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HEALTH CARE FREEDOM AMENDMENT FAQS

Amending the Ohio Constitution

Citizens may initiate constitutional amendments in Ohio through the following process:

- Draft a proposed constitutional amendment, along with a "fair and truthful summary" of the proposed amendment. *R.C. 3519.01(A).*

- Gather 1,000 valid signatures, and submit to the Ohio Attorney General. *Id.*

- After the Ohio Attorney General certifies the language as fair and truthful, the Ohio Ballot Board must then certify, within ten days, that the proposed amendment is only one constitutional amendment. *R.C. 3505.062*.

- Once certified by the Ohio Ballot Board, the Ohio Attorney General must then immediately issue a final certification. *Id.*

- Once certified, proponents are free to gather signatures, and must submit an amount of signatures equivalent to ten percent of the number of Ohio citizens to have voted in the most recent election for governor, and must do so no later than 125 prior to the date of the election upon which the proponents wish to place the measure on the ballot. *Section 1, Article II, Ohio Constitution.*

- For the November, 2010 elections, approximately 402,000 signatures must be submitted by June 30, 2010. However, signatures collected prior to that date may be submitted at a later date, and the issue will appear on the 2011 ballot.

- Submitted signatures need not all be valid: so long as the requisite number of signatures are submitted, the Secretary of State must count them, and then submit them to county boards of elections for verification. Proponents, under current Ohio law, may continue to gather signatures while this process is taking place, and then have ten additional days to gather and submit

signatures once the Secretary of State indicates that less than the requisite number of signatures are valid.

What does the Health Care Freedom Amendment do?

The Health Care Freedom Amendment does several things:

- It prohibits government from forcing any Ohioan to participate in a "health care system." This prohibition includes, but is not limited to, the forced purchase of "minimum essential" health insurance, as prescribed by the Patient Protection and Affordability Act ("PPAA"). The mandate reflects a bargain between large insurance corporations and insurances companies, and is the cornerstone upon which the PPAA rests.

- It prohibits government from barring the purchase or sale of health care or health insurance.

- It prohibits government from government from levying a fine on the purchase or sale, or failure to purchase or sell, health care or health insurance.

- The Amendment "grandfathers" pre-existing laws that would otherwise violate its protections. This includes Medicare, Medicaid, and Workers Compensation laws, amongst others.

What <u>doesn't</u> the Health Care Freedom Amendment do?

This Amendment does nothing to influence or interfere with voluntary insurance and health care arrangements, whether between you and your doctor, you and your insurer, or you and your employer, other than to protect them from being supplanted by the federal government preemption of the health care and health care insurance field.

As noted above, this Amendment does nothing to interfere with state, federal, and locals laws and programs that were in place prior to March 19, 2010, the day the Patient Protection and Affordability Act was passed.

What about the Supremacy Clause? Won't federal law trump this Amendment?

This can be complicated. It is generally, but not always, true that federal law trumps conflicting state law. The Supremacy Clause states "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." However, this clause contains internal and external limitations that are relevant the Ohio Health Care Freedom Amendment.

- The Supremacy Clause only applies "[a]s long as [the federal government] is acting within the powers granted it under the Constitution." *Wyeth v. Levine* (2009). Thus, if the PPAA's

individual mandate itself is unconstitutional, it cannot preclude the Ohio Health Care Freedom Amendment.

- There are currently numerous lawsuits challenging the individual mandate on Commerce Clause, First Amendment (Freedom of Association), Substantive Due Process (Privacy), Takings, Taxation, and Ninth and Tenth Amendment grounds. If any of these lawsuits success, the Ohio Health Care Freedom Amendment's force will be unquestioned.

- The Ohio Health Care Freedom Amendment, alongside similar state constitutional amendments, statutes, and resolutions in other states, alter the constitutional analysis from what it would otherwise be:

    - The mandate is not a regulation of commercial activity *per se*. This means the constitutional inquiry turns on whether the mandate "substantially affects interstate commerce," and is warranted under the Necessary and Proper Clause. See *Gonzales v. Raich* (2005), 545 U.S. 1.

    - An exercise of federal authority is not "proper" under the Necessary and Proper Clause where it:

        - Results in a commerce clause power that "knows no limit," or converts it to a "general police power." *Lopez, Morrison.*

        - Requires the Court to ignore "the significance of federalism in the whole structure of the Constitution." *Lopez*.

        - "[E]ffectively obliterates[s] the distinction between what is national and what is local and create[s] a completely centralized government." *Lopez.*

        - Regulates health, a field "where states historically have been sovereign." *Lopez*; *Whalen v. Roe* (1977), 429 U.S. 589.

        - Undermines our "dual system of government," which "secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. U.S.* (1992), 505 U.S. 144; *U.S. Term Limits v. Thornton* (1995), 514 U.S. 779.

        - Converts the central government from one of limited and defined powers to one of unlimited powers, and our republic to one of centralized government, thus contravening "the spirit of the constitution," and rendering states "political non-entities." *Raich; Printz v. U.S.* (1997), 521 U.S. 898.

    - The Ninth Amendment, which protects rights created by state law, and particularly state constitutions, is relevant to the analysis once a state's citizens are protected from the individual mandate. See *Acme, Inc. v. Besson* (D. N.J. 1935), 10 F. Supp. 1.

    - Passage of the Ohio Health Care Freedom Amendment converts the dispute over the PPAA into a clash over federalism. The U.S. Supreme Court has recently sided with state sovereignty, as against federal power, in three major cases: *Oregon v. Gonzalez* (upholding Oregon's "right to die" law against a federal preemption challenge); *Horne v.*

Flores (upholding Arizona's "English language immersion" law against federal court intrusion); and *Northwest Austin Municipal Utility District No. 1 v. Holder* (criticizing federal penalty of state elections conduct).

- The Ohio Health Care Freedom Amendment's proscriptions against government takeover or suppression of private health care markets will be effective irrespective of any decision regarding the individual mandate.

- The Ohio Health Care Freedom Amendment's protections will be effective as against state and local government irrespective of its effectiveness as against the federal government.

Why a state constitutional amendment?

Several reasons. The first is pragmatic, and anticipates litigation. When a citizens challenges the constitutionality of a statute, Courts have (quite unfortunately and inexplicably), developed a test whereby they place the burden on the citizen to prove that the statute is unconstitutional "beyond a reasonable doubt." Passage of a state constitutional amendment shifts that burden to the federal government, or at minimum, creates a level playing field.

State constitutions are recognized as the organic law of the state, representing the will of that state's people, and were intended to be the first line of defense against government usurpation of rights.

For more information, see www.OhioConstitution.org, or contact Maurice A. Thompson, Director of the 1851 Center for Constitutional Law at (614) 340-9817, or MThompson@OhioConstitution.org