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Written Testimony in Support of HJR 203
February 7, 2018
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This testimony is in regard to two questions that have been raised about potential interpretations of HJR 203, the proposed HOPE amendment to the Oregon Constitution. Specifically, two questions have been posed:

- 1) whether this amendment would create a private right of action for individuals; and
- 2) how some of the key terms in the amendment would be interpreted.

In this memo, we have attempted to provide some guidance on how the courts may resolve these questions.

HJR 203 would amend the Oregon Constitution and add the following provision:

“It is the obligation of the state to ensure that every resident of Oregon has access to effective, medically appropriate and affordable health care as a fundamental right.”

1. Is there a Private Right of Action?

It is unlikely that this amendment could create a private right of action. The Oregon Supreme Court has been very clear on this issue. “If an implied private right of action for damages for governmental violations of [Article I, section 8](#), and other non-self-executing state constitutional provisions is to exist, it is appropriate that it come from the legislature, not by action of this court.” [Hunter v. City of Eugene](#), 309 Or. 298 (1992). In other words, without further enacting legislation, an individual would not be able to sue the state for damages.

This is not to say that an individual or group would be wholly without a remedy. Rather, a plaintiff could file a declaratory judgment action against the State. That action would seek to have a court declare that the State has failed to comply with the Oregon constitution. Under the right circumstances, a court could order the State to comply with these requirements. As a result,

although there would be no private right of action, a plaintiff could seek to hold the State accountable for future compliance. [Pendleton School Dist. 16R v. State](#), 345 Or 596 (2009).

2. How would this current language be interpreted?

Because the voters will have adopted this amendment through the initiative process, the courts will be charged with determining the intent of the voters in adopting it. [Ecumenical Ministries v. Oregon State Lottery Comm.](#), 318 Or. 551, 559, 871 P.2d 106 (1994). “ ‘The best evidence of the voters' intent is the text of the provision itself. The context of the language of the ballot measure may also be considered; however, if the intent is clear based on the text and context of the constitutional provision, the court does not look further.’ ” [Pendleton School Dist.](#), *supra*.

The first operative, and perhaps most important term in this proposed Amendment is “access.” The Amendment requires the State to ensure every citizen has “access” to health care that meets three requirements: affordable, effective and medically appropriate. Normally, the plain language of the terms will control. The most appropriate of the definition of the term “access” is “freedom or ability to obtain or make use of something.”¹ Thus, the State must give residents *the ability to obtain* effective, medically appropriate and affordable health care. A court may also simply conclude that residents must be provided “a way of approaching” the described healthcare.

In regard to the type of healthcare that residents must have access to, none of these terms will be easily defined. For instance, “affordable” health care will be interpreted as having “a cost that is not too high”-- but what is “too high” will be difficult to define.

Similarly, “medically appropriate” has been defined by the courts as “in the patient's best medical interest in light of his medical condition. [Oregon State Hosp. v. Butts](#), 358 Or. 49 (2015); [United States v. Ruiz-Gaxiola](#), 623 F.3d 684, 687–88 (9th Cir.2010). Whether the health care that residents have access to is “medically appropriate” would be a question for a patient and her provider.

Finally, “effective” health care is a very vague term. The term “effective” is defined as “producing a decided, decisive, or desired [effect](#).” The application of this term in the context of health care will likely be so vague that the courts will have difficulty applying it in a challenge to whether the State has provided access to this “effective” healthcare. Ultimately, a court will be unlikely to inquire as to whether any particular health care is effective or medically appropriate. Instead, access to an appropriately licensed health care provider will likely satisfy these

1 The dictionary definition of the term “access” is:

a : permission, liberty, or ability to enter, approach, or pass to and from a place or to approach or communicate with a person or thing

b : freedom or ability to obtain or make use of something : paying for *access* to the Internet

c : a way or means of entering or approaching

Webster's Third New International Dictionary (1993).

requirements. The health care that the provider directs would then have to have a cost to the resident that is not “too high.”

Ultimately, the legislature’s implementation of these terms will be given substantial deference. In other words, where the legislature has defined these terms in a reasonable manner or asserted reasonable methods of evaluating compliance, a court will rely on that definition. As a result, if the legislature affirmed that access to “effective, affordable and medically appropriate” health care reflected the current system of charity care, Urgent Care, Emergency Department access, Oregon Health Plan, and public and private insurance, that would be given substantial deference by a court.