A. Smoking Initiation Starts with Young People Under 21, Who Are Particularly Vulnerable to Nicotine Addiction

The critical importance of the Tobacco 21 Regulation to public health in Genesee County becomes clear when it is understood that, according to national data, 80% of adult smokers begin smoking before age 18 and 95% of adult smokers begin smoking before they turn 21.²⁷ The 18-20 age range is a pivotal time of transition to regular use of cigarettes.²⁸ According to one national survey, 18-20 year olds are twice as likely as 16-17 year olds to be current smokers (18.8% vs. 7.5%).²⁹ The tobacco industry has long known the importance of “getting them while they’re young.” In 1982, one researcher for the RJ Reynolds Tobacco Co. observed, “If a man has never smoked by age 18, the odds are three to one he never will. By age 24, the odds are twenty to

²⁶ National Academies of Sciences, Engineering and Medicine, *Public health consequences of e-cigarettes*, Washington, D.C.: The National Academies Press, 2018. <http://nationalacademies.org/hmd/Reports/2018/public-health-consequences-of-e-cigarettes.aspx>.

²⁷ United States Department of Health and Human Services. Substance Abuse and Mental Health Services Administration public online data analysis system (PDAS), National Survey on Drug Use and Health, 2016, <https://pdas.samhsa.gov/#/survey/NSDUH-2016-DS0001> ; see also IOM Report, at 43.

²⁸ See National Survey on Drug Use and Health, 2016, <https://pdas.samhsa.gov/#/survey/NSDUH-2016-DS0001>. See also: Hammond, D, “Smoking behaviour among young adults: beyond youth prevention,” *Tobacco Control*, 14:181 – 185, 2005. Lantz, PM, “Smoking on the rise among young adults: implications for research and policy,” *Tobacco Control*, 12(Suppl I):i60 – i70, 2003.

²⁹ Substance Abuse and Mental Health Services Administration's public online data analysis system, National Survey on Drug Use and Health, 2016. https://pdas.samhsa.gov/#/survey/NSDUH-2016-DS0001/crosstab/?row=CIGMON&column=CATAG7&weight=ANALWT_C&results_received=true.

one.”³⁰ The industry well understands what is confirmed by research – because the adolescent and young adult brain is not fully developed until about age 25, and adolescence is a time of high sensation seeking and peer influence, adolescents and young adults are more likely to engage in risky behaviors such as smoking.³¹

Adolescents are particularly vulnerable to the addictive effects of nicotine. According to the Institute of Medicine, “[t]he parts of the brain most responsible for decision making, impulse control, sensation seeking, and susceptibility to peer pressure continue to develop and change through young adulthood, and adolescent brains are particularly vulnerable to the effect of nicotine and nicotine addiction.”³² Also, young people can often feel dependent earlier than adults.³³ Key symptoms of dependence can be apparent after just minimal exposure to nicotine.³⁴ The IOM Report summarized the evidence: “It is clear that the juxtaposition of numerous risk factors during the adolescent and young adult years is likely to increase the probability that first trial of tobacco use will turn into persistent use.”³⁵ As a result of nicotine addiction, about three out of four teen smokers end up smoking into adulthood, even if they intended to quit after a few years.³⁶ Not only are individuals who start smoking at younger ages more likely to smoke as adults, they also are

³⁰ RJ Reynolds, “Estimated Change in Industry Trend Following Federal Excise Tax Increase,” September 10, 1982, Bates Number 513318387/8390, at 2
<http://legacy.library.ucsf.edu/tid/tib23d00;jsessionid=211D4CCF0DBD25F9DC2C9BB025239484.tobacco03>.

³¹ IOM Report, at 63, 68-69.

³² IOM Report, at 3.

³³ 2014 SG Report, at 113, see also HHS, *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*, Centers for Disease Control and Prevention, Office on Smoking and Health, 2012
<http://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/index.html> at 24 and U.S. Dept. 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* (2010), (Executive Summary) at 4.

³⁴ U.S. Dept. 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* (2010) (Executive Summary) at 4.

³⁵ IOM Report, at 82.

³⁶ U.S. Department of Health and Human Services, *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General (Fact Sheet)* (2012), at 1
<https://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/factsheet.html>.

among the heaviest smokers.³⁷ In addition to longer-term health risks such as cancer and heart disease, young people who smoke are at risk for more immediate health harms, like respiratory symptoms, and reduced lung growth.³⁸

Delaying the age when young people first experiment or begin using tobacco can reduce the risk of addiction and transition to regular or daily tobacco use and increase their chances of successfully quitting if they do become regular users.³⁹ Noting that the age of initiation is critical, the IOM Report predicts that “increasing the minimum age of legal access to tobacco products will likely prevent or delay initiation of tobacco use by adolescents and young adults.”⁴⁰ It is no mystery as to why an internal Philip Morris document expressed the company’s fear that “[r]aising the legal minimum age for cigarette purchaser to 21 could gut our key young adult market (17-20) where we sell about 25 billion cigarettes”⁴¹

B. The Vulnerability of the Young to Nicotine Addiction and Tobacco Use Is Exacerbated by Tobacco Industry Marketing, Which Has Long Targeted Youth and Young Adults

The tobacco industry has exploited the vulnerability of the young through its marketing strategies, which have long targeted youth and continue to do so. Reducing the legal access of

³⁷ U.S. Department of Health and Human Services, *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* (1994), at 6, https://profiles.nlm.nih.gov/NN/B/C/F/T/_/nnbcft.pdf.

³⁸ *Id.* at 6.

³⁹ See, e.g., Khuder, SA, et al., “Age at Smoking Onset and its Effect on Smoking Cessation,” *Addictive Behavior* 24(5):673-7, September-October 1999; D’Avanzo, B, et al., “Age at Starting Smoking and Number of Cigarettes Smoked,” *Annals of Epidemiology* 4(6):455-59, November 1994; Chen, J & Millar, WJ, “Age of Smoking Initiation: Implications for Quitting,” *Health Reports* 9(4):39-46, Spring 1998; Everett, SA, et al., “Initiation of Cigarette Smoking and Subsequent Smoking Behavior Among U.S. High School Students,” *Preventive Medicine* 29(5):327-33, November 1999; Breslau, N & Peterson, EL, “Smoking cessation in young adults: Age at initiation of cigarette smoking and other suspected influences,” *American Journal of Public Health* 86(2):214-20, February 1996.

⁴⁰ IOM Report, at 4.

⁴¹ Philip Morris, *Discussion Draft Sociopolitical Strategy*, January 21, 1986, Bates Number 2043440040/0049, at 9, <http://legacy.library.ucsf.edu/tid/aba84e00>.

young people to tobacco products is an important tool to protect young people from being victimized by this industry marketing.

Tobacco companies have heavily targeted young adults through a variety of marketing activities – such as music and sporting events, bar promotions, college marketing programs, college scholarships and parties.⁴² Tobacco industry internal documents make clear that long-term profitability will depend upon increasing consumption within this target market, as these quotations from R.J. Reynolds documents attest:

- Our aggressive Plan calls for gains of about 5.5 share points of smokers 18-20 per year, 1990-93 (about 120,000 smokers per year) . . . [I]f we hold these YAS [young adult smokers] for the market average of 7 years, they would be worth over \$2.1 billion in aggregate incremental profit. I certainly agree with you that this payout should be worth a decent sized investment.”⁴³
- “eighteen to twenty-four year olds will be “[c]ritical to long term brand vitality as consumption increases with age.”⁴⁴
- “. . . [t]he number one priority for 1990 is to obtain younger adult smoker trial and grow younger adult smoker share of market.”⁴⁵
- “To stabilize RJR’s share of total smokers, it must raise share among 18-20 from 13.8% to 40% . . . ASAP.”⁴⁶

In 2006, Judge Gladys Kessler of the U.S. District Court for the District of Columbia, after a nine-month trial involving thousands of internal tobacco industry documents, found that the

⁴² Ling, PM, et al., “Why and How the Tobacco Industry Sells Cigarettes to Young Adults: Evidence From Industry Documents,” *American Journal of Public Health*, 92(6):908 – 916, June 2002. Sepe, ES, et al., “Smooth Moves: Bar and Nightclub Tobacco Promotions That Target Young Adults,” *American Journal of Public Health*, 92(3):414 – 419, March 2002. Ernster, VL, “Advertising and promotion of smokeless tobacco products,” *NCI Monograph*, 8:87 – 94, 1989. Griffith, D., “Tobacco pitch to college students: Free samples of smokeless products are offered near campuses,” *Sacramento Bee*, May 25, 2004, <http://www.calstate.edu/pa/clips2004/may/25may/tobacco2.shtml>.

⁴³ Quoted in *United States v. Philip Morris, USA, Inc.*, 449 F.Supp. 2d 1, 564 (D.D.C. 2006), *aff’d in relevant part*, 566 F3d 1095 (D.C. Cir. 2009), *cert. denied*, 130 S.Ct. 3501 (2010).

⁴⁴ Quoted in *United States v. Philip Morris*, *supra* at 564.

⁴⁵ Quoted in *United States v. Philip Morris*, *supra* at 565.

⁴⁶ Quoted in *United States v. Philip Morris*, *supra* at 562.

major cigarette companies had engaged in a 50-year conspiracy to defraud the American people about the dangers of tobacco use, holding them liable under the federal Racketeer Influenced and Corrupt Organizations (RICO) Act. She found the evidence “clear and convincing – and beyond any reasonable doubt – that Defendants have marketed to young people twenty-one and under while consistently, publicly, and falsely, denying that they do so.”⁴⁷ She continued: “Defendants’ marketing activities are intended to bring new, young, and hopefully long-lived smokers into the market in order to replace those who die (largely from tobacco-caused illnesses) or quit.”⁴⁸ In 2014, the Report of the Surgeon General found that the industry’s youth marketing was continuing: “[T]he root cause of the smoking epidemic is also evident: the tobacco industry aggressively markets and promotes lethal and addictive products, and continues to recruit youth and young adults as new consumers of these products.”⁴⁹ The lucrative lessons learned by the cigarette companies in marketing to young people have not been lost on the marketers of JUUL e-cigarettes. JUUL has been effectively marketed through social media platforms widely used by young people, with lifestyle images evoking feelings of relaxation, freedom and sex appeal, while emphasizing its kid-friendly flavors.⁵⁰

These marketing tactics make it all the more imperative that communities like Genesee County be able to implement tools like the Tobacco 21 Regulation to help protect their young people from being victimized by these predatory industry activities.

⁴⁷ *United States v. Philip Morris*, *supra* at 691.

⁴⁸ *Id.*

⁴⁹ 2014 Surgeon General Report, at 871.

⁵⁰ Huang, J., et al., “Vaping versus JUULing: how the extraordinary growth and marketing of JUUL transformed the US retail e-cigarette market,” *Tobacco Control*, epub ahead of print, doi: 10.1136/tobaccocontrol-2018054382, May 31, 2018.

C. The Tobacco 21 Regulation Will Reduce the Availability of Tobacco Products to Young People Under 18 by Limiting Access by Older Teens Within Their Social Circles

In addition to protecting 18-20 year olds from the adverse health effects of tobacco products, raising the minimum age for tobacco sales will make youth in that age group less available as supply sources for younger children, thus reducing the prevalence of tobacco use among children below the age of 18.

To the extent that kids below 18 are able to get access to tobacco products despite current restrictions on their legal sale, research shows that youth smokers identify supply sources such as friends and classmates. Data from the federal Population Assessment of Tobacco and Health study shows that three in four smokers aged 15-17 obtain cigarettes from social sources, including giving such sources money to buy cigarettes from a store or simply asking the source for cigarettes.⁵¹ In enacting its Tobacco 21 Regulation, Genesee County found these sources to be significant sources of cigarettes for County high school students, with 15.6% of County high school smokers reporting they usually give someone money to purchase their cigarettes and 26.2% reporting they usually get their cigarettes by asking someone they know for them.⁵²

Research shows that underage smokers generally turn to persons close in age to them as supply sources. A study of the sources of cigarettes for minors, based on the California Tobacco Survey, found that the majority of adolescents who smoke are primarily dependent on others for their cigarettes and that “[a]dolescents seemed most likely to get cigarettes from persons that were approximately their own age.”⁵³ “In particular,” according to this study, “16 to 17-year olds were

⁵¹ Tanski, S, et al., “Youth Access to Tobacco Products in the United States: Findings from Wave 1 (2013-2014) of the Population Assessment of Tobacco and Health (PATH) Study,” *Nicotine & Tobacco Research*, published online November 8, 2018.

⁵² Tobacco 21 Regulation, Section 1003 (Purpose and Findings).

⁵³ White, MM, et al. “Facilitating Adolescent Smoking: Who Provides the Cigarettes?” *American Journal of Health Promotion*, 19(5): 355 – 360, May/June 2005, at 358.

more likely to obtain cigarettes from 18-20 year olds than were younger adolescents.”⁵⁴ Moreover, “[t]he majority of people approached by adolescents to purchase cigarettes were of legal age to do so (18+ years).”⁵⁵ Another study of the age groups 18 and above most likely to be asked to furnish cigarettes to minors found that the subgroups “with the highest rates of being asked to provide tobacco to minors were smokers aged 18 and 19 years, smokers aged 20 to 24 years, and nonsmokers aged 18 and 19 years.” Older age groups were far less likely to be asked.⁵⁶

Raising the tobacco sale age to 21 would significantly limit these social sources of tobacco for minors because it “would increase the age gap between adolescents taking up smoking and those who can legally provide them with cigarettes.”⁵⁷ For example, it would limit tobacco availability in high schools, where 15 to 17 year olds may have school or social connections to 18 and 19 year olds who can legally buy cigarettes. With the minimum legal sale age set at 21, legal purchasers would be less likely to be in the same social networks as high school students and therefore less able to sell or give them cigarettes. In turn, the supply of cigarettes to younger teens would be diminished as well because their older teen suppliers would have reduced access to tobacco products. The IOM Report found that the greatest impact of raising the legal age to 21 would be on social sources for adolescents between 15-17 years of age.⁵⁸ That is the age group where adolescents are at greatest risk for becoming established smokers.⁵⁹

Thus, the Tobacco 21 Regulation can be expected to reduce the supply of tobacco products from social sources to the adolescent population in Genesee County.

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Id.

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Id.

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Ribisl, KM, et al., “Which Adults Do Underaged Youth Ask for Cigarettes?” *American Journal of Public Health*, 89(10):1561 – 1564, 1999, at 1562.

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White, et al., *supra* at 359.

⁵⁸

IOM Report, at 6.

⁵⁹

White, *supra* at 359.

D. The Tobacco 21 Regulation Will Reduce the Prevalence of Tobacco-Related Disease and Death in Genesee County

By ending the legal availability of tobacco to 18-20 year-olds, an age group highly vulnerable to tobacco initiation and nicotine addiction, Genesee County's Tobacco 21 Regulation will diminish tobacco use among older teens, with demonstrably beneficial effects on their health throughout their lives. The Tobacco 21 Regulation also will diminish the 18-20 age group as a ready source of supply for younger teens, helping to reduce and delay initiation of tobacco use, and the concomitant risk of disease, among younger teens as well.

Of course, the Tobacco 21 Regulation will not completely eliminate access to tobacco products by the County's children and teens, nor will it eliminate use of those products in the County or the horrific diseases caused by those products. Nevertheless, it will measurably enhance the public health in this community. Here a useful analogy is our nation's movement to increase the legal age for consumption of alcohol.

In the early 1980s, many states raised the legal drinking age to 21. By 1988, all states had such laws. Research has shown that raising the minimum drinking age to 21 is associated with reduced alcohol consumption among youth and young adults and fewer alcohol-related crashes.⁶⁰ The National Highway Traffic Safety Administration estimates that, since 1975, increasing the minimum drinking age has saved more than 21,000 lives.⁶¹ Thus, although young people continue to consume alcohol, and are still involved in tragic alcohol-related automobile accidents, the public

⁶⁰ Wagenaar, AC and Toomey, TL, "Effects of Minimum Drinking Age Laws: Review and Analyses of the Literature from 1960 to 2000," *J Stud Alcohol*, Supplement No. 14: 206-225, 2002; O'Malley, PM, and Wagenaar, AC, "Effects of Minimum Drinking Age Laws on Alcohol Use, Related Behaviors and Traffic Crash Involvement among American Youth: 1976-1987," *J Stud Alcohol*, 52:478-491, 1991; Dejong, W and Blanchette, J, "Case Closed: Research Evidence on the Positive Public Health Impact of the Age 21 Minimum Legal Drinking Age in the United States," *J Stud Alcohol Drugs*, Supplement 17:108-115, 2014.

⁶¹ Kindelberger, J, *Calculating Lives Saved Due to Minimum Drinking Age Laws*, National Highway Traffic Safety Administration (NHTSA), March 2005, at 3. See also, NHTSA, *Lives Saved in 2012 by Restraint Use and Minimum Drinking Age Laws*, November 2013.

health and safety benefits of the nation's move to a higher minimum drinking age are readily apparent.

Laws like the Tobacco 21 Regulation can be expected to have a similarly beneficial impact on public health. Based on a thorough review of the existing scientific literature and predictive modeling based on the existing data, the Institute of Medicine, in its March, 2015 Report, reached these conclusions about the likely health effects of raising the minimum age for tobacco sales:

- Raising the minimum age of legal access to tobacco products, particularly to age 21 or 25, will likely lead to substantial reductions in smoking prevalence.
- Raising the minimum age of legal access to tobacco products will likely lead to substantial reductions in smoking-related mortality.
- Raising the minimum age of legal access to tobacco products (MLA) will likely immediately improve the health of adolescents and young adults by reducing the number of those with smoking-caused diminished health status. As the initial birth cohorts affected by the policy change into adulthood, the benefits of the reductions of the intermediate and long-term adverse health effects will also begin to manifest. Raising the MLA will also likely reduce the prevalence of other tobacco products and exposure to secondhand smoke, further reducing tobacco-related adverse health effects, both immediately and over time.
- An increase in the minimum age of legal access to tobacco products will likely improve maternal, fetal and infant outcomes by reducing the likelihood of maternal and paternal smoking.⁶²

The IOM Report found that raising the minimum age for tobacco products to 21 on a national scale will, over time, reduce the overall smoking rate by about 12% and smoking-related deaths by 10%, which translates into 223,000 fewer premature deaths and 4.2 million fewer years of life lost.⁶³

⁶² IOM Report, at 7-9.

⁶³ IOM Report, at 9.

CONCLUSION

There is little doubt that the Tobacco 21 Regulation, if allowed to be implemented, will save countless lives, and prevent untold suffering from tobacco-related disease, in Genesee County. Given the significant public health benefits of that Regulation to the community, and particularly to its young people, appellee bears a heavy burden to demonstrate that the Michigan legislature, in enacting the Age of Majority Act, intended to preempt local ordinances raising the minimum age for sale of hazardous products to protect the public health. Because appellee has failed to meet that burden, the lower court ruling should be reversed.

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APPENDIX

Description of Amici Curiae

1. African American Tobacco Control Leadership Council

Formed in 2008, the AATCLC partners with community stakeholders, elected officials, and public health agencies to inform the national direction of tobacco control policy, practices, and priorities, as they affect the lives of Black American and African immigrant populations. The AATCLC has been at the forefront of decreasing youth access to mentholated and other flavored tobacco products by elevating the regulation of these products on the local, state, and national tobacco control agenda. The AATCLC has also been involved with raising the legal age to purchase tobacco products in the City of San Francisco, the State of California, Chicago, and Genesee County, Michigan. In Genesee County, the African American Tobacco Control Leadership Council advocated vigorously for raising the minimum sales of tobacco to 21 — urging policy makers to enact the "Tobacco 21" policy as part of a comprehensive effort to give Genesee County's African American Community a fighting chance against the number one killer of Black people, tobacco. The African American Tobacco Control Leadership Council is an affiliate of the National African American Tobacco Prevention Network.

2. American Cancer Society Cancer Action Network

The American Cancer Society Cancer Action Network (ACS CAN) is making cancer a top priority for public officials and candidates at the federal, state and local levels. ACS CAN empowers advocates across the country to make their voices heard and influence evidence-based public policy change as well as legislative and regulatory solutions that will reduce the cancer burden. As the American Cancer Society's nonprofit, nonpartisan advocacy affiliate, ACS CAN is critical to the fight for a world without cancer. Despite decades of declines in cigarette smoking prevalence, about 30% of all cancer deaths are still caused by smoking. Cigarette smoking increases the risk of at least 12 cancers. Health consequences increase with both duration of smoking and number of cigarettes smoked. Thus, reducing tobacco use is critical, and ACS CAN advocates for effective tobacco control at all levels of government

3. American Heart Association

The American Heart Association is a voluntary health organization that, since 1924, has been devoted to saving people from heart disease and stroke—the two leading causes of death in the world. AHA teams with millions of volunteers to fund innovative research, fight for stronger public health policies, and provide lifesaving tools and information to prevent and treat these diseases. The Dallas-based association with local offices in all 50 states, as well as in Washington, D.C. and Puerto Rico, is the nation's oldest and largest voluntary organization dedicated to fighting heart disease and stroke.

4. American Indian Veterans of Michigan, Inc.

American Indian Veterans of Michigan is a non-profit organization, serving veterans and their families throughout Michigan and is active with numerous veteran organizations in Michigan and nationally. American Indian Veterans of Michigan vigorously advocated for the passage of Genesee County's Tobacco 21 regulation.

5. American Lung Association

The American Lung Association is the nation's oldest voluntary health organization. Because smoking is a major cause of lung cancer and chronic obstructive pulmonary disease (COPD), the American Lung Association has long been active in research, education and public policy advocacy regarding the adverse health effects caused by tobacco use. This includes supporting increasing the age of sale for tobacco products to 21 to protect kids.

6. Campaign for Tobacco-Free Kids

The Campaign for Tobacco-Free Kids is a leading force in the fight to reduce tobacco use and its deadly toll in the United States and around the world. The Campaign envisions a future free of the death and disease caused by tobacco, and it works to save lives by advocating for public policies that prevent kids from smoking, help smokers quit and protect everyone from secondhand smoke.

7. ChangeLab Solutions

ChangeLab Solutions works across the nation to advance equitable laws and policies that ensure healthy lives for all. We prioritize communities whose residents are at highest risk for poor health. Our interdisciplinary team of lawyers, planners, policy analysts, and more, works with neighborhoods, cities, and states to create thriving communities. ChangeLab Solutions creates and helps implement legal and policy solutions designed to reduce tobacco-related harm and health inequities.

8. Genesee County Medical Society

The Genesee County Medical Society is a 501(c)(6) corporation representing physicians of Genesee County, and their patients. The Genesee County Medical Society focuses on public health issues impacting our community. Those efforts include support of initiatives like Tobacco 21, active involvement in the Greater Flint Health Coalition, development and maintenance of a Genesee County Physicians Public Health Advisory System, and many others. This Medical Society has actively participated via testimony, and provision of staff and physician support to the passage of Tobacco 21.

9. Genesee County Prevention Coalition

The Genesee County Prevention Coalition (GCPC) is a community coalition, with a diverse group of members, working within the community to develop new and different methods — including Genesee County's new Tobacco 21 policy — to prevent and reduce substance use and mental health disorders. GCPC believes it their collective and individual responsibility to ensure healthy, safe, and productive lives for all Genesee County residents through innovative strategies and community partnerships.

10. Genesee Health Plan

Genesee Health Plan (GHP) is a community-initiated non-profit program designed to provide health care coverage to the uninsured residents of Genesee County. The mission of GHP is to improve the access to the health care system for low-income and indigent Genesee County residents by providing them a medical “home”, providing coverage for health care services through a managed health care system, and to help those who qualify for insurance to apply. At Genesee Health Plan, we have a Health Navigation program designed to assist individuals with chronic disease management including smoking cessation for individuals wanting to make healthy changes with their lifestyle. By conducting assessments with our GHP members, we know that over 40% of our members smoke. We have helped over ten thousand Genesee County residents over the last fifteen years get the resources they need to start the difficult process of quitting smoking. GHP also has Community Health Workers in each of the Flint Public Schools. Thirty-Four (34%) percent of the adults assessed are smokers in the households where the children in the Flint community reside. GHP has also helped these Flint residents get the tools they need to quit smoking.

11. Hurley Medical Center

Hurley Medical Center is a 443-bed premier public teaching hospital recognized as a regional resource for advanced specialized health care. From helping to bring new life into our world, to employing cutting edge technology to save lives, Hurley has been helping patients and their families for over a century. As the region’s only Level I Trauma Center and Pediatric Level II Trauma Center (Genesee, Lapeer and Shiawassee Counties), Hurley provides the highest level of critical care, while also serving as the region’s only burn center, Level III NICU, pediatric intensive care unit and premier Bariatric and Hernia Centers of Excellence. Founded in 1908, Hurley provides patient care for more than 100,000 people annually, and is one of the area’s largest employers, actively involved in collaborative efforts to enhance the quality of life in our community.

12. Michigan Academy of Family Physicians

The Michigan Academy of Family Physicians (MAFP) is the state’s largest specialty physician association. With more than 4,200 members, MAFP is dedicated to assisting Family Physicians and their practices as they work to ensure high-quality, cost-effective healthcare for patients of all ages.

13. Michigan Association for Local Public Health

The Michigan Association for Local Public Health (MALPH) was founded in 1985 as a private, non-profit, 501(c)(3) state association. The Association is organized to represent Michigan's 45 city, county, and district health departments before the state and federal legislative and executive branches of government, to strengthen Michigan's system of local public health departments and local governing boards.

14. Michigan Association of Preventive Medicine and Public Health Physicians

Michigan Association of Preventive Medicine and Public Health Physicians (MAPPP) is a physician organization whose members include Medical Directors at local public health departments in Michigan as well as physician scientists in academic and other public health agencies. The mission of MAPPP is to improve the health of Michigan's public through the application of evidence based medicine to preventive and public health issues.

15. Michigan Chapter of the American Academy of Pediatrics

The Michigan Chapter of the American Academy of Pediatrics (MIAAP) is a diverse group of over 1400 pediatricians. Members include general pediatricians, sub-specialists, and academicians. Members are active in promoting the health and well-being of the children in the state of Michigan. The mission of MIAAP is to identify, develop and manage and opportunities to improve the health and welfare of children and the practice of pediatric medicine and to provide ongoing Continuing Medical Education opportunities for its members.

16. Preventing Tobacco Addiction Foundation

Established in 1996, the Preventing Tobacco Addiction Foundation strives to reduce the terrible toll of smoking and tobacco use through a preventive effort. The belief that tobacco use is a voluntary risk undertaken by smokers themselves is belied by the fact that virtually all nicotine use begins in adolescence when experimentation and risk-taking are part of normal development. To prevent early exposure to tobacco products, the Foundation supports raising the legal minimum sales age to 21, as well as a concerted societal and political strategy including school-based education, reduced media exposure to tobacco products, counter-marketing, and smoke-free homes and public areas.

17. SMART Coalition

The SMART Coalition (Smoke Free Multi Agency Resource Team) is a tobacco reduction coalition that had been in existence in Genesee County 30 years. SMART is a coalition dedicated to reducing tobacco use and involuntary exposure to secondhand smoke in Genesee County. SMART's membership consists of prevention agencies, hospital personnel, non-profit agencies and concerned citizens.

18. South Eastern Michigan Indians, Inc.

South Eastern Michigan Indians, Inc. is a 501(c) (3) nonprofit organization providing services primarily to American Indians residing in the southeastern Michigan, urban American Indian population. Since 2007, SEMII has provided commercial tobacco prevention and education services to the urban American Indian population and has partnered with the 12 Federally Recognized Tribes in Michigan on a number of commercial tobacco projects.

19. Tobacco Control Legal Consortium

The Tobacco Control Legal Consortium is a national network of nonprofit legal centers working to protect the public from the devastating health consequences of tobacco use. The Consortium's activities are coordinated by the Public Health Law Center, Inc., of the Mitchell Hamline School of Law in St. Paul, Minnesota. Affiliated legal centers joining in this brief include: ChangeLab Solutions, Oakland, California; Legal Resource Center for Tobacco Regulation, Litigation & Advocacy, at University of Maryland School of Law, Baltimore, Maryland; Public Health Advocacy Institute and the Center for Public Health and Tobacco Policy, at Northeastern University School of Law, Boston, Massachusetts; Smoke-Free Environments Law Project, at Center for Social Gerontology, Ann Arbor, Michigan.

20. Tobacco-Free Michigan

Tobacco-Free Michigan is a coalition that works to prevent and reduce tobacco use and its harmful effects in all Michigan communities through education, networking, advocacy and dissemination of research data, with a specific focus on vulnerable populations heavily targeted by the tobacco industry.

21. Trinity Health

Trinity Health is one of the largest multi-institutional Catholic health care delivery systems in the nation. Trinity Health is headquartered in Michigan and owns several healthcare facilities in Michigan. It serves people and communities in 22 states from coast to coast with 93 hospitals, and 120 continuing care locations — including home care, hospice, PACE and senior living facilities — that provide nearly 2.5 million visits annually. Trinity Health employs more than 97,000 full-time colleagues, including 5,300 employed physicians. Tobacco use is one of the largest driver of health care costs. Chronic diseases are the most common and costly of all health problems, but are also the most preventable. For these reasons, Trinity Health has prioritized tobacco control policy, playing a key role in advocating for laws raising the minimum legal sales age for tobacco products to 21 (Tobacco 21). Trinity Health has disseminated Tobacco 21 toolkits to all of its health Ministries and across the country; invested in legal research and developed model policies; shared information with other health systems; and presented on this topic at several national conferences, including co-hosting a briefing on Capitol Hill.

22. Truth Initiative

Truth Initiative envisions an America where tobacco is a thing of the past and where all youth and young adults reject tobacco use. Truth Initiative's proven -effective and nationally recognized public education programs include truth®, the national youth smoking prevention campaign that has been cited as contributing to significant declines in youth smoking; EX®, an innovative smoking cessation program; and research initiatives exploring the causes, consequences and approaches to reducing tobacco use. Truth Initiative also develops programs to address the health effects of tobacco use –with a focus on priority populations disproportionately affected by the toll of tobacco –through alliances, youth activism, training and technical assistance. Located in Washington, D.C., Truth Initiative was created as a result of the November 1998 Master Settlement Agreement (MSA) between attorneys general from 46 states, five U.S. territories and the tobacco industry.