Appeal 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 DR. SEJAL HATHI, in her official capacity as Director of Oregon Health Authority,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Oregon
The Honorable Michael H. Simon
Case No. 3:22-cv-01486-SI

PLAINTIFF-APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The Answering Brief of Oregon Health Authority and the other Defendants (collectively, "OHA") makes three fundamental errors in its defense of HB 2362. First, OHA largely ignores the key statutory text. It relegates its defense of the definition of "health care entity" to a footnote. And, with respect to the unbounded definition of "material change transaction," OHA fails to address, much less defend, the statutory text. Those definitions do not give ***any*** organization with ***any*** relationship to health care items or services fair notice that ***any*** of its contracts or corporate affiliations may be subject to an agency's review and imposition of onerous conditions. Nor do the statute's definitions cabin the agency's enforcement authority in any meaningful way.

OHA's defense of its authority to approve, deny, or impose conditions on any transaction is similarly deficient. As the Oregon Association of Hospitals and Health Systems d/b/a Hospital Association of Oregon ("Hospital Association") explained, HB 2362 contains no meaningful limitation on OHA's approval authority. And even if the parties to a transaction somehow satisfy the agency's arbitrary and vaguely defined standards for approval, OHA can still place onerous conditions on the parties' future behavior with no meaningful limiting principle or standard. There is simply no way for entities potentially subject to the law to know in advance what they must do to comply. And there is no way to determine *post*

hoc whether the agency is enforcing the law consistent with an objective or defined legislative standard. OHA does not contest those points, as a matter of statutory interpretation or otherwise.

OHA relies on the veneer of specificity that HB 2362 contains. But OHA cannot deny what is plain on the face of the statute. Lurking under the surface of the statute's prolixity and cross-references is unprecedented power to block, change, or fundamentally restructure any transaction involving health care in the state. The legislature essentially gave the agency the power to determine for itself, in its sole discretion and without any other check, whether it is following the law. That is HB 2362's fatal flaw under the Due Process Clause.

Rather than defend the statute on the merits, OHA falls back on doctrinal disagreements with the Hospital Association regarding standing and the relevance of agency rules and guidance. OHA's arguments should be rejected. Under recent authority from the U.S. Supreme Court and this Court, the Hospital Association has standing to assert a pre-enforcement facial vagueness challenge. As the Hospital Association explained below and in its Opening Brief, neither an agency's statements in administrative rules, nor "sub-regulatory" guidance or statements on websites (which can be changed on a whim), can remedy HB 2362's unconstitutional vagueness.

Finally, OHA (and *amici* who support the agency) assert, in effect, that the ends justify the means. They contend that, as long as HB 2362 can be perceived as advancing legitimate policy goals, the legislature's inability to articulate those goals and standards—in even the most general way—should be ignored. That approach is exactly wrong. As the variety of *amici* illustrates, HB 2362 affects a sector that has profound effects on the daily lives of Oregonians. While *amici* may now be satisfied that OHA is acting consistent with their policy preferences, that satisfaction is based on the agency, not the law. How would the *amici* feel if the agency shifts course, changes leadership or goals, or exercises its power to approve, deny and impose different conditions on transactions? At that point, there is no recourse, precisely because the legislature has not imposed a comprehensible standard against which the agency's conduct can be measured. Instead, the legislature has simply given the agency unbounded discretion. Whether or not one agrees with the general goals that OHA and *amici* espouse, the appropriate forum for making such policy decisions in the first instance is the democratically elected legislature, not a state agency.

For the reasons outlined below and in the Hospital Association's Opening Brief, the district court erred by granting summary judgment to OHA and denying summary judgment to the Hospital Association.

II. ARGUMENT

A. The Definition of "Health Care Entity" Is Unconstitutionally Vague.

1. The Definition Is Vague and Entirely Open-Ended.

HB 2362's definition of "health care entity" amounts to a non-exclusive list that (1) does not define the outer boundaries of the entities that are subject to its requirements; and (2) contains an open-ended residual clause that leaves grave uncertainty concerning which entities are subject to its requirements or excluded from its scope. Opening Br. 22–26. OHA's rebuttal to the Hospital Association's argument concerning the definition of "health care entity" is confined to a single footnote and misconstrues the Hospital Association's position. *See* Answering Br. at 17–18 n.3. The Hospital Association did not argue that "*any* non-exclusive list in a statute is void for vagueness." *Id.* (emphasis added). The Hospital Association explained that the meaning of "health care entity" is central to HB 2362's operation because the term controls whether or not the statute applies to a given entity. Opening Br. at 22. In other words, HB 2362's open-ended list of what a "health care entity" "includes" is not a peripheral statutory definition. Because liability under HB 2362 turns on a statutory term that does not define the outer boundaries of what entities are (or are not) "included," the law is fundamentally vague. *Id.* at 22–23; *see Carroll v. Trump*, 49 F.4th 759, 769 (2d Cir. 2022).

Defendants also ignore Supreme Court case law concerning the constitutionality of residual clauses in statutes that otherwise provide ascertainable standards. As the Hospital Association explained, *see* Opening Br. 24–25, the Supreme Court has rejected as unconstitutionally vague a residual clause containing imprecise and undefined terms that injected "grave uncertainty" into the statutory analysis. *Johnson v. United States*, 576 U.S. 591, 597 (2015). Here, the residual clause in HB 2362's definition of "health care entity" uses but does not define critical terms, including what a "primary function" is, what counts as "health care items or services," and what it means for one entity to be "closely related to" another. Moreover, none of these phrases bears a common meaning. HB 2362's use of multiple terms whose meaning is uncertain therefore does not give a reasonable person fair notice of what is prohibited. OHA has no meaningful response to the fact that HB 2362's definition of "health care entity" in effect specifies no standard of conduct at all. *See United States v. Lucero*, 989 F.3d 1088, 1101 (9th Cir. 2021).

OHA insists that the definition of "health care entity" should be understood by reference to "the legislature's intent, analyzing text in context and any pertinent legislative history." Answering Br. 18 n.3. But OHA does not identify any legislative history bearing on how the term "health care entity" should be interpreted. Nor does OHA explain how HB 2362's larger statutory context cures

the fatal vagueness of its residual clause. OHA also does not invoke any pertinent tools of statutory interpretation to hazard a response to the dizzying array of questions that the definition of "health care entity" leaves unanswered. *See* Opening Br. 25–26. How, for example, is one meant to determine what counts as an entity's "primary function"? Is a company that supplies critical technology, equipment, or medications to a hospital "closely related to" a "health care entity"? HB 2362 provides no clear answer, and OHA does not explain what interpretive guidance legislative history or statutory context offer, either. HB 2362's gateway definition is unconstitutionally vague.

2. The Hospital Association Has Standing to Advance a Vagueness Challenge to the Definition of "Health Care Entity."

Citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) ("*Hoffman Estates*"), OHA's principal argument is that the Hospital Association lacks "standing" to challenge the vagueness of the definition of "health care entity." Answering Br. at 14, 16. OHA, like the district court, is incorrect on this point for at least three reasons. First, that statement from *Hoffman Estates* concerns the substantive vagueness standard, not Article III standing. Second, the principle from *Hoffman Estates* does not apply in these circumstances—a pre-enforcement facial challenge by an entity with organizational standing. Third, the rule that OHA favors makes little practical sense in the context of a facial challenge like this one.

a. OHA Confuses Article III Standing with the Vagueness Standard

As an initial matter, the district court and OHA framed their arguments regarding the definition of "health care entity" as whether the Hospital Association has "standing." *See* Answering Br. at 16–17; ER-33–34. OHA, however, misinterprets *Hoffman Estates* as articulating a standard concerning Article III standing, which it does not.

In its organizational and representative capacity, the Hospital Association brought a pre-enforcement facial challenge to HB 2362, arguing both that the law fails to provide the necessary notice and that it authorizes and even encourages arbitrary and discriminatory enforcement. *See* ER-70–71; *see also City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). When that type of challenge is at issue, the standing test is clear. "An organization has 'direct standing to sue [when] it show[s] a drain on its resources from both a diversion of its resources and frustration of its mission.'" *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013) (citation omitted); *see also Isaacson v. Mayes*, 84 F.4th 1089, 1099 (9th Cir. 2023) (analyzing standing in due process vagueness challenge); *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1346–47 (9th Cir. 1984) ("Thus, assuming that no constitutional overbreadth problem exists, the Court has recognized that a party has standing to challenge a statute facially, despite the ordinary rule against facial statutory review, if 'no standard of conduct is specified

at all'; that is, if the statute 'is impermissibly vague in all of its applications.'" (citations omitted)). Thus, provided that it demonstrates the requirement for direct standing (a conclusion that OHA does not challenge in this case), an organizational plaintiff may bring a pre-enforcement facial vagueness challenge without having to demonstrate that a member or individual plaintiff could also bring a successful as-applied challenge.

Here, the Hospital Association satisfies that threshold requirement independent of whether any of its members do or do not engage in conduct "clearly proscribed" by the statute. *See* Opening Br. at 27–29. For that reason, the Hospital Association clearly has standing to challenge HB 2362 on its face. OHA does not cite any facial vagueness case similar to this one in which the court has interpreted *Hoffman Estates* as a standing limitation, or any case in which a court determined that standing exists to challenge one statutory definition or provision, but not another.

b. The "Clearly Proscribed" Rule Does Not Apply in These Circumstances.

The relevant question, then, is not standing, but whether the Hospital Association can satisfy the current vagueness standard without also showing that its members are clearly covered or not covered by the statutory definition of "health care entity." The answer to that question is yes, based on recent case law and the reasoning of those cases.

In *Johnson*, the Supreme Court held that a statute may be unconstitutionally vague even if some applications of the statute are clear. The Court reached that conclusion without inquiring whether the defendant engaged in conduct clearly proscribed by the statute. 576 U.S. at 601–03. In fact, the Court reasoned that laws may be unconstitutionally vague even if some conduct would clearly violate the otherwise vague prohibitions at issue. *Id*. at 602–03.

Moreover, the Court did not indicate that it was applying a different or specific standard for asserting a facial vagueness claim. In fact, the Court expressly *rejected* the dissent's assertion that an unconstitutionally vague statute must be vague in all applications. The Court responded that such a requirement has not been applied in the past, and if a statute is unconstitutionally vague, it is unconstitutional as to any application of that statute, regardless of the facts of the particular case. *Id.* at 603 ("[I]f we hold a statute to be vague, it is vague in all its applications (and never mind the reality)."). The Court then applied the same reasoning in *Sessions v. Dimaya*, 584 U.S. 148 (2018), and *United States v. Davis*, 588 U.S. 445 (2019). Thus, in *Johnson*, *Dimaya*, and *Davis*, the Court addressed facial vagueness claims on the merits without first requiring the challengers meet the "in-all-applications" standard by showing as-applied vagueness.

This Court likewise has recognized that the articulation of the vagueness standard in *Hoffman Estates* may no longer govern. *See Henry v. Spearman*, 899

F.3d 703, 709 (9th Cir. 2018). In *Henry*, a California prisoner asserted that California's second-degree felony-murder rule was unconstitutionally vague under *Johnson*, 576 U.S. 591. The State of California contended that the prisoner lacked standing to bring a facial vagueness challenge because his conduct was "clearly proscribed." *Henry*, 899 F.3d at 708. This Court observed that "[b]efore *Johnson*, the Supreme Court had held that '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" *Id.* (quoting *Hoffman Estates*, 455 U.S. at 495). But "*Johnson* concluded that the Court's decisions 'squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp.'" *Id.* at 709 (quoting *Johnson*, 576 U.S. at 602). This Court observed that *Johnson* "struck down the residual clause in its entirety, even as to 'straightforward cases.'" *Id.* (quoting *Johnson*, 576 U.S. at 602). The Court further noted that the Court's subsequent opinion in *Dimaya* rejected the "narrow interpretation of *Johnson*" suggested by the three dissenting justices under which *Johnson* allegedly "'weakened the principle that a facial challenge requires a statute to be vague in all applications'" but that, in the dissenters' view, ultimately "'did not address whether a statute must be vague as applied to the person challenging it.'" *Id.* (quoting *Dimaya*, 584 U.S. at 220 (Thomas, J., dissenting)). This Court observed that to the extent *Hoffman Estates* is "inconsistent with

Johnson and *Dimaya*," the case "may not reflect the current state of the law." *Henry*, 899 F.3d at 709; *see also Guerrero v. Whitaker*, 908 F.3d 541, 544 (9th Cir. 2018) (holding that *Johnson* and *Dimaya* "expressly rejected" the principle "that a statutory provision survives a facial vagueness challenge merely because some conduct clearly falls within the statute's scope").

To be sure, the Supreme Court and this Court have cited the "clearly proscribed" rule in circumstances involving both as-applied and facial vagueness challenges outside of the First Amendment context. In *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), for example, the plaintiffs raised a vagueness challenge to a criminal statute prohibiting material support to terrorist organizations. The plaintiffs identified the "particular activities" they wished to pursue, and their only claim was "whether the statute 'provide[s] a person of ordinary intelligence fair notice of what is prohibited.'" *Id*. at 8, 20. The plaintiffs did not challenge whether the statute raised the specter of arbitrary or discriminatory enforcement. *See* 561 U.S. at 20 (observing that "[p]laintiffs do not argue that the material-support statute grants too much enforcement discretion to the Government").

Likewise, in *Kashem v. Barr*, 941 F.3d 358 (9th Cir. 2019), the plaintiffs challenged their inclusion on the No Fly List both as applied and on its face. The court rejected the plaintiffs' as-applied challenges based on the criteria's

application to the specific conduct at issue. *Id*. at 364. When discussing the plaintiffs' facial challenge, the court further stated that "as a general matter, a defendant who cannot sustain an as-applied vagueness challenge to a statute cannot be the one to make a facial vagueness challenge to the statute." *Id*. at 375. But the court also noted the tension between the "general rule" and the analysis in *Johnson*/*Dimaya* as well as this Court's opinion in *Henry*. *Id*. at 375–77. The court ultimately concluded that, in the circumstances of that case, the "traditional rule" of *Hoffman Estates* would apply. *Id*. at 377.

Both *Holder* and *Kashem* are distinguishable from this case. First, in *Holder* (which preceded both *Johnson* and *Dimaya*), the plaintiffs brought a notice-only claim, identified specific conduct that they wished to pursue, and disclaimed any challenge to the statutory terms at issue "in all their applications." 561 U.S. at 14, 20. The nature of the claim made it relatively easy for each court to confine its decision to whether the plaintiffs stated an adequate as-applied challenge (and to proceed no further). In *Kashem*, this Court acknowledged the potential inconsistency in the formulations of the vagueness standard. Based on its conclusion that the No Fly List criteria both provided fair notice and did not encourage arbitrary enforcement (as applied to the ten plaintiffs), however, the court did not need to resolve whether there may be other circumstances not

involving an as-applied challenge when a statute is so indeterminate that it is vague on its face. 941 F.3d at 376–77.

c. OHA's Interpretation Would Practically Eliminate Facial, Pre-Enforcement Due Process Challenges.

Interpreting the current law to allow the Hospital Association's challenge makes sense. As *Johnson* and *Dimaya* demonstrate, a statute may clearly apply to some conduct—whether hypothetical or real—but be so infused with vagueness that it lacks the "core" necessary to pass constitutional muster. The definition of "health care entity" is just such a statute. While it may clearly apply to one of the 61 community hospitals, it is by its terms open-ended and indeterminate as to any number (100? 500? 1000?) of other potential entities that may have some undefined relationship to some "health care items or services," or even have some corporate relationship to an entity that meets that definition.

OHA's approach would virtually eliminate the possibility of a facial vagueness challenge in every case: Either the plaintiff would have to demonstrate that the law is unconstitutionally vague as applied to their conduct (in which case there would be no need to address a facial challenge at all), or the plaintiff's "clearly proscribed" conduct would doom any facial challenge right out of the gate.

Ultimately, as a matter of both law and logic, OHA's standing argument proves too much under the circumstances of this case. However the formulation

articulated in *Hoffman Estates* may apply in another case, it does not deprive the Hospital Association of standing here.

B. HB 2362's Definition of "Material Change Transaction" and Its Grant of Unchecked Power to Deny, or Impose Conditions on, Transactions Are Unconstitutionally Vague.

1. Defendants Do Not Contest the Plain Meaning of the Key Provisions.

Based on nested cross-references, HB 2362's definition of "material change transaction" gives OHA standardless authority to decide whether a particular transaction is subject to the statute's demands. *See* Opening Br. 30–34. Like its definition of "health care entity," HB 2362's definition of "material change transaction" allows OHA (the agency that is also charged with enforcing the statute) unlimited authority to define critical terms. *See, e.g.*, Or. Rev. Stat. § 415.500(2), (5), (10) (definition of "transaction" refers to "essential services," which in turn refers to "health equity," which "has the meaning prescribed by the Oregon Health Policy Board and adopted by the authority by rule").

Importantly, the presence of some ascertainable terms in the definition of "material change transaction" does not cure the statute's fatal vagueness. The structure of that definition allows OHA to unilaterally bypass the ascertainable standards in favor of a rule that the agency alone develops. The additional categories in the definition—for example, "[n]ew contracts, new clinical affiliations and new contracting affiliations that will eliminate or significantly

reduce, as defined by the authority by rule, essential services," Or. Rev. Stat. § 415.500(10)(c)—could theoretically apply to a boundless array of transactions, leaving parties to guess at whether a particular transaction falls within the statute's scope and leaving OHA (not the legislature) to make the final determination. Due process cannot tolerate such uncertainty. *See Winters v. New York*, 333 U.S. 507, 519 (1948).

The same goes for the criteria used to approve, deny, or impose conditions on transactions. As the Hospital Association explained, even if parties are able to navigate all specific criteria for approval, they still must show that "the transaction meets the criteria adopted by the department by rule under subsection (2)." Or. Rev. Stat. § 415.501(9)(a)(A); *see* Opening Br. at 35–37. The legislature provided no standard by which to measure the agency's additional criteria. Those criteria could be virtually anything, as the relevant rules demonstrate. Indeed, OHA admits as much when it asserts that the agency's criteria for comprehensive review "***largely*** mirror" the statutory criteria. Answering Br. at 19 (emphasis added).

OHA does not disagree that HB 2362 means what it says in those respects. OHA's sole textual argument points to criteria concerning "when to conduct a comprehensive review and appoint a review board." Or. Rev. Stat. § 415.501(8)(c); *see* Answering Br. 18–19. But that argument misses the point. By its terms, that subsection only dictates ***when*** OHA is to conduct a

comprehensive review and appoint a review board. It is irrelevant to ***what*** criteria the agency may impose. As to what criteria the agency may impose, Oregon Revised Statute § 415.501(9) provides the "standard." For the reasons previously described, that "standard" is no standard at all. Opening Br. at 12–13, 35.

2. Implementing Regulations and Sub-Regulatory Guidance Cannot Save a Vague Statute.

Rather than identify how the statutory text complies with even basic vagueness requirements, OHA relies entirely on OHA's implementing regulations, sub-regulatory guidance, and answers to FAQs. *See* Answering Br. at 20 ("By any measure of vagueness, HB 2362 ***and OHA's implementing regulations*** provide fair notice of the law's requirements and set forth more-than sufficient standards to avoid arbitrary enforcement." (emphasis added)); *see also id.* at 27 ("Implementing regulations and published guidance commit the agency to a specific, articulated policy that must be consistently applied and may be tested by the judicial branch.").

But if a statute is unconstitutionally vague, no amount of subsequent agency guidance can cure that fundamental vagueness. Due process requires an ascertainable *legislative* standard, and here, there is none. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1722 (2012). Pointing to regulations or statements by the agency (some of which could

be changed on a dime) does not address, much less solve, that basic problem. Crediting OHA's position that an agency can fill constitutionally deficient gaps in a statutory scheme would increase the risk of arbitrary enforcement. It is also inconsistent with the separation-of-powers rationale undergirding the vagueness doctrine. *See Dimaya*, 584 U.S. at 156 (plurality opinion); *see also id.* at 181 (Gorsuch, J., concurring in part and concurring in the judgment). One hopes the agency will apply and enforce the law evenhandedly and consistent with the legislature's intent. But the premise of the arbitrary-enforcement prong of vagueness analysis and its separation-of-powers rationale is that the legislature may not shirk its responsibility to enact laws containing sufficiently clear standards. Opening Br. at 37–44.

OHA's "regulatory clarification" argument also proceeds from a false premise. In OHA's view, HB 2362 does not pose a constitutional problem because it gives OHA "quasi-legislative authority to fix and codify generally applicable policy." Answering Br. at 22. Nothing could be further from the statutory text or the truth. HB 2362 contains a lot of text and many specific provisions, but it leaves key definitions, and enforcement authority, entirely open-ended. OHA's promulgated regulations, sub-regulatory "guidance" and answers to FAQs do not simply guide the agency's decision-making. They create the standards out of whole cloth.

In addition, OHA, like the district court, largely focuses on the issue of notice. As OHA acknowledges, however, "the vagueness doctrine is concerned with arbitrary, *ad hoc* enforcement of vague standards." Answering Br. at 22. Providing state agencies with unfettered authority to decide whether a particular transaction will be subject to a burdensome statutory scheme raises that precise risk. The risk of arbitrary enforcement does not evaporate if the agency is given *carte blanche* to do whatever it wants. Giving an agency unfettered authority to set standards and impose onerous conditions creates the very risk of arbitrary enforcement that the vagueness doctrine seeks to guard against.

Finally, as the Hospital Association explained, OHA's regulations and guidance only exacerbate the statute's fundamental vagueness. *See* Opening Br. 41–44. Oregon Administrative Rule 409-070-0060(5)(a)(B), for example, provides that a transaction is prohibited if it is "contrary to law." Yet that requirement—compliance with the "law"—is only in the administrative rule, has no basis in the statute itself, and gives the agency the power to block, or impose conditions on, any transaction that violates any "law" in whatever form. The "law" apparently could be from whatever source (federal or state, common or statutory) and it need not even have any relationship to health care at all. Even by their terms, OHA's regulations and sub-regulatory guidance do nothing to cure HB 2362's constitutional infirmity.

C. Defendants' Other Arguments Concerning the Vagueness Standard Are Wrong.

OHA's remaining arguments should be rejected. OHA asserts that "the fact that HB 2362 delegates policymaking discretion to OHA 'does not demonstrate ambiguity. It demonstrates breadth.'" Answering Br. at 23 (quoting *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998)). OHA misapprehends the fundamental problem with HB 2362. A broad but comprehensible legislative standard followed by agency gap-filling is one thing. But when a statute is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all," *Valle del Sol*, 732 F.3d at 1020 (citation omitted), it fails to provide fair notice and raises arbitrary-enforcement concerns. HB 2362 does exactly that.

Next, OHA insists that vagueness requires a statute to contain "an intelligible principle to which the [agency] is directed to conform." Answering Br. at 13 (quoting *United States v. Melgar-Diaz*, 2 F.4th 1263, 1267 (9th Cir. 2021)); *see also id.* at 21–22. But the "intelligible principle" test does not apply to claims that a state law is unconstitutionally vague, but instead to challenges to federal laws on the basis that they violate the nondelegation doctrine. *See, e.g.*, *Gundy v. United States*, 588 U.S. 128, 135–36 (2019). OHA cites no authority in support of their position that this Court should borrow a test intended for an entirely different

purpose to analyze whether a state statute satisfies the Constitution's due process guarantee. Even if it did, HB 2362 would fail that test, too.

Finally, OHA falls back on their view that a more lenient standard of review applies to economic legislation. HB 2362's unique flaws, however, preclude it from satisfying *any* standard. *See* Opening Br. 47–49.

D. The Policies That HB 2362 Purports to Further Do Not Justify the Unconstitutional Means of Accomplishing Those Ends.

Ultimately, OHA and *amici* invite the Court to ignore HB 2362's fundamental flaws in service of their view that it embodies good policy. *Amici*, for example, cite "the urgent need for a robust regulatory framework" to regulate material change transactions and to protect the public interest. *Amici Curiae* Brief, Dkt. 30.1, at 1. *Amici* laud the power of OHA to exercise its authority to impose a wide range of conditions on transactions. Indeed, the transactions, examples, and conditions that *amici* outline underscore just how broad—and unchecked—OHA's authority is. *Amici Curiae* Brief at 9–25. OHA has imposed conditions on, or denied approval entirely of, transactions based on employment practices, types of care, identity of patients, and all manner of market effects. And the conditions themselves are extensive, long-lasting, and open-ended—many lasting at least a ***decade***. *E.g.*, *id*. at 12, 14, and 16.

Importantly, while *amici* consistently refer to those actions as being the result of "HCMO," they do not point to any part of the ***statute*** that allows, defines,

or restricts what the agency has done in any of those respects.[1] In that way, the *amici*'s brief proves the point. None of the actions listed by *amici* are pursuant to a legislative standard or subject to legislative oversight. They are based on what the agency has determined is or is not lawful in the specific instance, with no standard against which a party could determine whether the agency's view is, in fact, that of the legislature.

Amici's position is both shortsighted and misses the point. Although *amici* might now support the decisions that OHA has made, administrations and agency personnel change. And understandings of what is or is not "contrary to law," what measures advance public health, and what "health equity" means may change with them. The genie cannot be put back in the bottle. If OHA is allowed to impose its will without sufficient legislative guardrails, its future actions are unpredictable.

For that reason, the prudence of the goals and policies that, in *amici*'s view, HB 2362 advances are beside the point. Fundamental policy standards and decisions (including the policy decisions inherent in imposing conditions on material change transactions) are for the legislature, not the agency, to consider and enact. The legislature is not entitled to delegate unfettered and unlimited

[1] Amici misquote Oregon Revised Statute § 415.501(1). *See Amici Curiae* Brief at 7. That section states simply: "The purpose of this section is to promote the public interest and to advance the goals set forth in ORS 414.018 and the goals of the Oregon Integrated and Coordinated Health Care Delivery System described in ORS 414.570."

authority to an agency, even if the ends achieved policy that the legislature might favor. *Barr v. Am. Ass'n of Political Consultants, Inc.*, 591 U.S. 610, 621 (2020) (recognizing that even where a statute endeavors to achieve "a worthy goal," it must still pass constitutional muster); *see also Moore v. Harper*, 600 U.S. 1, 19–20 (2023) (where a legislature "exceeds the constitutional limits on the exercise of its authority," a court should invalidate the legislative act (citing *Marbury v. Madison*, 1 Cranch 137, 177 (1803))).

Ultimately, *amici*'s brief underscores the importance of the issues in this case. It is clear that HB 2362 is having a vast and significant impact on the health care marketplace—a sector that impacts the lives of virtually every Oregonian. And the examples cited by *amici* are only the transactions that it selected. They do not cover the transactions that were never started in the first place, nor those that were abandoned due to the agency's shifting and onerous requirements. *Amici*'s brief says nothing about the actual legal question before this Court—namely, whatever the merits of the policy goals may be, whether a state statute can attempt to further those goals in a manner that violates the Constitution. The Hospital Association respectfully submits that it cannot.

III. CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court.

DATED: April 14, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(e) and Ninth Circuit Rule 32-1(b) because this brief contains 5,175 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Dated: April 14, 2025

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