

## IN THE SUPREME COURT OF OHIO

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

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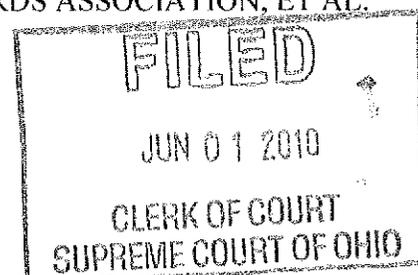
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## INTRODUCTION

In its opening brief, the Ohio Hospital Association (“OHA”) demonstrated that the Board of Tax Appeals committed two legal errors when interpreting R.C. 5709.12 and R.C. 5709.121, the tax exemptions for charitable property: (1) the Board erroneously defined the term “charitable” as requiring a certain (unidentified) level of free medical care to the poor, and (2) the Board relied upon inappropriate factors and ignored relevant ones when determining whether an institution qualifies as “charitable.” (OHA Br. at 15-22; see *Dialysis Clinic, Inc. v. Wilkins* (Nov. 24, 2009), Bd. of Tax Appeals, No. 2006-V-2389 (“Bd. Op.”) at 12-13.) In response, the Tax Commissioner and various government organizations (“Government Amici”) do not dispute that the two statutes represent separate and distinct grounds for exemption. (See OHA Br. at 6-15.) Yet, while the Board largely conflated those statutes in the proceedings below, the Commissioner and Government Amici erroneously attempt to justify its position in this Court.

To defend the Board’s narrow definition of “charitable,” the Commissioner primarily relies on a strained reading of the Court’s case law. “If the [Board] truly erred by inquiring into whether [Appellant Dialysis Clinic, Inc. (“DCI”)] rendered sufficient services to [the needy],” the Commissioner asks, “what are we to make of the precedential value of” the Court’s cases? (Comm’r Br. at 5.) But this Court has already answered his question noticeably *contrary to* his position. In interpreting its prior law, the Court indicated that “the provision of medical . . . services qualifies as charitable if those services are provided on a nonprofit basis to those in need, without regard to . . . ability to pay.” *Church of God in N. Ohio, Inc. v. Levin*, 124 Ohio St.3d 36, 2009-Ohio-5939, at ¶ 19. As illustrated by *Church of God*, the Court’s case law establishes a non-discrimination rule, not the Commissioner’s free-services rule. See *Vick v. Cleveland Mem. Med. Found.* (1965), 2 Ohio St.2d 30, paragraph two of the syllabus. The Court should follow that historic position here.

That the Commissioner seeks a change from the Court's historic treatment of nonprofit health-care providers, moreover, is shown by his reliance on changed circumstances. (Comm'r Br. at 21-23.) Nonprofit hospitals were historically charitable, according to the Commissioner, only because they predominately served poor patients. Since now most patients have insurance and can pay for care, he claims that hospitals should no longer qualify. (*Id.*) Once again, however, his argument is at odds with the Court's precedents, namely, that "the prevalence of medical insurance plans" "defeats neither the charity nor the tax exemption." *Planned Parenthood Assn. v. Tax Comm'r of Ohio* (1966), 5 Ohio St.2d 117, 121-22. Finally, quoting from charitable-immunity law, the Commissioner claims that the Court has already found nonprofit hospitals to be uncharitable due to their "'businesslike'" nature. (Comm'r Br. at 24-25 (quoting *Clark v. Southview Hosp. & Family Health Ctr.* (1994), 68 Ohio St.3d 435, 443).) But the Commissioner misconstrues that law. The Court did not eliminate charitable immunity for hospitals because they were uncharitable. Rather, it relied on any businesslike qualities only to reinforce its conclusion that the absence of absolute charitable tort immunity would not put them out of business or destroy their charitable purposes. *See Avellone v. St. John's Hosp.* (1956), 165 Ohio St. 467, 475. As such, these immunity cases are irrelevant to the question presented here.

The Commissioner equally errs in supporting the Board's decision to ignore many relevant factors for determining whether an institution qualifies as charitable under R.C. 5709.121. The Commissioner, for example, suggests that this Court should simply disregard DCI's research grants when considering whether it is charitable. (Comm'r Br. at 37-38.) Contrary to his claim, the Court has often looked to an entity's use of revenue when determining whether it qualifies as charitable. *See Akron Golf Charities, Inc. v. Limbach* (1987), 34 Ohio St.3d 11, 13-14 (per curiam). And the Commissioner suggests that the Court should

ignore an entity's federal tax-exempt status under 26 U.S.C. § 501(c)(3), pejoratively referring to that status as embarrassingly easy to obtain. (Comm'r Br. at 36.) But the Commissioner overlooks that state regulations themselves treat all Section 501(c)(3) entities as presumptively charitable for purposes of trust law, illustrating Section 501(c)(3)'s persuasive power for the tax-exemption statutes. *See* Ohio Adm. Code 109:1-1-02(A)(1). Lastly, the Commissioner suggests the Court should ignore the subsidized care that nonprofit health-care providers offer under the Medicare and Medicaid programs. (Comm'r Br. at 34.) But his view conflicts even with his own narrow interpretation of charity, which covers not simply free care but also "reduced fee" care. (*Id.* at 3.) Treating patients at below cost certainly qualifies as the latter type of care.

In sum, the Commissioner fails to justify the legal errors that the Board committed here. No matter how the Court decides this case, it should refuse to entrench those errors in Ohio law.

## **ARGUMENT**

In resolving this case, the Court should adhere to two well-established rules. First, health care counts as charitable under R.C. 5709.12 and R.C. 5709.121 if it is provided on a nonprofit basis without regard to ability to pay. Second, when determining whether an institution is charitable under R.C. 5709.121, all its purposes and activities should be considered, not simply the uses of the specific property under review. The Court, by contrast, should reject the Commissioner's attempts to muddle each of these longstanding principles.

### **I. THE COMMISSIONER ERRS IN DEFINING "CHARITABLE" TO REQUIRE AN UNSPECIFIED LEVEL OF FREE CARE.**

The Commissioner defends the Board's view that "charitable" in the tax-exemption statutes requires some unidentified level of free medical care. (Comm'r Br. at 19-29.) In doing so, however, he ignores that the Board's "free care" mandate conflicts with nearly every definition of "charitable." (*See* OHA Br. at 15-19.) It conflicts with the common-law definition,

which encompasses “all [that] aids man and seeks to improve his condition,” *Goldman v. Friars Club, Inc.* (1952), 158 Ohio St. 185, 200 (internal quotation marks omitted), including a nonprofit hospital’s medical care. *See* Restatement of Law 2d, Trusts, Section 372 & cmt. b. It conflicts with the General Assembly’s definition, which, far from mandating free care, covers all “improvement of health through the alleviation of illness” done on a nonprofit basis. R.C. 5739.02(B)(12) (defining “charitable purpose”). And it conflicts with the Attorney General’s definition, which reaches all Section 501(c)(3) entities exempt from federal taxation. *See* Ohio Adm. Code 109:1-1-02(A)(1) (defining “charitable trust”). As described below, moreover, the authorities that the Commissioner cites equally fail to support his position.

**A. The Commissioner Misconstrues The Court’s Cases.**

In seeking to require a certain level of free care, the Commissioner sets forth an erroneous interpretation of this Court’s cases. (Comm’r Br. at 25-29; *see also* Gov’t Amici Br. at 17-19.) Most notably, he fails to distinguish this Court’s case law instructing that no level of free care is required for nonprofit health care to be charitable. The Court has, instead, treated “the provision of medical or ancillary healthcare services . . . as charitable if those services are provided on a nonprofit basis . . . without regard to . . . ability to pay.” *Church of God*, 2009-Ohio-5939, at ¶ 19. Indeed, in *Vick*, the Court made clear that “[w]here a corporation not for profit . . . provid[ed] services to those in need, without regard to . . . ability to pay, the fact[] that the hospital charge[d] patients who [were] able to pay . . . [did] not change its essentially charitable nature.” 2 Ohio St.2d 30, paragraph two of the syllabus.

In addition to his failure to distinguish controlling law, the Commissioner compounds that error with an untenable interpretation of the Court’s other cases. For instance, the Commissioner initially quotes *O’Brien v. Physicians’ Hospital Association* (1917), 96 Ohio St. 1, for the proposition that the ““first concern of a public charitable hospital must be for those who

are unable to pay.’” (Comm’r Br. at 26 (quoting *O’Brien*, 96 Ohio St. at 9).) But he mistakes this reasoning for *O’Brien’s* holding. *O’Brien* held that a “hospital may receive pay from patients who are able to pay” so long as it does not “exhaust its accommodations,” forcing it to reject non-pay patients. 96 Ohio St. 1, at paragraphs five and six of the syllabus. The concern for patients unable to pay thus led *O’Brien* to establish *Church of God’s* rule (requiring care without regard to a patient’s ability to pay), not the *Commissioner’s* rule (requiring an unidentified level of free care to the needy).

Nor does the Commissioner gain ground by citing a pair of cases issued prior to R.C. 5709.121’s enactment. (See Comm’r Br. at 26-27 (discussing *Cleveland Osteopathic Hosp. v. Zangerle* (1950), 153 Ohio St. 222, and *Lincoln Mem. Hosp., Inc. v. Warren* (1968), 13 Ohio St.2d 109).) Both *Cleveland Osteopathic* and *Lincoln Memorial* hold only that *for-profit* health care does not count as charitable. In *Cleveland Osteopathic*, the Court found that a hospital that was “nonprofit” in name only did not qualify for tax exemption. In “*designedly mak[ing] a very substantial profit*,” the hospital was, in reality, “conducted for gain, profit, or advantage.” 153 Ohio St. at 227-28. Notably, the Court pointed out that a nonprofit entity is not charitable if it pays salaries as “*a device for securing the profits of the institution and not merely compensation for services rendered*.” *Id.* at 228 (internal quotation marks omitted). Given this language, the Court has since clarified that *Cleveland Osteopathic* involved a “*private profit-making venture*,” not a true nonprofit hospital. *Highland Park Owners, Inc. v. Tracy* (1994), 71 Ohio St.3d 405, 406-07 (emphasis added) (citing *Cleveland Osteopathic*, 153 Ohio St. 222).

As for *Lincoln Memorial*, it involved a for-profit corporation on its face. That corporation owned a hospital, but leased it to a nonprofit entity. 13 Ohio St.2d at 109-10. Relying on the proposition that “ownership of the property and its use must coincide,” the Court

held that the hospital was not exempt because the for-profit owner's use "was in the nature of a rental arrangement," not medical care. *Id.* at 110. To be sure, the Court also noted, in dictum, that "it [was] obvious from the financial setup described [*i.e.*, for-profit ownership] that a large majority of those who availed themselves of the hospital facilities were patients who paid for the attention and accommodations they received and that nonpaying charitable patients were decidedly in the minority." *Id.* But that was not the turning point for the decision. After all, the same was true for the hospital in *Vick*—where about 94% of patients paid—but that did not disqualify it for exemption. 2 Ohio St. 2d at 32. To the contrary, *Vick* held that "the fact[] that the hospital charge[d] patients who [were] able to pay . . . [did] not change its essentially charitable nature." *Id.* at paragraph two of the syllabus. As such, the *for-profit* company's use of the property—not the amount of free care provided there—made the difference in *Lincoln Memorial*. Like *Cleveland Osteopathic*, the case stands only for the proposition that a "private profit-making venture" does not provide charitable health care even if it treats some nonpaying patients. *Highland Park*, 71 Ohio St.3d at 406-07 (citing *Lincoln Mem.*, 13 Ohio St.2d 109); see *Church of God*, 2009-Ohio-5939, at ¶ 19 (health care must be "nonprofit" to be charitable).

Finally, the Commissioner's interpretation of recent cases fares no better. (Comm'r Br. at 28-29 (discussing *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420, 2004-Ohio-1749); see Gov't Amici Br. at 18-19.) He claims that *Bethesda Healthcare* requires nonprofit health-care providers to offer a sufficient quota of free health care. But that is not true. The case involved a fitness center, not health-care property.<sup>1</sup> In fact, it was undisputed that all the

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<sup>1</sup> The Commissioner seeks to make *Bethesda Healthcare* about health care by pointing out that a fitness center "serves to improve the overall physical well-being of its members." (Comm'r Br. at 39 n.15.) But many properties—ranging from a restaurant specializing in healthy foods to a retailer selling treadmills—serve to improve health. Contrary to the Commissioner's claim, these services do not all qualify as "health care" as ordinarily understood.

portions of the fitness center used *for medical purposes* were exempt. 2004-Ohio-1749, at ¶ 5-7. The owner, however, sought to exempt the *entire facility*, even portions not used for health care. As such, the Court did not resort to the traditional health-care test for those other portions. Instead, it looked to “[w]hether [the] institution render[ed] sufficient services to persons who [were] unable to afford them,” an independent ground for charitable status. *Id.* at ¶ 39.

And, contrary to the Commissioner’s claim (Comm’r Br. at 39 n.15), *Community Health Professionals, Inc. v. Levin*, 113 Ohio St.3d 432, 2007-Ohio-2336, illustrates *Bethesda Healthcare’s* narrow holding. In *Community Health Professionals*, the Court made clear that it “must consider the overall operation being conducted” when determining whether a use is charitable. 2007-Ohio-2336, at ¶ 22 (quoting *Bethesda Healthcare*, 2004-Ohio-1749, at ¶ 35). Once the Court found that the overall operation of the property at issue involved nonprofit health care, it applied the traditional health-care test. Specifically, it upheld an exemption because the nonprofit provider “provide[d] services without regard to a patient’s ability to pay.” *Cnty. Health Prof’ls*, 2007-Ohio-2336, at ¶ 23. The Court did not reference the level of free care provided, as would have been required if it followed the Commissioner’s “free services” test.

In sum, this Court consistently has interpreted its cases as holding that “the provision of medical or ancillary healthcare services qualifies as charitable if those services are provided on a nonprofit basis . . . without regard to . . . ability to pay.” *Church of God*, 2009-Ohio-5939, at ¶ 19. However it decides this case, the Court should not depart from that interpretation.

**B. The Commissioner’s Remaining Arguments Fail To Justify His Narrow View Of “Charitable.”**

The Commissioner’s other arguments equally fail to support the Board’s “free services” test. For starters, illustrating that the Commissioner asks this Court to alter its historic treatment of nonprofit health-care providers, he relies heavily on *changes* in health care. Specifically, he

claims that these providers were historically “charitable” only because they “were almost exclusively almshouses for the poor.” (Comm’r Br. at 21.) They should no longer qualify, the argument goes, because today most receive substantial revenue from “paying patients.” (*Id.* at 23.) But his interpretation of “charitable” squares with neither the historic view nor current practice. Historically speaking, “[a] trust to establish or maintain a hospital [was] charitable, although it [was] provided that the patients shall pay fees.” Restatement of Law 2d, Trusts, Section 372, cmt. b. Indeed, dating back to 1897, this Court upheld the exemption for property on which “charges [were] made for the use of certain privileges.” *Davis v. Cincinnati Camp-Meeting Assn.* (1897), 57 Ohio St. 257, 270 (per curiam).

The Court currently takes the same approach. It has repeatedly pointed out that “reasonable charges exacted from beneficiaries of a charitable institution” do not “detract from its eleemosynary [*i.e.*, charitable] character.” *Bowers v. Akron City Hosp.* (1968), 16 Ohio St.2d 94, 96; *see Planned Parenthood*, 5 Ohio St.2d at 121. Indeed, the Court has *already* rejected the Commissioner’s argument that the current availability of health insurance should disqualify health-care providers from the exemption. (*See* Comm’r Br. at 22-23.) According to the Court, “[t]oday, 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.” *Planned Parenthood*, 5 Ohio St.2d at 121-22. The Court should reject this argument once again.

Next, the Commissioner asserts that because “the Court abolished the doctrine of charitable immunity for hospitals” under the common law, it should likewise find they are not charitable under the tax-exemption statutes. (Comm’r Br. at 24-25 (citing *Clark*, 68 Ohio St.3d

at 442-43).) But the charitable-immunity doctrine does not justify his narrow view. As a general matter, if an entity had to qualify for charitable immunity to obtain a tax exemption, R.C 5709.12 and R.C. 5709.121 would exempt no property. That is because the Court has abolished the doctrine for *all* charities, not just hospitals. *Albritton v. Neighborhood Ctrs. Assn. for Child Dev.* (1984), 12 Ohio St.3d 210, paragraph one of the syllabus. And specifically with respect to hospitals, the Court did not end their charitable immunity—as the Commissioner claims (Comm’r Br. at 25)—because they were “large well run corporation[s]” or “businesslike.” *Clark*, 68 Ohio St.3d at 443 (internal quotation marks omitted). Rather, the Court relied on those considerations “to negate the argument that to hold [a] hospital amenable . . . to damages . . . would be such a detriment as to defeat [its] charitable purpose[s].” *St. John’s Hosp.*, 165 Ohio St. at 475. In other words, the Court relied upon the language from *Clark* and *St. John’s Hospital* quoted by the Commissioner to show that charitable hospitals could survive absent immunity, not that they stopped being charitable.

In addition, suggesting that the OHA requests a *per se* exemption for health-care property, the Commissioner argues that the General Assembly has never enacted “an explicit exemption for real property owned by non-profit healthcare providers.” (Comm’r Br. at 20; *see also* Gov’t Amici Br. at 2.) This type of “[l]egislative inaction,” however, “is a weak reed upon which to lean in determining legislative intent.” *Specht v. BP Am., Inc.* (1999), 86 Ohio St.3d 29, 32-33 (internal quotation marks omitted). Of most note, the General Assembly likely failed to include a specific exemption for health-care property because it approved of this Court’s longstanding view that treated such property as charitable if provided to all without regard to ability to pay. *See State v. Cichon* (1980), 61 Ohio St.2d 181, 183-84. Besides, the OHA’s arguments do not require a *per se* exemption for health-care providers. Such providers have to

offer care on a nonprofit basis, and cannot operate to enrich private actors. *Highland Park*, 71 Ohio St.3d at 406-07. And they have to provide services equally to all patients who present themselves, without discriminating against the poor. *Church of God*, 2009-Ohio-5939, at ¶ 19.

Lastly, the Commissioner is mistaken to cite the canon that tax exemptions should “be strictly construed” against exemption. (Comm’r Br. at 19; *see also* Gov’t Amici Br. at 9.) Because nearly every indicator of statutory interpretation—ranging from the common law to other statutory provisions—illustrates that “charitable” in R.C. 5709.12 and R.C. 5709.121 covers more than free care (OHA Br. at 15-19), the Board’s free-care requirement “is based on an incorrect legal conclusion.” *Columbia Gas Transmission Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, at ¶ 10 (internal quotation marks omitted). In addition, since “charitable” unambiguously covers the nonprofit provision of medical care to all patients without regard to ability to pay, *Church of God*, 2009-Ohio-5939, at ¶ 19, the strict-construction canon does not allow this Court to depart from that plain meaning. *Columbia Gas*, 2008-Ohio-511, at ¶ 34 (“[R]ules of strict construction do not apply if the statutory language is plain and unambiguous, because such statutes are to be applied as written, not construed in any party’s favor.”). In short, the strict-construction rule cannot save the Board’s erroneous legal view.

## **II. THE COMMISSIONER ERRS IN IDENTIFYING THE FACTORS FOR DETERMINING WHETHER AN INSTITUTION IS CHARITABLE.**

In its opening brief, the OHA also showed that the Board committed equally troubling errors by considering inappropriate factors and ignoring relevant ones when determining whether DCI qualified as a “charitable institution” under R.C. 5709.121. (OHA Br. at 19-22.) Namely, the Board relied heavily on DCI’s use of the specific property at issue, thereby conflating the first and second factors of this Court’s well-established test under R.C. 5709.121. *See Cmty. Health Prof’ls*, 2007-Ohio-2336, at ¶ 19-21. The Board also erroneously failed to take into

account DCI's use of income for research, its Section 501(c)(3) tax status, and its charitable purposes.

The Commissioner's arguments as to why DCI is not a charitable institution compound these errors. *First*, the Commissioner argues that DCI cannot qualify as "charitable" because, at the national level, it "failed to render sufficient services to those unable to afford them." (Comm'r Br. at 30.) This argument reinforces why his interpretation of "charitable" cannot be correct. While gifts to the poor are *sufficient* to prove an entity's charitable status, they are not *necessary* to do so. *See Friars Club*, 158 Ohio St. at 200 ("Charity is not aid to the needy alone, but it embraces and includes all which aids man and seeks to improve his condition.") (internal quotation marks omitted). Under the Commissioner's logic, traditionally charitable entities—such as organizations designed to build character, *see Girl Scouts-Great Trail Council v. Levin*, 113 Ohio St.3d 24, 2007-Ohio-972, at ¶ 2, 19, "to spiritually advance . . . mankind," *True Christianity Evangelism v. Zaino* (2001), 91 Ohio St.3d 117, 120 (per curiam), or to "endow[] research grants," *Herb Soc. of Am., Inc. v. Tracy* (1994), 71 Ohio St.3d 374, 376 (per curiam)—would not qualify if, in addition to those charitable endeavors, they did not provide free services to the needy. That is simply not the law.

*Second*, the Commissioner alleges that nonprofit health-care providers should not qualify as charitable institutions because they act like and closely resemble "[their] for-profit competitors." (Comm'r Br. at 24-25, 31; *see also* Gov't Amici Br. at 23-25.) But that is not true at all. By definition, "[a] nonprofit entity . . . differ[s] from a for-profit corporation . . . because it is barred from distributing its net earnings, if any, to individuals who exercise control over it, such as members, officers, directors, or trustees." *Camps Newfound/Owatonna, Inc. v. Town of Harrison* (1997), 520 U.S. 564, 585 (internal quotation marks omitted). These restrictions on

nonprofit corporations fully apply in Ohio. *See* R.C. 1702.01(C) (defining “nonprofit corporation” to prohibit distributions of net earnings to corporate insiders). In fact, most Ohio hospitals are not just nonprofit corporations but also “public benefit corporations,” the definition of which includes all corporations organized for charitable purposes and recognized as exempt from federal taxation under Section 501(c)(3). R.C. 1702.01(P). Thus, nonprofit hospitals operate under an irrevocable trust, and must use their assets for charitable purposes in perpetuity. *See* R.C. 1702.38(A), .39(B), .49(D)(2)-(E); *see also* R.C. 109.23, .25, .34, .35. As even the Board conceded, unlike its for-profit competitors, DCI used any net revenues for charitable endeavors, not to enrich corporate insiders. (Bd. Op. at 13.)

*Third*, the Commissioner argues that this Court should not consider DCI’s research grants when determining whether DCI is a charitable institution for the same erroneous reason that the Board provided. Specifically, the Commissioner argues that monetary donations do not count as charitable because “[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.” (Comm’r Br. at 38 (quoting *Hubbard Press v. Tracy* (1993), 67 Ohio St.3d 564, 566).) As the OHA already explained, however, *Hubbard Press* addressed R.C. 5709.121’s second question (whether an institution’s use of the property at issue was charitable), not the statute’s first question (whether the institution itself was). *See* 67 Ohio St.3d at 566. (*See* OHA Br. at 20-21.) As for the first question, this Court has long reached the commonsense conclusion that an institution’s monetary gifts are relevant to its charitable status. *See Akron Golf Charities*, 34 Ohio St.3d at 13-14 (finding an institution charitable because its “mission [was] the giving away of its net revenues to charity”); *see also Herb Soc.*, 71 Ohio St.3d at 376 (finding an institution charitable, in part, because it “endow[ed] research grants”).

*Fourth*, the Commissioner claims that an institution's "status as a § 501(c)(3) organization" should play no part in determining whether it is charitable. (Comm'r Br. at 36.) He is mistaken. This Court has expressly held that "[f]ederal statutes and regulations offer helpful insights." *Cincinnati Cmty. Kollel v. Levin*, 113 Ohio St.3d 138, 2007-Ohio-1249, at ¶ 14. The General Assembly agrees. *See* R.C. 5709.12(D)(1) (relying on Section 501(c)(3) to determine charitable status); R.C. 1702.01(P) (relying on Section 501(c)(3) to determine whether corporation constitutes "public benefit corporation"). Nor is the Commissioner correct that the Court should ignore Section 501(c)(3) because it is "embarrassingly easy" to qualify. (Comm'r Br. at 36 (internal quotation marks omitted).) The State's actions speak louder than the Commissioner's rhetoric. Specifically, the Commissioner overlooks that the Attorney General treats all Section 501(c)(3) entities as charitable under charitable-trust law, a decision subjecting them to extensive oversight. *See* Ohio Adm. Code 109:1-1-02(A)(1). If Section 501(c)(3) provides a sufficiently reliable indicator of charitable status for trust law, it necessarily provides a reliable indicator of charitable status for tax law. *See State ex rel. Cordray v. Midway Motor Sales, Inc.*, 122 Ohio St.3d 234, 2009-Ohio-2610, at ¶ 25 (noting that separate sections of the Revised Code addressing similar topics should be construed harmoniously).

*Fifth*, the Commissioner contends that shortfalls between a nonprofit hospital's costs of care and its reimbursement under the Medicare and Medicaid programs should not count in the charity calculus. (Comm'r Br. at 34.) That is an unsupportable position. Of most note, he concedes that charity includes not only "free" care but also "*reduced fee care.*" (*Id.* at 3 (emphasis added).) A hospital's decision to accept Medicare and Medicaid patients knowing full well that it will obtain reduced fees insufficient to cover its costs of care falls squarely within the latter kind of charity. *See Eldertrust of Fla., Inc. v. Town of Epsom* (N.H. 2007), 919 A.2d 776,

784-785; *Wexford Med. Group v. City of Cadillac* (Mich. 2006), 713 N.W.2d 734, 748; *In re St. Margaret Seneca Place v. Bd. of Prop. Assessment* (Pa. 1994), 640 A.2d 380, 384. The Commissioner also concedes that the charitable exemptions exist because charitable properties provide “present benefit to the general public sufficient to justify the loss of tax revenue.” (Comm’r Br. at 20 (internal quotation marks omitted).) He fails to explain how excluding this subsidized care—which represents a portion of the benefits that nonprofit hospitals provide the public fisc—would serve the exemptions’ purposes. It would not.

Finally, the Commissioner’s argument is all the more troubling given the recently enacted federal health-care reform, entitled the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (Mar. 23, 2010). Since the Act greatly expands the number of individuals in the Medicaid program, the obligations of nonprofit hospitals to subsidize these patients will likely expand. As government actors themselves recognize, moreover, for-profit providers will likely “tend to accept more patients who have private insurance (with relatively attractive payment rates) and fewer Medicare or Medicaid patients, exacerbating existing access problems for Medicaid enrollees.” Chief Actuary, Centers for Medicare and Medicaid Services, *Estimated Financial Effects Of The Patient Protection And Affordable Care Act, As Amended* 20 (April 22, 2010). Simply put, the Court should not disregard the real subsidies that nonprofit health-care providers offer federal programs at a time when those programs will be asking them to shoulder an ever growing number of such subsidized care. And all of this subsidized care, of course, comes on top of the \$900 million in annual charity care that nonprofit hospitals also provide. See OHA, HCAP, Uncompensated and Charity Care Fact Sheet (July 29, 2009), available at <http://www.ohanet.org/SiteObjects/F1A3987FDC54C93F4431C0CB5CBCCFB/charity.pdf>

## CONCLUSION

Amicus Curiae Ohio Hospital Association respectfully requests that the Court reject the Board's and the Tax Commissioner's legally erroneous interpretation of the property-tax exemptions for charitable property.

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Respectfully submitted,



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**CERTIFICATE OF SERVICE**

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