Docket No. 24-3770

In the

United States Court of Appeals

For the

Ninth Circuit

OREGON ASSOCIATION OF HOSPITALS AND HEALTH SYSTEMS,

Plaintiff-Appellant,

v.

STATE OF OREGON, OREGON HEALTH AUTHORITY
and DOCTOR SEJAL HATHI,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the District of Oregon,
No. 3:22-cv-01486-SI · Honorable Michael H. Simon

AMICI CURIAE BRIEF OF BASIC RIGHTS OREGON, COMMUNITY CATALYST, COMPASSION & CHOICES, END OF LIFE WASHINGTON, OREGON NURSES ASSOCIATION, OREGON TRIAL LAWYERS ASSOCIATION, AND SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 49 IN SUPPORT OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici are non-profit organizations and labor unions with no parent corporations and do not issue stocks

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INTRODUCTION

The District Court correctly held that Oregon's Health Care Market Oversight Program (HCMO) does not violate the United States Constitution.[1] While amici do not dispute the District Court's thorough analysis, they respectfully emphasize that the decision did not fully address the conditions that necessitated HCMO's creation or the substantial benefits it has already delivered to Oregonians. Amici submit this brief to highlight the broad and critical range of health care interests protected by HCMO. These interests underscore the urgent need for a robust regulatory framework and affirm the reasonableness of HCMO's authority. Although Appellants seek this Court's intervention to safeguard their own economic interests, amici contend that the countervailing public interests advanced by HCMO—the promotion of accessible, high-quality, affordable, and equitable health care—are at least as significant, if not more so. For these reasons, amici respectfully urge the Court to uphold the constitutionality of HCMO, recognizing that the program serves an essential role in promoting public welfare and addressing pressing health care challenges in Oregon.

[1] No counsel for a party authored this brief in whole or in part; and no person or entity, other than amici and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Movants endeavored to obtain consent from all parties prior to the filing of this motion. Counsel for Defendants-Appellees consents to movant's appearance and Counsel for Plaintiff-Appellant takes no position on the matter but reserves the right to file a response to the motion when it is received.

STATEMENTS OF INTEREST

Amici are a coalition of nonprofit organizations, interest groups and labor unions dedicated to the maintenance and promotion of accessible, high-quality, affordable, and equitable health care.

1. Basic Rights Oregon is a non-profit organization dedicated to ensuring that all lesbian, gay, bisexual, transgender, queer, two-spirit, intersex, and asexual Oregonians experience equality by building a broad and inclusive politically powerful movement, shifting public opinion, and achieving policy victories. Basic Rights Oregon works towards a state in which LGBTQIA2S+ Oregonians live free from discrimination and are treated with dignity and respect in every community in our state. Basic Rights Oregon supports HCMO because ensuring equitable access to health care for LGBTQIA2S+ Oregonians is a part of the organization's mission and HCMO's oversight of health system transactions is important to assure that the already limited resources for LGBTQIA2S+ patients and marginalized individuals are not negatively impacted.

2. Community Catalyst is a leading non-profit national health advocacy organization dedicated to advancing a movement for health equity and justice. Community Catalyst partners with local, state, and national advocates to leverage and build power so all people can influence decisions that affect their health. Community Catalyst is concerned about increasing concentration in health care

markets, which often leads to higher prices, profit-driven care decisions, fewer provider network options, and less access to lower-margin services like maternity care. All too frequently, this burden falls disproportionately on communities that have been historically underserved by our health system, such as Black, Latino, and low-income communities. Community Catalyst supports HCMO because of its mission to promote health equity and ensure accessible, affordable, and high-quality health care for all Oregonians.

3. Compassion & Choices is a non-profit corporation whose mission is to improve care, expand options, and empower everyone to chart their end-of-life journey. Its services include educating the public about the importance of documenting their end-of-life values and priorities, empowering individuals to control their end-of-life care by providing information about the full range of available options at the end of life, advocating for expanded end-of-life options and improved medical practices that prioritize patients, and defending existing end-of-life options from efforts to restrict access. Compassion & Choices supports HCMO due to its commitment to ensuring the continued availability of all lawful end-of-life options to all Oregonians.

4. End of Life Washington ("EOLWA") is a non-profit organization in Washington State that provides direct service, community education, and advocacy to ensure that Washington residents have access to a full range of end-of-life

options, including excellent palliative care and, for those who qualify and choose it, medical aid in dying. Founded in 1988, EOLWA believes that a peaceful death should be within everyone's reach and that no one should face intolerable suffering at the end of life. In 2008, EOLWA drafted and sponsored Initiative 1000, which was passed by Washington voters and became in 2009 the Washington Death with Dignity Act, RCW 70.245, making Washington the second State after Oregon to adopt medical aid-in-dying legislation. Washington has very similar issues to Oregon concerning possible mergers of health care organizations and possible limitations on the right to medical aid in dying resulting from mergers. Additionally, many residents in Southwest Washington seek medical care in Oregon and are thus affected by health care organizations' mergers.

5. The Oregon Nurses Association (ONA) is a professional association and labor union representing over 20,000 nurses and health care professionals. ONA members work in urban and rural hospitals, clinics, school-based health centers, home health, and county health departments across Oregon. ONA's advocacy work centers on ensuring that our members are empowered to provide highly-skilled professional care, and patients are able to access affordable, high-quality health care. ONA supports the HCMO program because mergers and acquisitions are correlated with higher prices and no better care for patients, and lower wages for nurses and other health care professionals.

6. The Oregon Trial Lawyers Association (OTLA) is a statewide organization committed to the principles of trial by jury and a fair and efficient civil justice system. OTLA consists of around 1,400 attorneys and other legal professionals who represent plaintiffs or claimants in civil court. For over 50 years, OTLA and its members have advocated for the rights of consumers by securing access to quality health care, promoting safer products, safeguarding the environment, and eliminating discrimination in public places, workplaces, and schools. OTLA promotes open access to the courts and the civil justice rights of all Oregonians. Accordingly, OTLA does not seek to appear in this case in order to present a private interest of its own but rather to present a position as to the correct rule of law that in OTLA's view would assist the private interests of its members' clients. OTLA supports HCMO because Oregonians—and in particular, those who are injured, vulnerable, or otherwise marginalized—deserve access to affordable and quality health care.

7. Service Employees International Union (SEIU) Local 49 is a labor union in Oregon representing more than 15,000 health care and building service workers, including certified nursing assistants, dietary aides, housekeepers, janitors, security officers, and airport workers. Its membership is diverse -- the majority are women; many are people of color, single parents, immigrants, and

non-native English speakers. Despite the fact that many of these individuals work in health care, many struggle to afford the care they need to keep themselves and their families healthy. SEIU supports HCMO because it firmly believes that all of its members should be able to afford high-quality health care in their communities, and any health care deal taking place in Oregon should benefit patients first.

ARGUMENT

I. HCMO PROTECTS THE RIGHTS AND INTERESTS OF OREGONIANS SEEKING ACCESSIBLE, QUALITY, AFFORDABLE, AND EQUITABLE HEALTH CARE

The principle that states have an interest in preserving public health is not controversial. It is a core tenet of federalism that "the States [have] great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Gonzales v. Oregon*, 546 U.S. 243 (2006) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)) (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)). Not only do states have the authority to legislate around public health, they "undoubtedly [have] a compelling interest in . . . protecting the health of [their] citizens." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020) (Kavanaugh, B.,

Dissenting).[2] Even further, Oregon's responsibility to affirmatively protect the health of its citizens is constitutionally mandated. Or. Const. art. I, § 47(1) ("It is the obligation of the state to ensure that every resident of Oregon has access to cost-effective, clinically appropriate and affordable health care as a fundamental right.").

On the basis of this responsibility, Oregon established HCMO with the express aim of achieving "universal access to an adequate level of high quality health care at an affordable cost." Or. Rev. Stat. § 415.501(1); Or. Rev. Stat. § 414.018(1). Oregon also recognizes that the availability of high-quality, affordable health care fosters numerous public benefits beyond the health of its residents, including employment growth and economic development. *Id.* at (2)(c). As a consequence of this effort and others, Oregon continues to be a leader in the provision of public health.

HCMO is a vital and effective measure to protect the health of Oregon's citizens. In the short period that the program has been operational, it has already demonstrated its impact by placing conditions on numerous material change

[2] The comparison of the state's compelling interest in the preservation of its health care versus the "less strict" vagueness test applied for economic regulation is instructive. *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.,* 455 U.S. 489, 498 (1982). In this sense, the benefit health care providers accrue from being able to engage in transactions without pinpoint clarity cannot possibly supersede the benefit the benefit Oregonians accrue from access to affordable, high-quality health care.

transactions. Those conditions, put in place after opportunity for community input and monitored by Appellees' continuing oversight, demonstrate the program's important role in safeguarding Oregon patients from increases in cost and reduced access to quality health care.

A. HCMO protects the ability of Oregonians to access health care

HCMO serves as a vital and effective tool for ensuring access to health care across Oregon. Without robust oversight of material change transactions, health care markets have repeatedly exhibited significant deficiencies in providing rural, end-of-life, gender-affirming, and reproductive care. HCMO has already demonstrated its value in addressing and mitigating the adverse impacts of certain transactions on these essential health care services. While not all material change transactions inherently restrict access, the documented potential for such harm underscores the critical need for Oregon's proactive regulatory framework. By implementing HCMO, the State has taken a necessary step to protect and promote equitable health care access for all Oregonians.

1. HCMO is necessary to protect the ability of Oregonians to access rural health care

Oregon has long struggled with ensuring access to rural health care. Recent reporting indicates that 65% of rural Oregon has been classified as an Unmet Need Area (compared to 8% of urban Oregon). Oregon Office of Rural Health, *Oregon Areas of Unmet Healthcare Needs Report* 4 (Sept. 2024). In many of these rural

service areas, the lack of health access is severe. For instance, there are twenty primary care service areas with no mental health providers, twenty-four with no dentists, and nine with no primary care providers whatsoever. *Id.* at 5. As such, both the attraction of new providers and maintenance of the existing stock of providers is of utmost importance.

Insufficiently regulated material change transactions can be a significant factor in the lack of access to rural health care. Affiliations, for example, have been shown to reduce access to on-site diagnostic imaging technologies, obstetric and primary care services, and outpatient nonemergency visits in rural hospitals. Claire E. O'Hanlon, et al., *Access, Quality, and Financial Performance of Rural Hospitals Following Health System Affiliation,* 38 Health Affairs 12 (2019). Even when assurances of continued access are provided following health care mergers and acquisitions in rural markets, evidence indicates that these commitments are frequently revoked shortly thereafter. Dylan Scott, *Community hospitals are facing an impossible dilemma*, VOX (Nov. 28, 2022), https://www.vox.com/policy-and-politics/2022/11/28/23424682/us-health-care-rural-hospital-closures-merger. Consequently, Oregon's proactive efforts to prevent rural health care deserts is a logical extension of its constitutional mandate to ensure access to health care.

HCMO has been instrumental in promoting the continued availability of health care services in rural Oregon. Concerned by the market dominance of the

entities, HMCO conditioned St. Charles Health System's acquisition of the Neuromusculoskeletal Center of the Cascades on numerous provisions aimed at maintaining access to care in the underserved Central Oregon region, which includes several rural communities like Prineville and Sisters. *In the Matter of the Proposed Material Change Transaction of St. Charles Health System, Inc. and Neuromusculoskeletal Center of the Cascades, P.C.,* Transaction ID: 35, (Oct. 24, 2024) (order), https://www.oregon.gov/oha/HPA/HP/ HCMOPageDocs/035-Order.pdf. Many of these conditions focus on restricting St. Charles Health System's ability to impose anti-competitive employment practices on its new hires, such as non-compete agreements and limitations on admitting and surgical privileges. *Id*. If left unregulated, these practices could result in reductions to the number of available health care providers in the region, exacerbating existing shortages. Conditions such as these highlight the ongoing necessity for continued regulatory oversight by the HMCO.

2. HCMO is necessary to protect the ability of Oregonians to access end-of-life care

Oregon has long been considered a national leader in delivering and pioneering end-of-life care. Not only is Oregon the national leader in Medicare beneficiary access to hospice and palliative care, National Alliance for Care at Home, *Hospice Facts & Figures* (2024); Center to Advance Palliative Care, *America's Readiness to Meet the Needs of People with Serious Illness* (2024),

Oregon is the first state in the nation to have authorized medical aid in dying, a regulated process by which terminally-ill patients with six months or less to live can self-ingest doctor-prescribed medication to hasten their death. Compassion & Choices, *An Introduction to Medical Aid in Dying – Oregon*, https://compassionandchoices.org/resource/an-introduction-to-medical-aid-in-dying-oregon (last accessed Dec. 6, 2024). Despite its best intentions and record of innovation, Oregon must continue to take proactive measures to ensure broad access to end-of-life care.

Allowing health care mergers and acquisitions to proceed unchecked can result in a significant loss of end-of-life health care options. Oregon permits providers to opt out of medical aid in dying, Or. Rev. Stat. §127.88(4), and at least 30-40% of acute care beds are controlled by systems that do opt out of such care. AdventistHealth, *End of Life Option Act,* https://www.adventisthealth.org/patient-resources/end-of-life-option-act (last accessed Jan. 16, 2025); Tess Solomon, et al., *Bigger and Bigger: The Growth of Catholic Health Systems*, Community Catalyst (Oct. 2020). And it is not just access to medical aid in dying that is restricted. Some providers have policies whereby they refuse to honor certain patients' documented preferences to forgo assisted nutrition or hydration, while other providers may refuse to honor a patient's clearly documented desire to remove a

feeding tube or other form of life support. U.S. Conf. of Catholic Bishops, *Ethical and Religious Directives for Catholic Healthcare Services* 23-24 (2016).

HMCO has already been successful in influencing the availability of end-of-life care in Oregon. When considering the approval of the affiliation between Mid-Columbia Medical Center (MCMC) and Adventist Health System/West (Adventist), HCMO conditioned the transaction on the continued provision of "end of life services, including comfort care and lethal medication under Oregon's Death with Dignity Law" for a ten-year duration. *In the Matter of the Proposed Material Change Transaction of Adventist Health System/West and Mid-Columbia Medical Center,* Transaction ID: 006 (April 14, 2023) (order), https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/006-Adventist-MCMC-Final-Preliminary-Review-Order.pdf. HCMO also conditioned the Pennant Group's acquisition of a number of home health and hospice agencies on requiring interested parties be provided "a list of all home health or hospice agencies serving the geographic area to ensure . . . informed choice." *In the Matter of the Proposed Material Change Transaction of Mount Hood Healthcare, LLC and Avamere Home Health Care, LLC,* Transaction ID: 029, (Oct. 14, 2024) (order), https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/029-Order.pdf. This ability to regulate material change transactions ensures the continued availability of end-of-life health care, demonstrating the necessity and effectiveness of HCMO.

3. HCMO promotes the ability of Oregonians to access reproductive health care

Oregon recognizes that access to high-quality reproductive health care is essential. In 2017, the Oregon Legislature passed the Reproductive Health Equity Act (RHEA), affirming the State's commitment to expanding access to critical reproductive services. Oregon Health Authority, *Reproductive Health Equity Act,* https://www.oregon.gov/oha/ph/healthypeoplefamilies/reproductivesexualhealth/pages/reproductive-health-equity-act.aspx (last accessed Dec. 6, 2024). The RHEA enhances coverage for groups that have historically encountered barriers to care, including DACA recipients, lawful permanent residents, and transgender and gender nonconforming individuals. *Id*. The law ensures that insured individuals receive reproductive health services with no out-of-pocket costs, including co-pays or deductibles. Additionally, the RHEA prohibits discrimination in the delivery of reproductive health services and mandates that insurers cover abortion services. *Id*. However, despite these efforts, significant disparities remain in areas such as unintended pregnancy rates, maternal and birth outcomes, sexually transmitted infections (STIs), and cervical cancer. Oregon Health Authority, *HB 3391*, *Reproductive Health Equity Act: Report to the Legislature* 1 (Sept. 2018).

Oregon's progress in ensuring access to reproductive health care risks being undermined by insufficient regulation of material change transactions. The RHEA includes a "legacy" exemption, which allows certain "grandfathered-in" health care

plans to bypass abortion coverage requirements. Or. Rev. Stat. § 743A.067(7)(e). This exemption creates a particularly fragile environment for access to reproductive health care. It is both self-evident and empirically supported that when an entity restricting access to certain reproductive health care acquires a provider that offers such care, access to reproductive health care is likely to diminish. *See* Elaine L. Hill et al., *Reproductive Health Care in Catholic-Owned Hospitals*, 65 Journal of Health Economics 48 (2019).

HCMO has already used its authority to ensure access to essential reproductive health care. When considering the approval of an affiliation between MCMC and Adventist, HCMO conditioned the affiliation on the maintenance of "reproductive health care services, including but not limited to induced abortion, birth control methods (including emergency contraception), sterilization, fertility services, and testing for pregnancy and sexually transmitted infections" for a duration of ten years. *In the Matter of the Proposed Material Change Transaction of Adventist Health System/West and Mid-Columbia Medical Center* at 7. This ability to ensure the continuation of these reproductive health care services demonstrates the necessity of HCMO's ample regulatory authority.

4. HCMO is necessary to protect the ability of Oregonians to access gender-affirming health care

Oregon recognizes and attempts to address the health care needs of its transgender population. While the state ranks highly at the national level in terms

of supporting gender-affirming care, the lived experiences of transgender individuals in Oregon reveal significant gaps in health care access. Jonathan Garcia & Richard A. Crosby, *Social Determinants of Discrimination and Access to Health Care Among Transgender Women in Oregon,* 5 Transgender Health 4 (2020). In response to these disparities, Oregon enacted House Bill 2002 in 2023, which prohibits health insurers from denying coverage for medically necessary gender-affirming treatments that are prescribed in accordance with established standards of care. Oregon Division of Financial Regulation, *Gender-Affirming Care,* https://dfr.oregon.gov/insure/health/pages/gender-affirming-care.aspx (last accessed, Dec. 6, 2024). The law further mandates that insurers ensure gender-affirming health care is available within their provider networks. Or. Rev. Stat. § 414.769.

However, Oregon's efforts to ensure network adequacy for gender-affirming care may be undermined by unregulated material change transactions. The current scarcity of gender-affirming care[3] in Oregon could be even further exacerbated by proposed revisions to existing provider policies. Brian Fraga, *US bishops vote to*

[3] "Oregonians face several barriers to [gender-affirming care]: access is much more limited in rural areas; gender affirming surgery is offered in Portland, but waiting lists can be as long as three years; and electrolysis is required before bottom surgery, but few electrolysis providers in Oregon accept health insurance reimbursement." Tao Li, et al., *Oregon's Healthcare Workforce Assessment* 105, Oregon State University College of Health (January, 2025).

revise health care directives on transgender patients, National Catholic Reporter (June 16, 2023). Without the power to effectively regulate material change transactions, the acquisition of a facility that currently provides gender-affirming care by a provider with a policy that explicitly excludes such care could result in significant loss of access to these services.

HMCO has already been successful in influencing the availability of gender-affirming care in Oregon. When considering the approval of an affiliation between MCMC and Adventist, HCMO conditioned the transaction on the continued provision of "gender-affirming care, including but not limited to counseling and hormone therapy" for a 10-year duration. *In the Matter of the Proposed Material Change Transaction of Adventist Health System/West and Mid-Columbia Medical Center* at 7. This ability to ensure the continuation of gender-affirming health care demonstrates the necessity and effectiveness of HCMO.

B. HCMO protects the quality of Oregonians' health care

Oregon has made significant strides in improving the quality of its health care system through innovative policies and reforms. One of its most notable efforts is the strategy of adopting value-based payment models, which incentivize providers to prioritize patient outcomes over service volume. Oregon Health Authority, *Value-Based Payment*, https://www.oregon.gov/oha/hpa/dsi-tc/pages/value-based-payment.aspx (last accessed Dec. 6, 2024). Oregon also

pioneered the development of Coordinated Care Organizations (CCOs), which integrate physical, mental, and dental health services to streamline care delivery and improve outcomes. Oregon Health Authority, *Coordinated Care: the Oregon Difference*, https://www.oregon.gov/oha/HPA/Pages/CCOs-Oregon.aspx (last accessed Dec. 6, 2024). The state has also implemented rigorous data collection and public reporting systems to enhance transparency and accountability in health care performance. Kusuma Madamala et al., *Oregon's Approach To Demonstrating The Value Of A Modern Public Health System Through Accountability Metrics,* 43 Health Affairs 6 (June 2024). These initiatives reflect Oregon's commitment to delivering high-quality health care to its residents.

Inadequately regulated material change transactions risk undermining the progress Oregon has made in delivering high-quality health care. In the hospital setting, there is a direct correlation between adequate staffing levels and health care quality. Jack Needleman et al., *Nurse-Staffing Levels and the Quality of Care in Hospitals,* 346 New England Journal of Med. 1715 (May 30, 2002). Meanwhile, health care consolidation can increase staff rationing, suppress wages, and reduce the satisfaction of employees. Amy Phillips, *The consequences of U.S. hospital consolidation on local economies, healthcare providers, and patients*, Equitable Growth (Nov. 15, 2023). There is also a positive correlation between quality of care and improved staff engagement and employee pay. Gillian Janes et al., *The*

Association Between Health Care Staff Engagement and Patient Safety Outcomes: A Systematic Review and Meta-Analysis, 17 Journal of Patient Safety 207 (Jan. 7, 2021); Enrique Lopezlira & Ken Jacobs, *Proposed Health Care Minimum Wage Increase: what it would mean for workers, patients, and industry,* UC Berkeley Labor Center (April 2023). Further, studies have shown that wages for nurses, pharmacy workers, and low-skilled workers tend to decrease following mergers in concentrated hospital markets. Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals,* American Economic Review vol. 111, no. 2, (February 2021).[4]

HCMO has demonstrated its capacity to protect health care quality in several ways. For example, HCMO conditioned a material change transaction on the continued reporting of quality metrics. *In the Matter of the Proposed Material Change Transaction of Amazon.com, Inc. and 1Life Healthcare, Inc.* Transaction ID: 005, (Feb. 7, 2023) (order), https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/2023-02-07-005-Amazon-OneMedical-Order.pdf. Another transaction was conditioned on various assurances that physicians, not private investors, will have decision making authority over medical matters. *In the Matter of the Proposed Material Change Transaction of Agility Podiatry MSO,*

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[4] HCMO has yet to issue conditions that directly address workforce and its correlation to the quality of patient care. Amici encourage HCMO to consider these topics when evaluating conditions on future transactions.

KeiperSpine, and Spine Surgery Center of Eugene, Transaction ID:017, (Mar. 18, 2024) (order), https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/017-Agility-Keiper-order.pdf. This ability for HCMO to safeguard against reduction in health care quality demonstrates the need for HCMO's ample regulatory mandate.

C. HCMO protects the affordability of Oregonians' health care

Appellees' commitment to the creation and preservation of affordable health care is a matter of constitutional mandate. In 2022, Oregonians passed a first-in-the nation constitutional amendment explaining that "it is the obligation of the state to ensure that every resident of Oregon has access to cost-effective, clinically appropriate and affordable health care as a fundamental right." Or. Const. art. I, § 47. Oregon uses its Health Care Cost Growth Target program to "promote a predictable and sustainable rate of growth for total health expenditures" and to limit cost growth throughout the state. Or. Rev. Stat. § 442.386. Despite these efforts, costs continue to grow above the state's projected target. Oregon Health Authority, *2024 Sustainable Health Care Cost Growth Target Annual Report,* (Aug. 1, 2024); www.oregon.gov/oha/HPA/HP/Cost%20Growth%20Target%20documents/2024Oregon-Cost-Growth-Target-Annual-Report.pdf. And the cost of insurance continues to skyrocket alongside it. Jake Thomas, *Oregon health insurance average rates poised to jump by as much as 16%*, The Lund Report (Sept. 5, 2024), https://www.thelundreport.org/content/oregon-health-insurance-

average-rates-poised-jump-much-16 (last accessed Dec. 9, 2024). In this context, Oregon's use of HCMO's regulatory authority to curb the escalation of costs becomes an even more crucial tool in fulfilling its mandate to ensure affordable health care.

Unregulated material change transactions can significantly increase the cost of health care for patients. Decades of research have shown that consolidation among health care entities is generally associated with higher prices. Jodi L. Liu et al. *Environmental Scan on Consolidation Trends and Impacts in Health Care Markets,* RAND (Sep 30, 2022). For example, one study found that prices at hospitals in highly concentrated markets can be up to twelve percent higher than those in markets with four or more rivals. Zack Cooper et al., *The Price Ain't Right? Hospital Prices and Health Spending on the Privately Insured.*134 Quarterly Journal of Economics 51 (Feb. 2019). Procedures at system-affiliated hospitals can be significantly more expensive than at independent hospitals. One study showed the median price for a shoulder arthroscopy was $1,789 higher at systems-affiliated hospitals than independent hospitals ($4,432 vs $2,643). Cody Lendon Mullens et al., *Evaluation of Prices for Surgical Procedures Within and Outside Hospital Networks in the US,* 2023 JAMA Netw Open. 6, (Feb. 13, 2023). Hospital acquisitions of physician groups can further inflate costs by adding facility fees and increasing referrals to expensive hospital-based services. United

States Government Accountability Office, *Increasing Hospital-Physician Consolidation Highlights Need for Payment Reform*, Medicare Report to Congressional Requesters (Dec. 2015); John Hargraves & Julie Reiff, *Shifting Care from Office to Outpatient Settings: Services are Increasingly Performed in Outpatient Settings with Higher Prices*, Health Care Cost Institute (Apr. 2, 2019), https://healthcostinstitute.org/hcci-originals-dropdown/all-hcci-reports/shifting-care-office-to-outpatient. From 2012 to 2024, the share of physicians employed by a hospital or health system increased from about 26 percent to over 55 percent. Physicians Advocacy Institute, "Updated Report: Hospital and Corporate Acquisition of Physician Practices and Physician Employment, 2019 – 2023, April 2024, 5 14, https://www.physiciansadvocacyinstitute.org/Portals/0/assets/docs/PAI-Research/PAIAvalere%20Physician%20Employment%20Trends%20Study%202019-2023%20Final.pdf?ver=uGHF46u1GSeZgYXMKFyYvw%3d%3d.

Hospital market concentration is also associated with medical debt. One recent study found that counties with increasing hospital market concentration from 2012-2022 had larger increases in the prevalence of medical debt. Noah Johnson, et al., *Is Hospital Market Concentration Related to Medical Debt?,* Urban Institute (Oct. 16, 2024). At the county level, a higher share of the population with medical debt is associated with more days of poor physical and mental health, more years of life lost, and higher mortality rates. Xuesong Han et al., *Associations*

of Medical Debt with Health Status, Premature Death, and Mortality in the US. 2024 JAMA Netw Open. 7:3 (Mar. 4, 2024).

Rising health care prices depress wages, reduce payrolls, and increase unemployment by raising employer-sponsored insurance premiums. Zarek-Brot Goldberg et al., *Who Pays for Rising Health Care Prices? Evidence from Hospital Mergers*, National Bureau of Economic Research (working paper), http://www.nber.org/papers/w32613 (last accessed Dec. 9, 2024). Programs like HCMO have a unique ability to address these issues by imposing conditions that maintain existing affordable health care.

HCMO has demonstrated its effectiveness in monitoring and redressing possible threats to the affordability of health care in Oregon. In one instance, a material change transaction concerning the joinder of Elevance Health and Clayton, Dubilier & Rice, LLC was conditioned on a requirement that it must be notified of "[a]ny and all expected impact of changes on costs of health care for consumers and payers, access to health care services, quality of health care, and health equity in Oregon" for a period of seven years. *In the Matter of the Proposed Material Change Transaction of Elevance Health, Inc. and Clayton, Dubilier & Rice, LLC*, Transaction ID: 024 (Aug 2, 2024) (order), https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/024-Elevance-CD%26R-Preliminary-Review-Order.pdf. In a separate material change transaction, HCMO conditioned

PeaceHealth's acquisition of Northwest Surgical Specialties on a guarantee to "not charge facility fees for any services rendered by former NWSS physicians for which no facility fees are currently applied." *In the Matter of the Proposed Material Change Transaction of PeaceHealth and Northwest Surgical Specialists, LLP*, Transaction ID: 0012 (Aug. 16, 2024) (order), https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/20230816-NWSS-Peacehealth-HCMO-Order.pdf. The HCMO program has further attempted to control health care costs by barring anti-competitive contracting practices and requiring reporting on contracts in effect between private equity-owned provider entities and third parties (including hospitals, payers, and Coordinated Care Organizations). *In the Matter of the Proposed Material Change Transaction of Agility Podiatry* at 4; *In the Matter of the Proposed Material Change Transaction of Radia Inc., P.S. and Medford Radiological Group, PC*, Transaction ID: 007 (Aug. 30, 2024) (modified order), https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/007-Radia-MRG-Preliminary-Review-Order-Modified-240830.pdf. These actions exemplify HCMO's approach to safeguarding health care affordability in Oregon and justify its ample regulatory authority.

D. HCMO advances health equity

The Oregon Health Authority has committed to eliminating inequities in health care by the year 2030. Oregon Health Authority, *Oregon Health Authority*

Strategic Plan (2024-2027), https://www.oregon.gov/oha/pages/strategic-plan.aspx (last accessed Jan. 13, 2025). Despite the State's sincere efforts, there remains significant work to be done to properly address existing inequities. For example, a Black person in Oregon under the age of 75 is twice as likely to die from treatable causes than a white person in Oregon. David C. Radley et al., *Advancing Racial Equity in U.S. Health Care*: *The Commonwealth Fund 2024 State Health Disparities Report*, The Commonwealth Fund (Apr. 2024). Black, Hispanic or American Indian and Alaska Native people in Oregon are also at least twice as likely to forego needed health care as white people. *Id*. While Oregon's efforts to address these issues are commendable, it must be armed with the proper tools to actually make good on its commitments.

Unregulated material change transactions heighten the risk of inequitable health care delivery. As described *supra*, certain unregulated material change transactions will result in a complete denial of gender-affirming health care, clearly yielding an inequitable outcome. Beyond blatant refusals of care such as those described *supra*, increased consolidation within hospital markets is correlated with decreased admissions of Medicaid patients. Sunita Desai, et al., *Hospital concentration and low-income populations: Evidence from New York State Medicaid*, 2023 J Health Econ. 90 (May 2023). Increased access to Medicaid services is correlated with a reduction in racial disparities in health coverage,

access, and outcomes. Jesse Cross-Call, *Medicaid Expansion Has Helped Narrow Racial Disparities in Health Coverage and Access to Care*, Center on Budget and Policy Priorities (Oct. 21, 2020), https://www.cbpp.org/sites/default/files/atoms/files/10-21-20health2.pdf (last accessed Dec. 9, 2024).

HCMO also advances health equity. When considering the approval of the affiliation between MCMC and Adventist, HCMO conditioned the transaction on continued "participation in all public health insurance programs (or any successor programs providing similar benefits to similar populations) in which MCMC is a participant as of the closing date of the transaction," in addition to requiring the preservation of gender-affirming care. *In the Matter of the Proposed Material Change Transaction of Adventist Health System/West* at *7.* In another order, HCMO conditioned the acquisition of KeiperSpine P.C. by Agility Podiatry on its willingness to continue serving Medicare patients. *In the Matter of the Proposed Material Change Transaction of Agility Podiatry MSO* at *4*. Another transaction between home health and hospice agencies was conditioned on continued servicing of Medicaid patients, regardless of their status as dually covered by Medicare and Medicaid. *In the Matter of the Proposed Material Change Transaction of Willow Creek Healthcare, LLC, Avamere Home Health Care, LLC and Signature Hospice Medford, LLC*, Transaction ID: 033, (Oct. 14, 2024) (order), https://www.oregon.gov/oha/HPA/ HP/HCMOPageDocs/033-Pennant-Signature-

Medford-Preliminary-Review-Order-Proposed.pdf. It is difficult to imagine OHA achieving its goal to eliminate health inequities by 2030 without HCMO's ample authority to regulate material change transactions.

CONCLUSION

Health care in the United States consists of a fragmented system of providers and insurers, each driven by diverse economic, social, and material considerations. Any government seeking to improve such a balkanized system must do so with ample authority and sufficient definitional leeway. Oregon's Health Care Market Oversight program serves as a vital regulatory tool that promotes equitable access to high-quality, affordable health care for its residents. By addressing the risks of unregulated material change transactions, HCMO safeguards critical services, including rural, reproductive, end-of-life, and gender-affirming care, while promoting affordability and health equity. The program has already demonstrated its effectiveness in mitigating some of the adverse effects of health care consolidation and maintaining an inclusive, accessible system responsive to community needs.

Upholding HCMO is not only consistent with Oregon's legal obligations but essential to the health and well-being of its residents. Given the current challenges

within the U.S. health system,[5] innovative state-level solutions are urgently needed. As a laboratory of democracy, Oregon has taken a bold step with HCMO to address this national crisis. Weakening HCMO's authority, as Appellants seek, would undermine health care for Oregonians. This Court should affirm the District Court's decision, recognizing HCMO as a necessary instrument to fulfill Oregon's constitutional mandate to provide access to affordable health care as a fundamental right.

Dated: January 27, 2025

Respectfully Submitted,

/S/AMITAI HELLER

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[5] The U.S. health system is currently ranked the worst among all high-income countries. David Blumenthal, *Mirror, Mirror 2024: A Portrait of the Failing U.S. Health System*, The Commonwealth Fund (Sept. 2024).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 24-3770

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Signature /s/AMITAI HELLER **Date** January 27, 2025

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I hereby certify that on this 27th day of January, 2025, I electronically filed the foregoing with the Clerk of the Court using the appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

/s/ *Amitai Heller*
Amitai Heller
Counsel for Amici

Docket No. 24-3770

In the

United States Court of Appeals

For the

Ninth Circuit

OREGON ASSOCIATION OF HOSPITALS AND HEALTH SYSTEMS,

Plaintiff-Appellant,

v.

STATE OF OREGON, OREGON HEALTH AUTHORITY
and DOCTOR SEJAL HATHI,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the District of Oregon,
No. 3:22-cv-01486-SI · Honorable Michael H. Simon

MOTION FOR LEAVE TO APPEAR AS *AMICI CURIAE*

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Oregon Trial Lawyers Association and Service Employees International Union Local 49

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Pursuant to FRAP 29, Basic Rights Oregon, Community Catalyst, Compassion & Choices, End of Life Washington, Oregon Nurses Association, Oregon Trial Lawyers Association, Service Employees International Union Local 49, move for leave to appear as *amicus curiae* aligned with Defendants-Appellees. Movants endeavored to obtain consent from all parties prior to the filing of this motion. Counsel for Defendants-Appellees consents to movant's appearance and Counsel for Plaintiff-Appellant takes no position on the matter but reserves the right to file a response to the motion when it is received.

I. APPLICATION TO APPEAR AS *AMICI CURIAE*

Movants seek leave to appear in this proceeding to address issues relevant to this Court's determination of whether the Health Care Market Oversight Program (HCMO) violates the United States Constitution. Movants are non-profit organizations and labor unions that work to promote public welfare and to address pressing health care challenges nationally and in the State of Oregon. Because of the importance of HCMO in the promotion and protection of accessible, high-quality, affordable, and equitable health care, movants respectfully requests that this Court grant it leave to appear as *amici curiae* in this matter to represent the interests of its members and constituents.

Movants intend to present a position that do not affect their private interests. The legal positions of the proposed *amici curiae* are aligned with Defendants-

Appellees' position. This motion is timely filed because the deadline aligned with Defendants-Appellees is January 28, 2025.

For the foregoing reasons, proposed *amici curiae* ask that its motion be granted.

Dated this 27th day of January, 2025

/s/ *Amitai Heller*
Amitai Heller
Counsel for proposed amici curiae

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on January 27, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

By: *s/ Amitai Heller*
Amitai Heller