In the
Supreme Court of Ohio

MADELINE MOE, et al., *Plaintiffs-Appellees*, v. DAVE YOST, et al., *Defendants-Appellants*.	Case No. 2025-0472 On Appeal from the Franklin County Court of Appeals, Tenth Appellate District Court of Appeals Case No. 24A0-483

BRIEF OF *AMICUS CURIAE* PROFESSOR JESSIE HILL IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Jessie Hill is the Judge Ben C. Green Professor of Law at Case Western Reserve University in Cleveland, Ohio.[1] She has engaged in scholarship and teaching in the fields of constitutional law and health law for more than twenty years and has published dozens of scholarly articles. In 2011, she collaborated with her colleague Professor Maxwell Mehlman and the nonprofit policy think tank Innovation Ohio to oppose passage of Issue 3, the ballot initiative creating the Health Care Freedom Amendment to Ohio's Constitution. She engaged extensively in the public debate surrounding the Health Care Freedom Amendment, including through communicating with multiple press outlets in the campaign that ultimately led to the Health Care Freedom Amendment's adoption.

Professor Hill submits this amicus curiae brief in order to assist the Court in understanding the public's interpretation of the Health Care Freedom Amendment at the time of its adoption.

ARGUMENT

In November 2011, Ohio voters enacted the Health Care Freedom Amendment ("HCFA" or "Issue 3"), which added Section 21 to Article I of the Ohio Constitution. Both the plain language of the HCFA and the intent of the voters at the time the amendment was being considered support a broad interpretation of the HCFA. The HCFA should therefore be understood to prohibit most restrictions on individual health care decisions, including H.B. 68's ban on evidence-based health care for transgender minors that is provided in consultation with their physicians and their parents.

[1] Amicus' institutional affiliate is provided for identification purposes only. The views expressed in this brief do not represent those of Case Western Reserve University or its School of Law.

I. When Interpreting a Constitutional Amendment, this Court Considers How the Language of the Amendment Would Have Been Understood by the Voters at the Time of Passage

When interpreting the language of a constitutional amendment ratified by direct vote, this Court considers how the language would have been understood by the voters who adopted it. *State v. Fisk*, 2022-Ohio-4435, ¶ 6, citing *Centerville v. Knab*, 2020-Ohio-5219, ¶ 22, citing *Castleberry v. Evatt*, 147 Ohio St. 30, 33 (1946). In determining how the language would have been understood by voters, courts apply the same rules of construction that govern the interpretation of statutes, starting with the plain language of the provision. *Fisk* at ¶ 6, citing *State v. Jackson*, 2004-Ohio-3206, ¶ 14. The court then "consider[s] how the words and phrases would be understood by the voters in their normal and ordinary usage." *Fisk* at ¶ 6, citing *Knab* at ¶ 22, citing *District of Columbia v. Heller*, 554 U.S. 570, 576-577 (2008).

When the language of the amendment is not sufficiently clear, courts will consider the intent of the voters who approved it. In *State ex rel. Swetland v. Kinney*, 69 Ohio St.2d 567, 570 (1982), this Court explained:

> The purpose of the amendment, and the reasons for, and the history of its adoption, are pertinent in determining the meaning of the language used, for when the language is obscure or of doubtful meaning the court may, with propriety, recur to the history of the time when it was passed, to the attending circumstances at the time of adoption, to the cause, occasion or necessity therefor, to the imperfections to be removed or the mischief sought to be avoided and the remedy intended to be afforded.

Kinney, citing *Cleveland v. Bd. of Tax Appeals*, 153 Ohio St. 97, 103 (1950), overruled on other grounds, *Denison University v. Bd. of Tax Appeals*, 2 Ohio St.2d 17 (1965). Thus, if this Court finds the language of the HCFA to be insufficiently clear, it may consider the circumstances surrounding its adoption in discerning the public's understanding and intent.

When determining the purpose behind an amendment, looking beyond the provision's text, courts have considered websites containing information relevant to the proposed

amendment, the ballot language and official explanation prepared by the ballot board, the arguments the board prepared for and against the amendment, and the broader political context in which the amendment was adopted. *Knab*, at ¶¶ 12, 15, 30; *State ex rel. Toledo v. Cooper*, 97 Ohio St. 86 (1917). For example, this Court cited the proponent's website to determine what "victim" meant in the context of the national victim rights movement, which was part of the context of the amendment at the time it was adopted. *Knab*, at ¶ 12.

This Court can also consider newspapers and other media in discerning the context of ballot initiative campaigns. While there is reason for courts to be cautious about relying too heavily on these materials, "television ads, literature pieces, campaign websites, newspaper articles, editorials and the like" may provide indications of public opinion and can therefore assist with the interpretation of voter-led constitutional amendments. R. Patrick DeWine, Ohio *Constitutional Interpretation*, 86 Ohio St. L.J. (forthcoming 2025), manuscript at 23, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4986929. Indeed, as Justice DeWine has pointed out, "it's a pretty safe bet that most voters formed their impression of the proposal at least in part from the public debate and campaign that surrounded the proposal." *Id*. Such evidence is particularly probative where, as here, major media outlets, as well as both the proponents and opponents of the amendment, embraced a near-uniform understanding of its scope.

The Ohio Supreme Court should interpret the HCFA based on the plain language of the Amendment, which is clear and supports the view that H.B. 68 is an unconstitutional prohibition on the purchase and sale of health care. However, if the court remains in doubt, then it should look to the history of the HCFA's adoption and what it reveals about the intent of the voters who voted for it at the time of passage.

II. The Public Understood the HCFA's Expansive Language as a Sweeping Prohibition on Laws Restricting Health Care Decisions

I have unique insights into the public understanding of the HCFA at the time voters were considering it. I was deeply involved in the campaign opposing adoption of the Health Care Freedom Amendment in 2011, because I believed the language was so capacious that it would require courts to hold a wide array of health care regulations unconstitutional. I anticipated that this provision, if adopted, could have negative consequences in many areas. As part of my work opposing the HCFA, I co-authored with my colleague Maxwell Mehlman a report entitled *Bad Medicine: Unintended Consequences of Ohio's Issue 3*, setting forth our interpretation of the proposed constitutional amendment and its potential consequences.[2] This report was shared widely with the press during the ballot initiative campaign and extensively cited.

The history of the HCFA and the public discourse surrounding it indicate that voters intended to adopt a sweeping ban on legislation restricting individuals' health care decisions. Indeed, as an opponent of the HCFA during the campaign leading to its adoption, I repeatedly argued that the HCFA was so broadly worded that it would invalidate certain health care programs or regulations that the Ohio legislature might enact in the future. Proponents of the HCFA did not resist this interpretation. Thus, when voters adopted this amendment, they understood and intended that the amendment would provide broad protections for freedom of choice in health care and invalidate attempts to prohibit particular health care decisions, including laws such as H.B. 68.

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[2] Maxwell J. Mehlman is a Distinguished University Professor, the Arthur E. Petersilge Professor of Law, a Professor in the Department of Bioethics at the CWRU School of Medicine, and Co-Director of the Law-Medicine Center at Case Western Reserve University School of Law.

A. Beyond Merely Resisting the Affordable Care Act, Voters Understood the Health Care Freedom Amendment to Broadly Limit the State's Ability to Take Certain Health Care Choices off the Table

Both opponents and proponents acknowledged at the time of the ballot initiative campaign that the impetus for Issue 3 was the passage of the Affordable Care Act (ACA), and in particular the individual mandate requiring nearly all Americans to carry health insurance. Yet at the same time, nearly everyone understood that the HCFA, which is a state law, could not repeal or block the ACA, which is a federal law. If the HCFA had been purely symbolic and without actual legal effect, then it may not have been particularly troubling. But I was concerned about the HCFA's potential impact on other areas of health care—particularly in its sweeping prohibition on participation in a "health care system," contained in section A of the HCFA. Ohio Const., art. I, § 21(A). While section A was the primary focus of my concern, I also recognized that section C, protecting individuals' right to purchase or sell health care, extended beyond health insurance, creating an expansive new individual right to health care decision making.

Because I was particularly concerned about the potential breadth of the HCFA's limit on participation in health care systems, I worked to alert the public about the potential consequences if Issue 3 passed. For example, I argued publicly that if the HCFA passed, it would have far-reaching effects on the health care system and could impact numerous laws in Ohio, in part because of how broadly worded the HCFA's definition of the "health care system" is. The HCFA forbids "compel[ling], directly or indirectly, any person, employer, or health care provider to participate in a health care system," defining "health care system" as "any public or private entity or program whose function or purpose includes the management of, processing of, enrollment of individuals for, or payment for, in full or in part, health care services, health care data, or health care information for its participants." Ohio Const., art I, § 21(E)(2). This definition had the

potential to impact a huge number of Ohioans and their health care plans, as many companies and organizations enroll employees in some sort of health care plans or health insurance.

I also warned that the prohibition on compulsory participation in the health care system under section A could affect numerous laws that did not directly regulate insurance. For example, I argued that governmental programs such as workers compensation, R.C. 4123.35; COBRA, R.C. 3923.38; child support enforcement orders, R.C. 3119.30; school immunizations, R.C. 3313.671; and state university rules mandating that students carry health insurance all involve requirements to purchase health care or health insurance and meet the definition of "health care system." Ohio Const., art I, § 21(E)(2); *see* Evan Bevins, *Issue 3 sparks health care dialogue*, Marietta Times A4, A8 (Nov. 4, 2011).

In addition to the above-listed laws, I argued that other laws and agency rules that require the submission of health data or information to state and local entities would be affected by section A of the HCFA, as those reporting and monitoring requirements likewise compel participation in a "health care system" under the HCFA's capacious terms. These laws include disease tracking, R.C. 3701.23; monitoring "pill mills," R.C. 4729.75; and abortion reporting, R.C. 2919.171. *See* Bevins, *supra*. I also argued that the HCFA's section A might be understood to go further, invalidating court ordered rehabilitation, R.C. 2929.27; involuntary mental health commitment, R.C. 5122.05; and various health care-related tax levies, R.C. 513.01, 749.01, 5705.222. *See* Scott Recker, *What are you fighting for?*, Toledo City Paper 9 (Oct. 27, 2011).

As a result of my concerns about this broad language, my colleague and I urged voters and the media to take a closer look at the HCFA. During the weeks and months preceding the November 2011 election, we spoke to multiple media outlets and appeared at a press conference

to raise public awareness about the sweeping prohibitions on compelled participation in health care systems. At the same time, we—like many others—recognized that the HCFA's protections reached far beyond health insurance and public health and would grant individuals a far greater degree of freedom to make individual health care decisions.

All major newspapers in Ohio at the time, including the *Cleveland Plain Dealer*, *Columbus Dispatch*, *Cincinnati Enquirer*, *Youngstown Vindicator*, *Akron Beacon Journal*, *Toledo Blade*, *Canton Repository*, and *Athens Messenger & Athens News*, recommended voting no on Issue 3. *Major Ohio newspapers: Vote No on Issue 3*, Youngstown Vindicator (Nov. 2, 2011). For example, the *Columbus Dispatch* editorial board explained, "The measure is problematic because it is broadly written and thus could have consequences beyond those intended by its authors." *State Issue 3: Health-care amendment wouldn't override federal law, might cause problems*, Columbus Dispatch A14 (Oct. 14, 2011). The unified messaging across major Ohio newspapers demonstrates that voters at the time were exposed to consistent interpretations of the HCFA—namely, that it would have expansive implications for Ohio law, extending well beyond concerns about the Affordable Care Act to potentially impacting many other forms of health insurance and even public-health initiatives. At the same time, there was broad recognition that the HCFA would provide new protections for a wide array of health care decisions.

Indeed, proponents of Issue 3 admitted that its effects would reach far beyond the ACA. In fact, the author of the HCFA, Maurice Thompson, Executive Director of the 1851 Center for Constitutional Law, agreed that the analysis in *Bad Medicine* was "not far off." David J. Betras, *Extremist & Costly*, Youngstown Vindicator A17 (Oct. 2, 2011), citing David Eggert, *Issue 3's Reach is Too Wide, Foes Say*, Columbus Dispatch 1B (Sept. 2, 2011). Thompson likewise noted

that the HCFA's backers "have consistently maintained that the HCFA is about more than just the federal health law or individual mandates." David Eggert, *Issue 3 opponents say amendment would disrupt Ohio laws*, Columbus Dispatch (Sept. 1, 2011). For example, Thompson told the *Columbus Dispatch*, "Our goal is to address and preempt numerous government interventions, regulations, and friendly-sounding but lobbyist-driven misdeeds that make life in general, including health care and health insurance, more costly for Ohioans." *Id*. In other words, the HCFA applies to all types of health care, not just health insurance. In another interview, Thompson said, "If somebody in Ohio believes in alternative medicine, does not have health insurance, doesn't want health insurance, and wants to spend their money in a different way, they can argue that under the Ohio Constitution they should be free from mandatory participation in a health-care system." Jim Provance, *Proposed change to Ohio Constitution debated*, Toledo Blade (Oct. 10, 2011). Surely, if the HCFA provides such a limitation on the state's ability to interfere with individual health care decisions—going so far as to restrict the state from prohibiting "alternative medicine"—it must also, at the very least, protect a parent's decision to allow their children to receive accepted, evidence-based therapies such as puberty blockers and hormone therapy prescribed by a licensed medical professional.

An opinion piece published by supporters of the amendment just before the election in November 2011 described the HCFA's impact in similarly broad terms. Former U.S. Attorney General Ed Meese and his co-author Jack Painter, board member of the Ohio Liberty Council and Ohioans for Healthcare Freedom, which helped to advance the HCFA campaign, wrote that the amendment is "about freedom – the freedom of Ohioans and others to make some of the most important personal decisions they can make about their choice of health care and how to pay for it." Ed Meese & Jack Painter, *Ohio's Battle for Health Care Freedom*, Politico (Nov. 7, 2011),

https://www.politico.com/story/2011/11/ohios-battle-for-health-care-freedom-067727. Thus, while the insurance-related aspects of the HCFA were often mentioned in public discourse leading up to the election, its protection for "personal decisions" regarding "choice of health care" was often highlighted as well.

B. Voters Did Not Understand the HCFA's Exception for "Laws Calculated to Punish Wrongdoing in the Health Care Industry" to Create a Massive Loophole Allowing the Legislature to Restrict Individual Health Care Decisions

The State argues that H.B. 68 is constitutional under Section 21(D) of the HCFA because the medical care provisions at issue are "laws calculated to … punish wrongdoing in the health care industry," which are not protected by Section 21(B) and (C). Ohio Const., art. I, §§ 21(B), (C), (D). Indeed, according to the State's logic, the Ohio General Assembly can define "wrongdoing" however it chooses, encompassing any health care decisions it disfavors, and thereby exempt its legislation from the HCFA's prohibitions. Properly understood, then, this argument suggests that the HCFA was written so as to allow the Ohio legislature to nullify its effect by passing a law with a simple majority of both houses—which would render the HCFA's protections essentially meaningless and permit ordinary legislation to trump a constitutional provision, rather than vice versa.

During the Issue 3 campaign, I did not express a view on the precise meaning or limits of the "wrongdoing" exception, and the term is not defined in the HCFA. However, given the discourse surrounding the HCFA and in particular the shared understanding that its terms were broad and highly protective of individual health care decisions, it would have been illogical to suggest that the exception for laws "deter[ring] fraud" or "punish[ing] wrongdoing in the health care industry" granted the legislature the ability to completely undermine the law's sweeping

protections. If anything, the term appeared to refer narrowly to laws aimed at misconduct that is similar to fraud and that relates to the commercial ("industry") aspects of health care.

Additionally, the public discussion of Issue 3 rarely discussed the "wrongdoing" exception. The drafters and supporters of the HCFA never claimed that this exception would permit a broad range of regulations or allow the legislature to pass any law that it believed would address "wrongdoing." Indeed, at no point did Issue 3's proponents argue that the exception for "laws calculated to … punish wrongdoing in the health care industry" could validate laws that otherwise clearly fell within the HCFA's textual scope, or that it transferred to the General Assembly the authority to erase the amendment's protections by simply defining the concept of wrongdoing however it wished.

CONCLUSION

Voters were repeatedly told at the time of its adoption that the HCFA was broad and did not only apply to health insurance. Indeed, the proponents of the HCFA agreed that it would constitute a sweeping protection for all forms of health care, not just health insurance. This understanding—which was shared by opponents such as myself—was the same understanding that was shared with voters time and again through media reporting and op-eds. Contrary to the State's contentions in this case, Ohio voters clearly believed that the Amendment would provide expansive protections for their freedom to make individual health care decisions.

Respectfully submitted,

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Dated: December 9, 2025

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2025, the foregoing was electronically filed via the Court's e-filing system. I further certify that a copy of the foregoing was served via email on all counsel of record.

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