

IN THE SUPREME COURT OF OHIO

ORIGINAL

DIALYSIS CLINIC, INC.,

Appellant,

v.

WILLIAM W. WILKINS
[RICHARD A. LEVIN],
TAX COMMISSIONER OF OHIO,

Appellee.

Case No. 2009-2310

Appeal from the
Ohio Board of Tax Appeals

Ohio Board of Tax Appeals
Case No. 2006-V-2389

BRIEF OF AMICUS CURIAE OHIO HOSPITAL ASSOCIATION
IN SUPPORT OF APPELLANT DIALYSIS CLINIC, INC.

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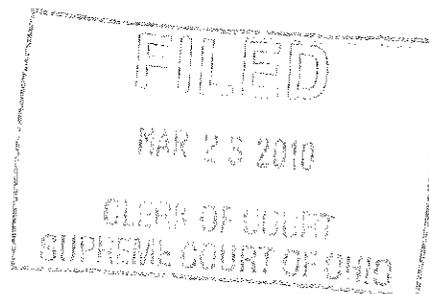


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STATEMENT OF INTEREST

The Ohio Hospital Association (“OHA”) is a private, nonprofit trade association established in 1915 as the first state-level hospital association in the United States. It aims to create an environment in which Ohio hospitals can best serve their communities. In carrying out that mission, the OHA brings together Ohio hospitals to develop health-care initiatives benefiting hospitals and their communities.

The OHA is comprised of over 170 private, state, and federal hospitals; 40 health systems; and over 1,900 individual members of affiliated societies, all located within the State of Ohio. OHA member hospitals anchor their communities. They are among the largest employers in Ohio (five of the top 11 Ohio employers are hospitals or health systems), and make a \$66 billion economic impact on the State.

The OHA has a deep interest in the resolution of today’s case, in particular because its members include many nonprofit hospitals. These hospitals, which deliver over 85% of acute hospital care in the State, provide in excess of \$2 billion in community benefit annually, including hundreds of millions in free care to the indigent, over \$1 billion in community programs and activities, and hundreds of millions in care to federal Medicaid patients whose care is not fully reimbursed by the program. *See* OHA, HCAP, Uncompensated and Charity Care Fact Sheet (July 29, 2009), *available at* <http://www.ohanet.org/SiteObjects/F1A3987FDC54C93F4431C0CB5CBBCCFB/charity.pdf>. The OHA and its members thus have a keen interest in the manner that the Board of Tax Appeals and the courts interpret Ohio’s tax exemptions for charitable institutions and charitable uses of real estate. Given the Board’s troubling interpretation of those exemptions here, the OHA felt compelled to address the traditional scope of the exemptions, the specific ways in which the Board erred in applying them, and the potential ramifications of the Board’s interpretation for Ohio’s nonprofit institutions.

INTRODUCTION

The Board of Tax Appeals' opinion breaks from the Court's longstanding precedents interpreting Ohio's tax exemptions for the charitable use of property. The statutory provisions at issue—R.C. 5709.12 and R.C. 5709.121—provide alternative routes to exemption. R.C. 5709.12 focuses primarily on how the property at issue is being used, exempting property “*used exclusively* for charitable purposes,” regardless whether the property belongs to a charitable institution. R.C. 5709.12(B) (emphasis added). R.C. 5709.121, by contrast, focuses primarily on the owner of the at-issue property. Where the property is owned by a “charitable or educational institution,” it qualifies for exemption so long as it is used “*in furtherance of or incidental to* [the institution's] charitable [or] educational . . . purposes and not with the view to profit.” R.C. 5709.121(A)(2) (emphasis added).

Despite these plain statutory distinctions, the Board, in holding that neither exemption applied, largely conflated the two statutes, rejecting exemption under *both* based on a *single* factor: the amount of free medical care provided. First, the Board concluded that Dialysis Clinic, Inc., (“DCI”)—a nonprofit that operates dialysis clinics providing care for kidney patients—had not *used* the clinic at issue exclusively for charitable purposes under R.C. 5709.12 because DCI had not given free care there. (*See Dialysis Clinic, Inc. v. Wilkins* (Nov. 24, 2009), Bd. of Tax Appeals, No. 2006-V-2389 (“Bd. Op.”) at 12.) Yet on the heels of that holding, the Board, applying R.C. 5709.121, next held that DCI *itself* did not qualify as a charitable institution for essentially the same reason, namely its “use of the subject property.” (*Id.* at 13.) Underlying this erroneous, circular reasoning was the Board's apparent adoption of a rule that nonprofit health-care institutions must devote a certain, unidentified percentage of revenue specifically to free medical care or risk losing charitable status for both their uses of property *and* themselves. Specifically, the Board held below that because DCI had devoted, at most, only

1.27% of its revenues to free medical care, that amount was “insufficient to meet the charitable service standards required for exemption.” (*Id.* at 16.)

The Board’s legal analysis is flawed in at least two fundamental ways. First, the Board, in defining what constitutes a “charitable institution,” *see* R.C. 5709.121, mistakenly equated “charitable” *solely* with providing free medical care to the poor. That holding is at odds not only with the common law and the Revised Code, but also the Court’s precedent. At common law, a “charitable purpose” did not simply cover “aid to the needy alone,” but “embrace[d] . . . all which aid[ed] man and [sought] to improve his condition.” *Goldman v. Friars Club, Inc.* (1952), 158 Ohio St. 185, 200 (internal quotation marks omitted). Ohio’s statutory scheme is in accord, defining “charitable purpose” for a similar tax exemption as including “the improvement of health” with no free-care requirement. R.C. 5739.02(B)(12). The Court too has long interpreted “charitable” specifically for the charitable-property tax exemptions in a manner more broadly than did the Board here. *See Gerke v. Purcell* (1874), 25 Ohio St. 229, 243. It has found, for instance, that medical services qualify as charitable, no matter the amount of free care, if “those services are provided on a nonprofit basis to those in need, without regard to race, creed, or ability to pay.” *Church of God in N. Ohio, Inc. v. Levin* (2009), 124 Ohio St.3d 36, 2009-Ohio-5939, at ¶ 19. Viewed in this light, the Board had no basis—precedential, statutory, or otherwise—for adopting a uniform free-care quota in determining what constitutes a charitable institution.

Second, the Board failed to consider appropriate factors for determining whether DCI qualified as a “charitable institution,” even under its unduly narrow interpretation of “charitable.” In concluding that DCI was not charitable, the Board examined “the ‘relationship between the actual use of [its] property and [its] purpose.’” (Bd. Op. at 12-13 (quoting *Cnty. Health Prof’ls*

Inc. v. Levin (2007), 113 Ohio St.3d 432, 2007-Ohio-2336, at ¶ 21.) But the charitable status of an *institution* (R.C. 5709.121)—as opposed to the charitable status of the *specific property* at issue (R.C. 5709.12)—depends on the institution’s general activities and purposes, not its specific use of the property. Confirming as much, the language in *Community Health Professionals* quoted by the Board addressed whether a charitable institution *used* property incidental to its charitable purposes, not whether the institution itself was charitable. 2007-Ohio-2336, at ¶ 20-21. In adopting this flawed legal analysis, the Board erroneously failed to consider DCI’s donations for scientific research when determining whether it was charitable. *Cf. Akron Golf Charities, Inc. v. Limbach* (1987), 34 Ohio St.3d 11, 13-14 (per curiam). Nor should the Board have ignored DCI’s revised charter, which limits its activities to nonprofit medical and scientific purposes, *see id.* at 13, or the fact that DCI qualifies as tax exempt under federal law. *See Cincinnati Cmty. Kolllel v. Levin*, 113 Ohio St.3d 138, 2007-Ohio-1249, at ¶ 14 (“[f]ederal statutes and regulations offer helpful insights” on whether an institution is charitable).

The Board’s two errors are not only at odds with the Revised Code and case law, but also undercut the Ohio General Assembly’s intent. The statutory exemptions at issue reflect the General Assembly’s decision that charitable property provides “present benefit to the general public sufficient to outweigh the loss of tax revenue.” *Bowers v. Akron City Hosp.* (1968), 16 Ohio St.2d 94, 94-95. The General Assembly’s adoption of the historically broad definition of charity, moreover, illustrates its view that charitable organizations should have flexibility in determining the best means to promote their local communities’ needs. *See Planned Parenthood Assn. v. Tax Commr. of Ohio* (1966), 5 Ohio St.2d 117, 121. The Board’s opinion, however, serves neither purpose. In looking narrowly to free care to assess charitable status, for example, the Board’s analysis ignores the fact that most nonprofit hospitals engage in a host of

community-outreach programs, among other charitable efforts. OHA, *Good Neighbors, Community Benefit Report 2009* at 8-11, available at <http://www.ohanet.org/SiteObjects/665DE291F02EFF5AF5A02593AEAF0713/OHA%20CBR09%205%2028%2009v2.pdf>. As the General Assembly has made clear, all public benefits should be considered, allowing charitable institutions to determine the best means to serve charitably the public welfare.

Finally, the Board's opinion has dramatic ramifications for charitable activity in Ohio. For one, the Board's decision may well chill charitable giving in our State, as its limited view of what constitutes a "charitable institution" will result in future donations no longer being deductible in many instances. *See, e.g., R.C. 5731.17(A)(2)*. For another, a rule requiring a uniform free-services benchmark for all health-care organizations overlooks the divergent circumstances in which these entities operate. For example, hospitals are located in nearly every Ohio community, urban and rural, OHA, *Good Neighbors*, at 1, and some can devote more revenue to free care than others. The Board's universal rule, however, may force institutions to operate in the red to obtain charitable status, risking their longevity, or to eliminate the wide-reaching community programs that go beyond the provision of free care to the indigent. Nor would the Board's rule permit institutions to save revenue in boom times for higher free-care demands in recessions. Further troubling, the novelty of the Board's interpretation upsets the reliance interests of nonprofit institutions, which have adopted policies that conform to the Court's longstanding interpretation of charitable medical services.

In sum, regardless how it resolves this appeal, the Court should reject the legal framework established by the Board here, and should clarify the proper analysis to be applied in these matters.

ARGUMENT

The Ohio General Assembly enacted two independent property-tax exemptions for charitable property. The first, R.C. 5709.12, exempts “[r]cal and tangible personal property belonging to institutions that is used exclusively for charitable purposes.” R.C. 5709.12(B). As its text illustrates, “*any* institution, irrespective of its charitable or non-charitable character, may take advantage of [this exemption].” *Episcopal Parish of Christ Church v. Kinney* (1979), 58 Ohio St.2d 199, 200-01 (per curiam) (internal quotation marks omitted). The second, R.C. 5709.121, carves out special rules for “charitable or educational institution[s].” R.C. 5709.121(A). As such, while both exemptions incorporate the word “charitable”—defined broadly to include many benefits to the public—they diverge in the charitable nexus that they require. The Board, in adhering to neither the broad definition of charitable nor the differences between the statutes, plainly erred.

I. R.C. 5709.12 AND R.C. 5709.121 ESTABLISH DIFFERENT RULES FOR TAX EXEMPTION.

R.C. 5709.12 and R.C. 5709.121 should not be conflated, as did the Board below. To be sure, as the exemptions cover either a “charitable” purpose or a “charitable” institution, both have incorporated the common-law meaning of the word charitable. Yet the exemptions require different *connections* to charity. R.C. 5709.12, which looks to whether a property is *used primarily* for charitable purposes, focuses on the specific use of the property at issue.

R.C. 5709.121, by contrast, applies to “charitable or education institution[s],” meaning that the threshold determination regards not the uses of the property, but the general activities and purposes of the owner. So long as an institution is charitable or educational, its property only need be *used incidentally* to charitable or educational purposes. These distinctions, which seemingly were ignored below, deserve the Court’s attention.

A. Both R.C. 5709.12 And R.C. 5709.121 Incorporate The Common-Law Meaning Of The Word “Charitable.”

The Revised Code does not define “charity,” “charitable purpose,” or “charitable institution” under R.C. 5709.12 and R.C. 5709.121. That said, “[i]t is well established that where a statute uses a word which has a definite meaning at common law, it will be presumed to be used in that sense and not in the loose popular sense.” *Richardson v. Doe* (1964), 176 Ohio St. 370, 372-73; *see Klemas v. Flynn* (1993), 66 Ohio St.3d 249, 250. Accordingly, for over a century, the Court has defined “charity” and “charitable” in the tax-exemption statutes consistent with their historic common-law meaning. *See, e.g., True Christianity Evangelism v. Zaino* (2001), 91 Ohio St.3d 117, 119-20 (per curiam); *Gerke v. Purcell* (1874), 25 Ohio St. 229, 243.

At common law, “the word ‘charity’” had a broader meaning than “the signification which it ordinarily bears,” namely, providing aid to the poor. *Gerke*, 25 Ohio St. at 243. “In its legal sense it includes not only [these] gifts for the benefit of the poor,” but also “endowments . . . for any other useful and public purpose.” *Id.*; *see Goldman v. Friars Club, Inc.* (1952), 158 Ohio St. 185, 200 (noting that charitable purpose “includes all which aids man and seeks to improve his condition”) (internal quotation marks omitted). As such, the term “charitable” in R.C. 5709.12 and R.C. 5709.121 covers any “attempt in good faith, spiritually, physically, intellectually, socially and economically to advance and benefit mankind in general, or those in need of advancement and benefit in particular, without regard to their ability to supply that need from other sources” *True Christianity*, 91 Ohio St.3d at 119-20 (internal quotation marks and emphasis omitted).

The word “charitable,” it bears noting, requires no free services. *Friars Club*, 158 Ohio St. at 200. Rather, a “charitable” institution or activity need only (1) have a purpose to better the public and (2) lack any purpose to generate private profit. Numerous endeavors qualify under

the first factor, from “[t]he maintenance of a school,” *Coll. Preparatory Sch. for Girls of Cincinnati v. Evatt* (1945), 144 Ohio St. 408, 413, to “[t]he dissemination of useful information” on herbs, *Herb Soc. of Am., Inc. v. Tracy* (1994), 71 Ohio St.3d 374, 376 (per curiam); see Restatement of Law 2d, Trusts, Section 368. As for the second, a charitable purpose excludes activities designed for private (rather than public) benefit. See *id.* § 372. Thus, property used to further “a private profit-making venture” is never charitable. *Highland Park Owners, Inc. v. Tracy* (1994), 71 Ohio St.3d 405, 406-07.

Measured against these backdrops, “the provision of medical or ancillary healthcare services qualifies as charitable if those services are provided on a nonprofit basis to those in need, without regard to race, creed, or ability to pay.” *Church of God in N. Ohio, Inc. v. Levin* (2009), 124 Ohio St.3d 36, 2009-Ohio-5939, ¶ 19. Conversely, “[a]n institution for the promotion of health is not a charitable institution if it is privately owned and is run for the profit of the owners.” William F. Fratcher, *Scott on Trusts* (4th ed. 1989), Section 372.1. Confirming this point, the Court has found for decades that property qualifies for exemption if related to the provision of nonprofit medical care. See, e.g., *Cnty. Health Prof’ls Inc. v. Levin* (2007), 113 Ohio St.3d 432, 2007-Ohio-2336, at ¶ 23; *Warman v. Tracy* (1995), 72 Ohio St.3d 217, 220-21; *Bowers v. Akron City Hosp.* (1968), 16 Ohio St.2d 94, 96; *Vick v. Cleveland Mem. Med. Found.* (1965), 2 Ohio St.2d 30, at paragraph two of the syllabus; *O’Brien v. Physicians Hosp. Assn.* (1917), 96 Ohio St. 1, at paragraph five of the syllabus.

B. R.C. 5709.12 Focuses Primarily On The Property’s Uses.

To qualify for R.C. 5709.12’s exemption, property must be “used exclusively for charitable purposes.” A property satisfies this requirement if its “primary use” is charitable. *Girl Scouts-Great Trail Council v. Levin*, 113 Ohio St.3d 24, 2007-Ohio-972, at ¶ 19. The primary-use test, as its name suggests, looks to the specific uses of the property in question; the

nature of the institution that owns the property is irrelevant. *See Akron City Hosp.*, 16 Ohio St.2d at 96; *Episcopal Parish*, 58 Ohio St.2d at 200-01. Equally true, as long as the property's primary activities are charitable, it is exempt even if some non-charitable activities occur. *See Friars Club*, 158 Ohio St. at 199 (granting exemption to property because non-charitable "uses [were] connected with and incidental to the overall programs carried on within the properties and the charitable nature of [the] institution as a whole").

Given this focus on a property's use, the mere fact that the property generates profit is irrelevant. Instead, the legal touchstone concerns whether the property is used *specifically* with "a view to profit" or whether profit is instead *incidental* to its charitable purpose. *Am. Commt. of Rabbinical Coll. of Telshe, Inc. v. Bd. of Tax Appeals* (1951), 156 Ohio St. 376, at paragraph one of the syllabus. If an institution uses property specifically for profit, R.C. 5709.12 does not exempt the property even if the institution donates it all to charity. *See Inc. Trs. of Gospel Worker Soc. v. Evatt* (1942), 140 Ohio St. 185, at paragraph two of the syllabus. If, by contrast, property put to charitable uses generates profit, R.C. 5709.12 exempts the property. In *Akron City Hospital*, for example, the Court rejected the argument that a nonprofit hospital had failed to use its parking lot for charitable purposes because it charged a fee and had "a \$19,000 'profit' from the lot in 1965 and \$15,000 in 1966," holding that the lot was used for charitable purposes because it facilitated the "hospital's function" of providing medical care. 16 Ohio St.2d at 96. Simply because the lot generated profit did not change things, as "[i]t is the use of the property rather than the fact that revenues are collected and received from property which is controlling." *Id.*; *see also Am. Issue Publ'g Co. v. Evatt* (1940), 137 Ohio St. 264, 266 (finding property exempt where "[p]rofits derived . . . from [charitable] activities [were] devoted . . . to promote and assist . . . with [charitable ends]").

Relatedly, a property is not used with a view to profit simply because reasonable sums are charged those who benefit. *See Davis v. Cincinnati Camp-Meeting Assn.* (1897), 57 Ohio St. 257, 270 (per curiam) (“[T]hough charges are made for the use of certain privileges [on the property], these are not inconsistent with the finding that none of [the] property is leased or used with a view to profit.”). Indeed, “[t]hat some consideration is exacted from [the property’s beneficiaries] on receipt of the benefits has never, nor should it ever, tarnish the charitable character of the enterprise.” *Planned Parenthood Assn. v. Tax Commr. of Ohio* (1966), 5 Ohio St.2d 117, 121-22. In *Vick*, for example, the Court exempted a hospital even though it charged over ninety percent of its patients and “accumulated a surplus fund in excess of \$700,000.” 2 Ohio St.2d at 32. As a general matter, therefore, “the facts that [a] hospital charges patients who are able to pay for its services and that a surplus has been created in the hospital fund (no part of which has been diverted to a private profit) does not change [the property’s] essentially charitable nature” under R.C. 5709.12.¹ *Id.* at paragraph two of the syllabus.

C. R.C. 5709.121 Focuses Primarily On The Property’s Owner.

R.C. 5709.121, by comparison, sets forth more lenient rules for charitable or educational entities. Property qualifies if it belongs to a charitable or educational institution and “is made available under the direction or control of [the] institution . . . for use in furtherance of or incidental to its charitable [or] educational . . . purposes.” R.C. 5709.121(A)(2). “To fall within the terms of R.C. 5709.121,” therefore, “property must (1) be under the direction or control of a

¹ *See also Planned Parenthood*, 5 Ohio St.2d at 121-22 (“Today, in part as a result of the prevalence of medical insurance plans, a substantial proportion of the patients of the average privately owned nonprofit but publicly operated general hospital possess the financial resources to defray the cost of care. . . . This inexorable fact defeats neither the charity nor the tax exemption.”); *O’Brien*, 96 Ohio St. at paragraph five of the syllabus (“A public charitable hospital may receive pay from patients who are able to pay for the hospital accommodations they receive, but the money received from such source becomes a part of the trust fund, and must be devoted to the same trust purposes, and cannot be diverted to private profit.”).

charitable institution . . . , (2) be otherwise made available ‘for use in furtherance of or incidental to’ the institution’s ‘charitable . . . purposes,’ and (3) not be made available with a view to profit.” *Cincinnati Nature Ctr. Assn. v. Bd. of Tax Appeals* (1976), 48 Ohio St.2d 122, 125.

1. An institution’s general purposes and activities determine whether it qualifies as a “charitable or educational” institution.

To qualify for R.C. 5709.121’s exemption, the institution that owns the property must be “charitable or educational.” R.C. 5709.121(A). That determination centers on the owner’s *general* activities and purposes, rather than the activities that take place at the *specific* property. See *Maumee Valley Broad. Assn. v. Porterfield* (1972), 29 Ohio St.2d 95, 98. An institution can illustrate its charitable or educational status in numerous ways. For instance, an institution’s charter, articles of incorporation, or bylaws often restrict it to charitable or educational pursuits. If so, the institution should constitute a charitable or educational institution so long as it has not violated the restrictions. See *Am. Chem. Soc. v. Kinney* (1982), 69 Ohio St.2d 167, 170 (“A review . . . of [the institution’s] national charter reveals that [it] is clearly a charitable or public institution for R.C. 5709.121 purposes.”). In *Akron Golf Charities, Inc. v. Limbach* (1987), 34 Ohio St.3d 11 (per curiam), for example, the Court held that where a corporation’s articles of incorporation restricted it “to serving the charitable needs of the Akron community,” it was charitable even if, as the tax commissioner argued, it was “in the business of staging a golf tournament” to raise revenue for charity and thus engaged in “a profit-making endeavor.” *Id.* at 13.

In addition, “[f]ederal statutes and regulations offer helpful insights” on whether an institution is charitable or educational. *Cincinnati Cmty. Kollel v. Levin*, 113 Ohio St.3d 138, 2007-Ohio-1249, at ¶ 14. Most notably, Section 501(a) of the federal tax code exempts from income taxation certain institutions “organized and operated exclusively for religious, charitable,

scientific, testing for public safety, literary, or educational purposes.” 26 U.S.C. § 501(c)(3). If an institution with a charitable or educational purpose qualifies as a Section 501(c)(3) entity (exempt from taxation under Section 501(a)), it likewise should qualify as charitable or educational under R.C. 5709.121(A). Indeed, state regulations treat all Section 501(c)(3) entities as “charitable trusts,” subjecting them to registration with the Attorney General. Ohio Adm. Code 109:1-1-02(A)(1); *see also* Ohio Charitable Trust Act Information Sheet, *available at* [http://www.ohioattorneygeneral.gov/files/Forms/Forms-for-Non-profits/Charity-Forms/Charitable-Trust-Registration-Ohio-501\(c\)\(3\)-organ/Ohio-Charitable-Trust-Act-Information-Sheet](http://www.ohioattorneygeneral.gov/files/Forms/Forms-for-Non-profits/Charity-Forms/Charitable-Trust-Registration-Ohio-501(c)(3)-organ/Ohio-Charitable-Trust-Act-Information-Sheet) (“The term ‘trust’ is broadly defined to include any 501(c)(3) tax exempt organization.”). Because “charitable” in R.C. 5709.121 incorporates the common law, it bears the same meaning associated with the common law of trusts. *See infra* Section I.A. And since Section 501(c)(3) entities are “charitable” for trust law, they likewise are “charitable” for tax-exemption law. *See Lannen v. Worland* (1928), 119 Ohio St. 49, at paragraph one of the syllabus (interpreting laws “in two separate and distinct acts” “with a view to harmonizing their several provisions”); *see also State ex rel. Cordray v. Midway Motor Sales, Inc.*, 122 Ohio St.3d 234, 2009-Ohio-2610, at ¶ 25 (“All provisions of the Revised Code bearing upon the same subject matter should be construed harmoniously unless they are irreconcilable.”).

Finally, an institution can qualify as charitable or educational if its general activities meet the common-law rules described above. *See infra* at Section I.A. An entity must not operate for the profit of private individuals, and it has to undertake activities that qualify as charitable or educational under the traditional meaning of those terms. *Herb Soc.*, 71 Ohio St.3d at 376 (“So long as an institution is operated without any view to profit and exclusively for a charitable purpose, it is a charitable institution.”).

2. R.C. 5709.121’s requirement that the property be used incidental to or in furtherance of a charitable or educational purpose establishes a more lenient standard than R.C. 5709.12’s primary-use test.

In codifying the language “in furtherance of or incidental to” a charitable purpose, R.C. 5709.121 sets forth “*no requirement* that charitable activity occur within [the property at issue]” *Warman*, 72 Ohio St.3d at 220 (emphasis added). Rather, a property can meet this test if “the actual use of the property” reasonably relates to “the purpose of the institution.” *Cnty. Health Prof’ls*, 2007-Ohio-2336, at ¶ 21. For example, selling merchandise to the Girl Scouts was incidental to the organization’s charitable purpose, thus entitling the selling store to exemption, because the store “exist[ed] to accommodate the Girl Scouts, the prices charged [were] intended to cover [the] costs of operation, and the merchandise [was] not marketed to compete with commercial, for-profit enterprises.” *Girl Scouts*, 2007-Ohio-972, at ¶ 3, 18.² These and other precedents make clear that R.C. 5709.121 establishes a more lenient standard than R.C. 5709.12 with respect to the actual property at issue. *See also Round Lake Christian Assembly, Inc. v. Commr. of Tax Equalization* (5th Dist. 1982), 4 Ohio App. 3d 189, 193 (“We do not find the words ‘exclusively,’ ‘solely’ or ‘completely’ . . . in R.C. 5709.121.”).

3. R.C. 5709.121’s rule that property be used without “view to profit” mandates that it not be used specifically to generate income.

Property held by a charitable or educational institution is exempt so long as it is not used with a “view to profit.” R.C. 5709.121(A)(2). In codifying the language “view to profit,” the

² *See also Cnty. Health Prof’ls*, 2007-Ohio-2336, at ¶ 23 (holding exempt the administrative buildings of nonprofit health-care entities because they were incidental to medical purposes); *Warman*, 72 Ohio St.3d at 220 (holding exempt a residence owned by nonprofit hospital because employees lived there); *Am. Chem. Soc.*, 69 Ohio St.2d 167, at paragraph two of the syllabus (holding exempt the recreational areas of scientific organization’s campus because it used the areas “in the recruitment, retention and productivity of . . . employees”); *Little Miami, Inc. v. Kinney* (1981), 68 Ohio St.2d 102, 103 (holding exempt an island that environmental entity “restored to its natural state” because that use was reasonably related to its “preservation” purposes).

General Assembly adopted the same language that the Court had been applying under R.C. 5709.12. *See Am. Commt. of Rabbinical Coll.*, 156 Ohio St. 376, at paragraph one of the syllabus; *see also Clark v. Scarpelli* (2001), 91 Ohio St.3d 271, 278 (“[T]he General Assembly is fully aware of any prior judicial interpretation of an existing statute when enacting an amendment.”). Under this test, “the amount of profit that an institution realizes is not a determinative factor. . . .” *Girl Scouts*, 2007-Ohio-972, at ¶ 20. Rather, as law decided prior to R.C. 5709.121’s enactment instructs, the “determinative factor” concerns whether the property is used incidental to a *charitable purpose* or solely to *generate income*. If the former, property qualifies; if the latter, it does not. *Compare Akron City Hosp.*, 16 Ohio St.2d at 96 (finding a hospital’s property exempt because used to provide charitable medical care and not for “income purposes,” even though it generated incidental profit), *with Inc. Trs.*, 140 Ohio St. at 188-89 (finding a religious entity’s property non-exempt because used for non-charitable publication purposes, even though all profits were put to charitable ends).

The Court’s case law interpreting R.C. 5709.121 reaffirms the point. On the one hand, property incidental to an institution’s charitable purposes is exempt, the Court has made clear, even if it generates profit, so long as the profit furthers the owner’s charitable purposes. *See, e.g., Girl Scouts*, 2007-Ohio-972, at ¶ 17-19; *Galvin v. Masonic Toledo Trust* (1973), 34 Ohio St.2d 157, 157. For instance, a charitable institution’s facility is exempt where any profits are “and will be used for maintenance and improvement of the facility.” *Masonic Toledo*, 34 Ohio St.2d at 157, 160. On the other hand, a charitable institution’s property is not exempt if it is used solely to generate income. Thus, where a school’s property was used solely to sell clothing for profit, the property was not exempt as the school’s “purpose [was] to be an educational institution and not a clothing distribution center.” *Seven Hills Schs. v. Kinney* (1986), 28 Ohio

St.3d 186, 187. In other words, the “ongoing operation of the clothing exchange as a business venture . . . [was] fatal to [the] exemption request.” *Id.* at 187 n.1.

In sum, R.C. 5709.12 and R.C. 5709.121 establish two different ways that property can be exempt. R.C. 5709.12 allows any institution’s property to be exempt if primarily used for charitable purposes. R.C. 5709.121, by contrast, exempts a charitable or educational institution’s property if used incidental to its charitable or educational purposes. These differences should be honored, not conflated as did the Board here.

II. THE BOARD’S REASONING FAILED TO FOLLOW GOVERNING LAW AND, IF FOLLOWED, WILL UNDERMINE BOTH LEGISLATIVE INTENT AND CHARITABLE ACTIVITY.

The Board misapplied the statutory framework governing tax exemptions for charitable property. By doing so, the Board not only disserved the General Assembly’s legislative intent for the charitable-property exemption, but also harmed beneficial and charitable interests in this State. As a result, the Court should correct the flawed legal framework employed by the Board.

A. The Board’s Opinion Committed Two Fundamental Legal Errors.

The Board’s reasoning is flawed for two reasons. First, it restricted this Court’s historically broad view of the word “charitable.” Second, when determining whether an institution was charitable, it relied on irrelevant factors while refusing to consider relevant ones.

1. The Board interpreted “charitable” in an unduly narrow manner.

The Board restricted the scope of activities that have historically qualified as “charitable” under the tax-exemption statutes. Specifically, it found that DCI, a nonprofit institution, did not qualify as charitable because “it provide[d] no free or charitable services,” even though DCI had never “turn[ed] away patients without the ability to pay.” (Bd. Op. at 7, 12.) Notably, while DCI discounted 1.27 percent of its charges as “a ‘bad debt charity write off,’” that “percent [was] insufficient,” in the Board’s view, “to meet the charitable service standards required for the

exemption.” (*Id.* at 15-16 (citations omitted).) The Board, therefore, determined that DCI was not charitable because it did not offer a sufficient, unidentified percentage of “free services.” This analysis is flawed.

First, as described above, *see supra* Section I.A, the Board erroneously relied upon the layperson definition of “charitable” (covering “aid to the needy alone”) when the statute calls for the legal definition (embracing “all which aids man and seeks to improve his condition”). *Friars Club*, 158 Ohio St. at 200 (internal quotation marks omitted). From a legal perspective, “charitable” has always included the “promotion of health.” Restatement of Law 2d, Trusts, Section 368. Indeed, at common law, “a nonprofit hospital [was considered] a charitable institution, even if it require[d] payment by all of its patients, and [did] not provide free or reduced-rate services for those who [were] unable to pay.” *Scott on Trusts* § 372; *see* Restatement of Law 2d, Trusts, Section 376 cmt. c (“A trust to establish or maintain an educational institution or hospital or home for poor persons is charitable although it is provided that the pupils or patients or inmates shall pay fees . . . if the income so derived is to be used only to maintain the institution or for some other charitable purpose.”). Correspondingly, a nonprofit entity that provided *free* medical services undertook two distinct charitable purposes—the relief of poverty *and* the promotion of health. *See* Restatement of Law 2d, Trusts, Section 368 cmt. c (“[A] trust to provide medical assistance for the poor is a trust for the relief of poverty and for the promotion of health.”). The tax exemption, however, requires only one.

Second, the Board’s strict “free services” rule conflicts not only with this common-law definition of the word “charitable,” but also with the Court’s consistent understanding of the term. For over a century, the Court has rejected the Board’s narrow view in favor of the broader meaning of “charity” or “charitable.” *See Gerke*, 25 Ohio St. at 243. More specifically, the

Court has repeatedly found that nonprofit medical services qualify, without requiring any percentage of free services. Just recently, for example, it indicated that “the provision of medical or ancillary healthcare services qualifies as charitable if those services are provided on a nonprofit basis to those in need, without regard to race, creed, or ability to pay.” *Church of God*, 2009-Ohio-5939, at ¶ 19. In other words, nonprofit medical care is charitable if offered to all without regard to their ability to pay, no matter what percentage of patients actually can and do pay. *See Planned Parenthood*, 5 Ohio St.2d at 121-22.

Third, in articulating its “free services” rule, the Board looked to law that does not concern medical care. (Bd. Op. at 11-12 (quoting *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420, 2004-Ohio-1749, at ¶ 36, 39 (per curiam).) The Board’s reliance on *Bethesda Healthcare* is misplaced. There, the health-care organization at issue operated a fitness center. *Id.* at ¶ 9-10. While all agreed that the portions of the center used for rehabilitative medical care were exempt, the organization also sought an exemption for the entire facility. *Id.* at ¶ 5, 9-10. The case thus did not involve the “charitable purpose” of providing “medical or ancillary healthcare services.” *Church of God*, 2009-Ohio-5939, at ¶ 19. And, on its face, “[t]he mere operation of a fitness center [did] not define whether the property [was] being put to a charitable use.” *Bethesda Healthcare*, 2004-Ohio-1749, at ¶ 36. As such, the Court examined the free services provided to the indigent to determine whether the facility satisfied the different charitable purpose of aiding the poor. *Id.* at ¶ 38-39. *Bethesda Healthcare*’s test, however, has no application when *medical services* are at issue. *See id.* at ¶ 35 (noting that the Court “must consider the overall operation being conducted”). Proving the point, *Community Health Professionals* subsequently found that a health-care entity’s administrative offices were incidental to charitable purposes without reference to any quantity of free care. Rather, because

the entity “provide[d] services without regard to a patient’s ability to pay”—the rule for nonprofit medical service—the property was exempt. *Cnty. Health Prof’ls*, 2007-Ohio-2336, at ¶ 23. *Community Health Professionals* confirms that courts need not look to the actual amount of free medical service if an institution, in operation, turns away no patients based on their inability to pay.

Fourth, the Board relied primarily upon *Provena Covenant Medical Center v. Department of Revenue* (Ill. App. Ct. 2008), 894 N.E.2d 452, an out-of-state authority that conflicts with this Court’s precedents. (Bd. Op. at 14-15.) *Provena*, it bears noting, expressly rejected the broad meaning of “charitable” that “several jurisdictions,” including this Court, have accepted for a century. 894 N.E.2d at 481. The Illinois Supreme Court’s recent decision affirming *Provena* likewise departs from the Court’s traditional definition of charitable medical care. *See Provena Covenant Med. Ctr. v. Dep’t of Revenue* (Ill. Mar. 18, 2010), No. 107328, 2010 WL 966858, at *14. That is made clear by the dissent, which criticized the plurality opinion for refusing to adopt the standard identical to this Court’s, namely, “whether health care was made available by the plaintiff to all who needed it, regardless of their ability to pay.” *Id.* at *22 (Burke, J., concurring in part and dissenting in part) (internal quotation marks omitted). In addition to ignoring this Court’s precedents, the Board’s reliance on out-of-state authority also disregards the General Assembly’s choices. The General Assembly has amended the property-tax exemptions many times since the Court adopted its broad definition of “charity,” and not once has it narrowed the Court’s interpretation or adopted a free-care quota. This “legislative inaction in the face of longstanding judicial interpretations . . . evidences legislative intent to retain existing law.” *State v. Cichon* (1980), 61 Ohio St.2d 181, 183-84. As such, it “would amount to judicial legislation upon the part of this court to make a change of interpretation or

application at this late date.” *Spitzer v. Stillings* (1924), 109 Ohio St. 297, 305. Simply put, the Board clearly erred by choosing an Illinois decision over this Court’s numerous contrary ones.

Fifth, the Board’s “free services” rule conflicts with other provisions of the Revised Code that indicate that the General Assembly intends for “charitable” to reach more than “free services.” A related excise-tax exemption, for example, expressly defines “charitable purpose” to include “the improvement of health through the alleviation of illness, disease, or injury,” so long as “no part of the net income of [the operations] inures to the benefit of any private shareholder or individual.” R.C. 5739.02(B)(12). This definition does not require an entity to provide free care, and its reference to “net income” contemplates charges for services. *Id.* And while the definition does not govern R.C. 5709.12, the common-law definition that does establishes the same rule. *See* Restatement of Law 2d, Trusts, Section 376. Similarly, the General Assembly has indicated that “charitable or educational institutions” in R.C. 5709.12 and R.C. 5709.121 include nonprofit organizations “encouraging the advancement of science,” regardless whether those organizations provide free services. R.C. 5709.12(D)(1). This is further proof of the lack of any “free services” requirement for otherwise charitable activities. For all these reasons, the Board legally erred by adopting its overly restrictive interpretation of “charitable.”

2. The Board failed to consider appropriate factors when determining whether an institution qualified as charitable.

The Board also erred when applying its narrow interpretation of “charitable” to DCI, both by considering inappropriate factors and by ignoring appropriate ones. As to its initial mistake, the Board looked to “the ‘relationship between the actual use of the property and the purpose of the institution’” when examining whether “DCI [was] a charitable institution.” (Bd. Op. at 12, 13 (quoting *Cnty. Health Prof’ls*, 2007-Ohio-2336, at ¶ 21).) An *institution’s* charitable status,

however, does not depend on the use to which it puts the specific *property* under review, but rather on the institution's general purposes and activities. See *Maumee Valley Broad.*, 29 Ohio St.2d at 98. Under the Board's analysis, by contrast, a nationally recognized charity could lose its charitable status if it operated a single property that did not qualify for exemption. Not surprisingly, the case on which the Board relied, *Community Health Professionals*, said no such thing. The Court there did not even consider whether the institution was charitable because the tax commissioner conceded as much. 2007-Ohio-2336, at ¶ 20. Instead, *Community Health Professionals* analyzed whether the institution used the property at issue in furtherance of or incidental to its admittedly charitable purposes, a separate and distinct factor under R.C. 5709.121(A)(2). *Id.* at ¶ 21.

This narrow focus on the use of property perhaps explains the Board's refusal to consider relevant factors. Namely, the Board refused to take into account DCI's donations for scientific research on kidney disease when evaluating whether it was charitable, contending that "[i]t is only the use of property in charitable pursuits that qualifies for tax exemption, not the utilization of receipts or proceeds that does so." (Bd. Op. at 13 (quoting *Hubbard Press v. Tracy* (1993), 67 Ohio St.3d 564, 566).) But that quotation and the supporting case law all address whether the institutions' *use* of property was charitable, not whether the institutions *themselves* were charitable. See *Hubbard Press*, 67 Ohio St.3d at 566 (holding that printing envelopes for churches was not charitable use); *Seven Hills*, 28 Ohio St. at 187-88 (holding that a school's clothing exchange designed solely to generate income was not charitable use); *Vick*, 2 Ohio St.2d at 33 (holding that hospital's medical care was charitable use).

Contrary to the Board's analysis, an institution's charitable donations are highly relevant for determining whether an *institution*—as opposed to its *use* of property—is charitable. In

Akron Golf Charities, for example, the Court found that an institution operated for charitable purposes under a related excise-tax exemption because its “mission [was] the giving away of its net revenues to charity.” 34 Ohio St.3d at 14. Other statutory provisions, moreover, confirm that an institution maintains its charitable status by devoting “net earnings” to charitable purposes. R.C. 5709.04, for example, exempts from taxation intangible property of a nonprofit institution “operated exclusively for . . . charitable . . . purposes,” if “no part of [its] net earnings . . . inures to the benefit of any private [individual].” R.C. 5709.04; *see* R.C. 5731.17(A)(2) (exempting from estate tax property bequeathed to organizations “operat[ed] exclusively for . . . charitable purposes” whose “net earnings” did not flow to private individuals). These statutes prove the importance of an institution’s use of proceeds for determining its charitable status. Otherwise, their mandate that institutions use revenues for charitable purposes would be meaningless. *See D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health* (2002), 96 Ohio St.3d 250, 2002-Ohio-4172, ¶ 26 (noting that a “court should avoid that construction which renders a provision meaningless or inoperative”) (internal quotation marks omitted). The Board thus should have fully considered DCI’s scientific donations for determining its charitable status.

Finally, the Board simply ignored other relevant factors. The Board, for example, failed to consider DCI’s revised charter. *See Akron Golf Charities*, 34 Ohio St.3d at 13. That charter makes clear that DCI operates as a nonprofit with both medical and scientific purposes—namely, to provide medical care to patients with kidney disease and to further scientific research related to that disease. (Bd. Op. at 3-4.) Both purposes qualify as charitable. *See infra* Section I.A; R.C. 5709.12(D)(1). In addition, the Board overlooked that DCI qualifies as a Section 501(c)(3) organization, exempt from federal taxation under Section 501(a). (Bd. Op. at 2.) Yet trust-law regulations automatically presume that this type of organization is charitable. Ohio Adm. Code

109:1-1-02(A)(1). R.C. 5709.121 should include the same presumption for charitable or educational institutions. In sum, the Board erred in concluding that DCI was not charitable, and in refusing to consider R.C. 5709.121's remaining two factors.

B. The Board's Legal Errors Will Frustrate The Legislative Will.

Further troubling is the fact that the Board's legal errors will disserve the Ohio General Assembly's underlying reasons for the property-tax exemptions. The exemptions serve at least two purposes. First, their existence illustrates the General Assembly's conclusion that charitable property provides "present benefit to the general public sufficient to outweigh the loss of tax revenue." *Akron City Hosp.*, 16 Ohio St.2d 94-95. And second, the General Assembly's acceptance of the broad definition of charity shows its judgment that charitable organizations, not taxing authorities or courts, should determine the best means to promote their local communities' diverse needs. *See Planned Parenthood*, 5 Ohio St.2d at 121 ("It is unnecessary for universal agreement to exist that the objectives or the means employed will, in fact, result in [public] benefits."). But the Board's reasoning frustrates these legislative choices. It limits the exemption's scope by considering *only* one potential benefit—the amount of free medical services—rather than the many different ways that a nonprofit health-care organization promotes general welfare. (Bd. Op. at 12-16.) And its narrow definition of charity constricts the flexibility inherent in the broad definition, turning taxing authorities and courts into micromanagers of how charitable institutions should serve the public good.

The typical activities of an Ohio nonprofit hospital illustrate well how the Board's decision will frustrate the General Assembly's statutory scheme. To be sure, "[e]very hospital in Ohio has a charity care policy under which they provide free care to patients below the federal poverty line." OHA, *Good Neighbors, Community Benefit Report 2009* at 8, available at <http://www.ohanet.org/SiteObjects/665DE291F02EFF5AF5A02593AEAF0713/OHA%20CBR0>

9%205%2028%2009v2.pdf. Yet that free care represents only a fraction of the activities that hospitals undertake to “better [the public’s] condition.” *Am. Issue Publ’g*, 137 Ohio St. at 266. They provide many other public benefits, benefits that can and should play a part in the exemption calculus.

Ohio hospitals, for example, undertake many programs and activities that respond to the health concerns of their local communities. In 2007, these programs and activities totaled more than \$1 billion. OHA, *Good Neighbors*, at 10. While they have as their common goal the promotion of public health, they serve that goal in many ways, including education, research, and community outreach. Numerous hospitals, for example, invest in education. Some operate residency programs “to educate the current and next generations of physicians, nurses and other health professionals.” Central Ohio Hosp. Council, *Connected to the Community 2009 Community Benefit Report* at 4, 13, 15, available at <http://www.centralohiohospitals.org/documents/Community%20Benefit%20Report%20FINAL%20121009.pdf>. Others offer more specialized education, such as giving physicians the opportunity to practice procedures with patient simulators, and thereby “stimulate[] greater innovation and improvement in the safe and expert delivery of health care.” *Id.* at 15. These educational efforts further public welfare, and thus satisfy the exemption’s charitable and educational criteria. *See Church of God*, 2009-Ohio-5939, at ¶ 19 (noting that “nonprofit provision of educational services constitutes charitable activity in a proper case”).

As for research, Ohio’s nonprofit hospitals support or undertake many clinical studies and trials to advance the needle of health care. *See, e.g.,* Central Ohio Hosp. Council, *Connected to the Community* at 16-18. One Ohio hospital, for example, participates in a program that brings together many national cancer research groups, allowing Ohio patients with the disease to

obtain “access to national clinical research trials on a wide variety of cancers in a familiar setting close to their home, instead of traveling quite a distance to participate.” *Id.* at 18. Research in furtherance of medical care benefiting the public at large certainly qualifies as charitable. *See, e.g., Herb Soc.*, 71 Ohio St.3d at 376 (upholding exemption for entity that “sponsor[ed] symposiums” and “endow[ed] research grants” for beneficial public purposes).

Finally, nonprofit hospitals engage in all sorts of community outreach to further public health. This outreach runs the gamut, from offering “free smoking cessation services,” OHA *Good Neighbors* at 10, to “travel[ing] to low-income neighborhoods, homeless shelters, soup kitchens and immigrant communities to provide basic care,” Central Ohio Hosp. Council, *Connected to the Community* at 9. It, too, qualifies as activity designed “to benefit mankind, [which] is, traditionally charity.” *Herb Soc.*, 71 Ohio St.3d at 376.

While legislative intent suggests that this nonprofit education, research, and community outreach should be considered because it benefits the public, the Board’s opinion indicates that it may ignore these beneficial activities. In this case, the facts show that DCI conducts a camp for children with kidney disease and provides grants to further scientific research on the disease. (Bd. Op. at 2.) But these charitable activities played no part in the Board’s calculus as to whether DCI constituted a charitable institution. (*Id.* at 13-16.) If its legal reasoning gains traction, nonprofit hospitals may have to redirect resources from their charitable community activities to meet the Board’s free-care quota. That is the case even though a dollar invested in educational, research, or community-outreach programs may save the public many dollars in curative medical services. OHA, *Good Neighbors* at 10. The Board’s decision, therefore, not only represents unsound policy but also conflicts with the legislative decision that charities on

the front lines of their diverse communities, not taxing authorities, should choose the “means” to best “benefit[]” those communities. *Planned Parenthood*, 5 Ohio St.2d at 121.

Ohio nonprofit hospitals, furthermore, accept Medicare and Medicaid patients, even though Medicare and Medicaid do not fully compensate them for the costs of care. Medicaid, for example, currently pays on average \$.84 for every \$1 that a hospital spends. *See* OHA, Medicaid Fact Sheet (Aug. 24, 2009), *available at* <http://www.ohanet.org/SiteObjects/C2BF96C2F636E9453B81C5A012E4CAEF/Medicaid%20Fact%20Sheet%20updated%2008-24-09.pdf>. Likewise, Medicare now pays on average \$.89 for every \$1 of care. *See* OHA, Medicare Fact Sheet, *available at* <http://www.ohanet.org/SiteObjects/CBA0810D8E0B852968E1F931AC51B33B/medicare.pdf>. These shortfalls certainly exist for Ohio hospitals. “In 2007, the gap between Ohio hospitals’ cost to provide services to enrollees and the reimbursement they received hit more than a billion dollars—\$1.4 billion.” OHA, HCAP, Uncompensated and Charity Care Fact Sheet (July 29, 2009), *available at* <http://www.ohanet.org/SiteObjects/F1A3987FDC54C93F4431C0CB5CBBCCFB/charity.pdf>.

Yet the Board’s opinion suggests that it will not take these costs into account. While DCI accepted both Medicare and Medicaid patients, the Board did not consider any care provided at below-cost rates because it focused only on totally free care that it considered a “gift.” (Bd. Op. at 3, 15.) Legislative intent, however, proves that these shortfalls should be counted because they represent “present benefit” that charities provide “to the general public.” *Akron City Hosp.*, 16 Ohio St.2d 94-95. In fact, numerous courts have recognized that these below-cost services reduce government burdens. *See Eldertrust of Fla., Inc. v. Town of Epsom* (N.H. 2007), 919 A.2d 776, 784-785 (finding “that Medicaid payments did not cover the entire cost of the services provided” and that health-care organization provided care to those “who otherwise would have

imposed a burden upon the government”); *Wexford Med. Group v. City of Cadillac* (Mich. 2006), 713 N.W.2d 734, 748 (finding that health-care organization “subsidizes the cost of care in light of the government’s underpayment” in Medicare and Medicaid programs and “thus lessen[s] the government’s burden of covering the full cost of a person’s care”); *In re St. Margaret Seneca Place v. Bd. of Property Assessment* (Pa. 1994), 640 A.2d 380, 385 (finding that health-care organization “pays a substantial portion of the cost for Medicaid patients” and “relieve[d] the government of some of its burden”). In sum, then, the Board’s opinion places its views concerning the activity and institutions that should qualify as charitable over the reasoned judgments of the General Assembly.

C. The Board’s Reasoning Threatens Charitable Endeavors In This State.

For numerous reasons, the Board’s analysis threatens to undermine charitable activity in Ohio. *First*, a “one size fits all” quota of free care fails to account for the different circumstances in which nonprofit institutions function, forcing some potentially to make imprudent decisions to retain their charitable status. For one thing, nonprofits operate in different geographic environments. “With 178 hospitals in Ohio,” for instance, “nearly every community in the state,” both rural and urban, “includes a hospital.” OHA, *Good Neighbors*, at 1. Given their differing income streams and patient types, some of these hospitals will be able to donate a greater percentage of net revenues to free care than others. But those that lack the revenue streams necessary to prudently meet an arbitrary free-care quota should not lose their charitable status as a result. To the contrary, an institution need only “extend[] its charitable benefits to member of the public at large *to an extent consistent with the continued operation of the [institution].*” *Coll. Preparatory Sch. for Girls*, 144 Ohio St. at 413 (emphasis added). Stated differently, a nonprofit health-care institution need not operate in the red, threatening its existence, to obtain a property exemption. *See Vick*, 2 Ohio St.2d 30, at paragraph two of the

syllabus; *Milwaukee Protestant Home for the Aged v. City of Milwaukee* (Wis. 1969), 164 N.W.2d 289, 296 (“A benevolent association is not required to use only red ink in keeping its books and ledgers.”).

For another thing, even in the same locale, the demand for free care will ebb and flow with the underlying economic environment. Given these *changing* conditions, the Court has rightly refrained from establishing an *unchanging* benchmark, opting instead for a flexible rule that simply examines whether an entity has refused to serve patients because of their inability to pay. *See Church of God*, 2009-Ohio-5939, at ¶ 19. That rule automatically adjusts for the changing economy. But a “free services” quota does not. Instead, it forces hospitals to provide an artificially high level of free care in boom years, rather than saving to pay for the extra subsidies required during recessionary years. In that the number of uninsured has been skyrocketing as of late, *see* OHA, Uninsured Fact Sheet (Oct. 21, 2009), *available at* <http://www.ohanet.org/SiteObjects/EAAD1A7442715D4578A6CAC1BB334A52/uninsured.pdf>, it seems foolish to prevent charitable institutions from managing their assets in the most prudent manner.

Second, the Board’s limited interpretation will seemingly result in fewer traditionally charitable institutions qualifying for the exemption, which in turn will reduce charitable activity. Institutions that no longer qualify will undoubtedly have to pay the new tax with revenue currently put to other uses, a heavy burden in that many nonprofits already operate on tight margins even with the tax exemption. Twenty Ohio hospitals, for example, have closed since 2000, and many others face significant economic challenges. OHA, Hospital Billing & Collections at 2 (2008), *available at* <http://www.ohanet.org/siteobjects/db583de3b730c4091ead75fafdce3f4a/hospitalbillingandcollections.pdf>. Any increased tax burden, then, likely

would decrease the amount of subsidized care that nonprofit health-care institutions can offer, the community outreach in which these institutions engage, or their many other beneficial public services, leaving the taxpayers to pick up the slack. *Cf. Denison Univ. v. Bd. of Tax Appeals* (1965), 2 Ohio St.2d 17, 28-29 (“It would be . . . unreasonable to tax facilities for . . . education where private donations have provided those facilities and thereby relieved tax dollars from providing them.”). Any short-term tax revenues, in other words, could be offset by the decreased amount of charitable activities that private entities can provide over the long term.

Third, the Board’s narrow view of “charitable institution” threatens to chill private donations to many entities that serve the public, further reducing the amounts available to promote general welfare. Ohio’s estate tax, for example, exempts charitable bequests to entities “organized and operated exclusively for . . . charitable . . . purposes.” R.C. 5731.17(A)(2). Similarly, a use tax exempts “[t]angible personal property held for sale by a person . . . and donated by that person, without charge or other compensation, to” “[a] nonprofit organization operated exclusively for charitable purposes in this state.” R.C. 5741.02(C)(9)(a). Under the Board’s narrow view of “charitable,” however, many traditionally charitable entities might not qualify for these related exemptions. That, in turn, would reduce their ability to obtain contributions from individuals expecting a deductible donation. *Cf. Denison*, 2 Ohio St.2d at 29 (“This court should not, by narrow and strict construction of statutes such as [an exemption for educational property], discourage private donations for public education.”).

Fourth, and finally, the Board’s reasoning upsets the settled legal expectations of Ohio’s health-care community. Ohio’s nonprofit entities have long relied on the Court’s view that a nonprofit medical institution’s property qualifies as exempt even if it generates a surplus by charging reasonable sums to those who can pay. *See Vick*, 2 Ohio St.2d 30, at paragraph two of

the syllabus; *O'Brien*, 96 Ohio St. at paragraph five of the syllabus. In this way, Ohio hospitals have made themselves open to all: “Ohio hospitals are committed to a charitable mission of providing quality health care 24 hours a day, seven days a week to everyone in their community regardless of ability to pay.” OHA, *Hospital Billing & Collections* at 1. The Board’s reasoning, however, departs from established expectations in the hospital community by requiring an unidentified level of free care on top of medical care to the public without regard to the public’s ability to pay. But “[i]ndividuals conducting their affairs must be able to rely on the law’s stability.” *State v. Silverman* (2009), 121 Ohio St.3d 581, 2009-Ohio-1576, at ¶ 31. That is especially true in the fairly delicate world of nonprofit medical care. In sum, the Court should reaffirm its prior law and reject the Board’s adopted legal framework in this case.

CONCLUSION

Amicus Curiae Ohio Hospital Association respectfully requests that the Court reject the Board's troubling and potentially far-reaching interpretation in this case of the property-tax exemptions for charitable property.

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Respectfully submitted,



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