No. 122203

IN THE SUPREME COURT OF ILLINOIS

CONSTANCE OSWALD,

Plaintiff-Appellant,

v.

BRIAN HAMER, in his official capacity as DIRECTOR of the Illinois Department of Revenue, and THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS

Defendants-Appellants,

and

ILLINOIS HOSPITAL ASSOCIATION

Intervenor-Defendant-Appellee.

On Appeal from the Appellate Court of Illinois,
First District No. 1-15-2691

There on Appeal from the Circuit Court of Cook County,
Illinois, No. 2012 CH 42723, Hon. Robert Lopez-Cepero, Judge Presiding

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AMICUS CURIAE BRIEF OF THE ILLINOIS ASSOCIATION OF SCHOOL BOARDS, ILLINOIS ASSOCIATION OF SCHOOL BUSINESS OFFICIALS, AND ILLINOIS ASSOCIATION OF SCHOOL ADMINISTRATORS, IN SUPPORT OF PLAINTIFF-APPELLANT CONSTANCE OSWALD

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TABLE OF CONTENTS

POINTS AND AUTHORITIES

Page(s)

POINTS AND AUTHORITIES (continued)

POINTS AND AUTHORITIES (continued)

POINTS AND AUTHORITIES (continued)

POINTS AND AUTHORITIES (continued)

POINTS AND AUTHORITIES (continued)

POINTS AND AUTHORITIES (continued)

STATEMENT OF INTEREST

Formed in 1913, *Amicus,* Illinois Association of School Boards ("IASB"), is a voluntary organization of local boards of education dedicated to strengthening the public schools through local citizen control. IASB is organized by member school boards as a private not-for-profit corporation under authority granted by Article 23 of the Illinois School Code. Its mission is "developing excellence in local school board governance" by offering training and networking opportunities, and advocacy on behalf of public education. 842 of Illinois' 856 school boards hold active membership in the IASB.

Amicus, Illinois Association of School Administrators ("IASA"), is the state-chartered association of the American Association of School Administrators. Founded in 1946, it is the premier advocacy organization for 1,715 Illinois public school administrators. IASA's mission is, "To support school leaders in the pursuit of educational excellence through continued school improvement." In furtherance of its mission, the IASA promotes policies that support the efforts of public school superintendents and other administrators to provide high quality education to the children of the State of Illinois.

Amicus, Illinois Association of School Business Officials ("IASBO"), is the state-chartered member of the Association of School Business Officials International. IASBO consists of 1,249 state-wide public school, charter school, and special education cooperative business management professionals. IASBO provides a comprehensive range of services to its members. These services include the provision of networking opportunities, continuing education, and training; fostering strong alliances among educational organizations and; connecting school business officials with reliable companies, services, and products for Illinois schools.

Amici have a direct and substantial interest in the outcome of this appeal. Under Illinois' current financing scheme the principal source of funding for public school districts is property tax revenue generated from the real estate located in their geographical boundaries. As such, litigation that involves property tax exemptions for nonprofit hospitals has significant consequences for school boards, school financial officers, and school administrators who must make resource allocation decisions as they fulfil their mission to educate children, and for the educational outcomes of children residing in some of this State's most economically vulnerable communities. *Amicus,* IASB, has an additional interest in the outcome of this appeal because some of its members currently have cases pending in the Illinois Department of Revenue in which one of the issues is the facial constitutionality of Section 15-86 of the Property Tax Code, 35 ILCS 200/15-86, – the statute in question here. Therefore, the Court's determination of Section 15-86's facial validity will directly impact those proceedings.

Amici's brief will aid the Court's disposition of Ms. Oswald's appeal in three ways. First, it explains why the Judiciary's obligation to construe legislation as constitutional "whenever it is reasonably possible to do so" conflicts with the traditional conception of the "no set of circumstances" test for facial validity, and provides a road map for their reconciliation. Second, *Amici*'s brief informs the Court why nonprofit hospitals, by and large, are not charitable institutions that make primarily charitable use of their property, and, therefore, cannot constitute a "new category" of property owners entitled to a charitable property tax exemption. Finally, *Amici*'s brief explains why, instead of lessening the burden of public education, property tax exemptions for nonprofit hospitals negatively

impact public education funding, community stability, and the educational outcomes for low-income children.

SUMMARY OF *AMICI'S* ARGUMENT

As it rejected Ms. Oswald's appeal, the appellate court opined that the Legislature intended to create "a new category of charitable ownership" when it enacted Section 15-86 of the Property Tax Code, 35 ILCS 200/15-86. *Oswald v. Hamer,* 2016 Ill App (1st) 152691, ¶ 44. In reality, the General Assembly did much more. Rather than confine itself to creating "a new category of charitable ownership," or setting a monetary expenditure threshold to determine primary charitable use, as Justice Burke suggested it do in *Provena Covenant Medical Center v. Department of Revenue*, 236 Ill. 2d 368, 412 (2010), the Legislature impermissibly broadened the qualifications for a charitable property tax exemption by creating a new type of charitable exemption − one which altogether relieved nonprofit hospitals and all similar institutions of the obligation to satisfy the Exclusive Use Requirement of Article IX, § 6 of the Illinois Constitution. Because the appellate court overlooked this palpable flaw, *Amici* join Ms. Oswald in urging that its decision be reversed, and that Section 15-86 be declared unconstitutional on its face. That said, *Amici* ask the Court to take note of the following matters as it weighs the litigants' competing claims concerning the facial validity of the healthcare industry exemption legislation.

First, this appeal presents the Court with an excellent opportunity to reassess the "no set of circumstances" test for facial validity. Reevaluation of the test is necessary because courts cannot continue to search for hypothetically valid application of legislation, and, at the same time, fulfil the obligation to construe legislation as constitutional whenever it is "reasonably possible" to do so because the search for hypothetically valid applications

takes into account considerations that are "completely divorced" from the text of the statute under review, while the determination if it is "reasonably possible" to construe legislation as facially valid is premised solely on a textual analysis in which our courts attempt to reconcile the language of the statute under review with the terms of the United States and Illinois constitutions. Searching for hypothetically valid applications of a statute also conflicts with a textual examination to determine facial validity because it invites courts to look beyond the language of legislation, to speculate about terms and conditions not expressly included by Legislature, and to rewrite legislation to salvage its facial constitutionality. Rewriting legislation, however, is not only an extra-textual method of constitutional analysis, it is forbidden by the separation of powers doctrine.

Despite their in-built contradictions, the textual examination required to determine legislation's facial validity and the "no set of circumstances" test can be reconciled by discarding the search for hypothetically valid applications of legislation, and reconfiguring the "no set of circumstances" test to mean that a statute whose plain language exceeds the Legislature's constitutional authority to legislate in a particular field cannot be reasonably construed as facially valid under any circumstances. The reconfiguration of the "no set of circumstances" test *Amici* propose finds support in recent decisions of this Court which settled the facially validity of challenged provisions, not by speculating about their potentially valid applications, but by examining their text to determine if the Legislature prohibited that which the United States and Illinois constitutions authorize, or whether the Legislature authorized that which the United States and Illinois constitutions prohibit. As such, restructuring the "no set of circumstances" test does not require a deviation from precedent.

If reconfigured, the "no set of circumstances" test provides the ideal analytical framework to assess the facial validity of Section 15-86 because it requires the Court to focus its attention on whether the Legislature exceeded its constitutional authority by enacting legislation that dispenses with the requirement that nonprofit hospitals and similar healthcare entities make primarily charitable use of their property in order to obtain a charitable property tax exemption.

Next, even though Section 15-86 characterizes the nonprofit sector of the "Illinois hospital community" as a "new category of charitable ownership," the operational behavior and business model which the vast majority of nonprofit hospitals employ militates against the depiction of these businesses as "charitable" as they bear very little resemblance to the institutions that traditionally cared for the poor and underserved. Instead of providing free medical care to those who would otherwise be unable to afford it, today's nonprofit hospitals provide very little free care relative to their overall expenditures; receive the lion's share of their revenue from fees charged for the delivery of services, not donations; maximize profits through price mark-ups; and employ the same organizational model and behavior as their for-profit counterparts. Thus, the Legislature's effort to create a classification of charitable ownership unique to the nonprofit healthcare industry distorts the requirement reiterated by this Court in *Provena* that property must be owned by a "charitable institution" in order to qualify for charitable property tax exemption.

Finally, even though "lessening the burden of government" is the *sine non qua* of "charity," property tax exemptions for the nonprofit "Illinois hospital community" actually increase the burden of government because they shrink the tax base and shift the burden to finance public education away from the multibillion-dollar "healthcare industry" and onto

residential property owners and small business owners. Shifting the tax burden in this manner has a ripple effect which is detrimental to public education funding and the academic outcomes for low-income children that far outweighs any truly charitable benefit derived from the presence of nonprofit hospitals in the community.

ARGUMENT

I. THE HYPOTHETICAL-DEPENDENT "NO SET OF CIRCUMSTANCES" TEST SHOULD BE DISCARDED BECAUSE IT IS INCOMPATIBLE WITH THE COURT'S OBLIGATION TO CONSTRUE LEGISLATION AS CONSTITUTIONAL WHENEVER IT IS "REASONABLY POSSIBLE" TO DO SO.

A. The Court fulfills its obligation to construe legislation as constitutional "whenever reasonably possible" by analyzing its text for consistency with the provisions of the United States and Illinois constitutions.

It is well-established that the enactments of the General Assembly enjoy "a strong presumption of constitutionality." *Walker v. McGuire*, 2015 IL 117138, ¶ 12. Consequently, courts must construe statutes as facially valid "if it is reasonably possible to do so" because a determination of facial invalidity '"is manifestly strong medicine"' which should be doled out "sparingly and only as a last resort." *People v. Melongo*, 2014 IL 114852, ¶ 20; *Pooh-Bah Enterprises v. County of Cook*, 232 Ill. 463, 473 (2009) (quoting *National Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998)). How is the Judiciary to determine if it "reasonably possible" to uphold a statute as facial constitutional? This Court's recent decisions instruct that courts must try to reconcile the text of legislation with the provisions of the United States and Illinois constitutions.

In *People v. Mosely*, 2015 IL 115872, the Court, after acknowledging its obligation to construe legislation as constitutional "if it can reasonably be done" (*Mosely*, 2015 IL 115872, ¶ 22), relied on its decision in *People v. Aguilar*, 2013 IL 112116, ¶ 19, in which

it concluded that the word "bear" in the 2nd Amendment is synonymous with "carry" in the Aggravated Unlawful Use of a Weapon Statute ("AUUW statute"), and struck down the statute's absolute ban on public possession of a ready to use firearm. *Id.* at ¶ 24-25. As it invalidated this provision, the Court noted that it was not "reasonably possible" to uphold its constitutionality because its terms conflicted with the 2nd Amendment. *Id.* at 25.

In *In re Jordan G.*, 2015 IL 116834, the Court reviewed the section of the AUUW statute prohibiting persons under the age of 21 from carrying or possessing a firearm, by first reaffirming its obligation to uphold the provision's facial validity "if it can reasonably be done." *Id.* at ¶ 10. As it considered whether it was "reasonably possible" to uphold this section of the AUUW statute, the Court looked at the language of the statute and conducted a historical analysis of the term "minor" to determine if the 2nd Amendment right to bear arms applied to persons under 21. *Id*. at ¶ 22. ("First the court must make a threshold inquiry into whether the restricted activity is protected by the second amendment. Under this threshold analysis, *the court conducts a textual and historical analysis* to determine whether the challenged state law imposes a burden on conduct understood to be within the scope of the second amendment's protection at the time of ratification."). Emphasis added.

In *People v. Burns*, 2015 IL 117387, this Court struck down yet another section of the AUUW statute that "categorically prohibits the possession and use of an operable firearm for self-defense outside the home." *Burns*, 2015 IL 117387, ¶ 25-30. Acknowledging that the AUUW statute could operate lawfully to bar felons from carrying weapons, the Court determined that the challenged provision was facially unconstitutional because its absolute prohibition on possession of firearms directly conflicted with the 2nd Amendment right to bear arms. *Id*.

Construction of the Criminal Code is not the only context in which the Court employed a textual analysis to determine the facial validity of legislation. In *Board of Education of Moline School District No. 40 v. Quinn*, 2016 IL 119704, the Court decided the constitutionality of an amendment to the Property Tax Code granting real property tax exemption on leasehold interests and improvements on land leased from a county airport authority to a fixed based operator that provided aeronautical services by considering whether it is "reasonably possible" to reconcile the text of the challenged provision with the Special Legislation Clause of the Illinois Constitution. *Board of Education*, 2016 IL 119704, ¶ 16 ("This court has a duty to uphold the constitutionality of a statute if it is reasonably possible to do so.").

Similarly, in *In re Pension Reform Litigation*, 2015 IL 118585, the Court invalidated legislation enacted to reduce State pensioners' annuity benefits its terms could not be reconciled with Article VIII, § 5 of the Illinois Constitution's express prohibition on the diminution or impairment of the contractual obligation of the State to pay its pensioners in accordance with its agreement. *Pension Reform Litigation*, 2015 IL 118585, ¶ 47 ("[T]here is simply no way that the annuity reduction provisions in Public Act 98–599 *can be reconciled with the rights and protections established by the people of Illinois when they ratified the Illinois Constitution of 1970 and its pension protection clause.*"). Emphasis added.

In *Walker v. McGuire*, the Court, after acknowledging the presumption of constitutionality and its obligation to construe legislation as facially valid if "reasonably possible to do so," applied the rules of construction used to interpret statutes and the Constitution, and conducted a historical analysis to determine whether of a provision of the

Code of Civil Procedure imposing a $50 filing fee in residential mortgage foreclosure cases, 2% of which was retained by the clerk of the court, violated the express prohibition on judicial fee officers contained in Article VI, § 14 of the Illinois Constitution. *Walker*, 2015 IL 117138, ¶¶ 1, 12, 16-27.

And, in *Kakos v. Butler*, 2016 IL 120377, this Court determined the facial constitutionality of legislation which, among other things, amended the Code of Civil Procedure and the Counties Code to require 6 person juries in all civil matters where the damage claim did not exceed $50,000, by first acknowledging that it was required to construe the legislation as constitutionally valid if it could "reasonably do so" (*Kakos*, 2016 IL 120377, ¶ 9), and then conducting a textual and historical analysis in an attempt to reconcile the legislation with Article I, § 13 of the Illinois Constitution, Ill. Const. 1970, article I, § 13. *Id.* at ¶¶ 13-24.

The significance of *Kakos* to the future of constitutional analysis is discussed in greater detail in section I(C) of *Amici*'s brief. But for now, what is most important is that *Kakos*, and the other decisions of the Court discussed above, make it clear that in deciding if it is "reasonably possible" to construe legislation as facially valid, an attempt to reconcile the language of the statute under review with the terms of the United States and Illinois constitutions must be undertaken.

B. The "no set of circumstances" test's search for hypothetically valid applications of legislation conflicts with the Court's obligation to construe statutes as constitutional whenever it is "reasonably "possible" to do so.

For decades, this Court has applied the "no set of circumstances" test to determine the facial constitutionality of legislation. See *e.g.*, *In re C.E.*, 161 Ill. 2d 200, 210-11 (1994); see also *Napleton v. Village of Hinsdale*, 229 ll. 2d 296, 306 (2008); and *In re*

Derrico G., 2014 IL 114463, ¶ 57 ("In order to successfully mount a facial challenge to a statute, the challenger must establish that no set of circumstances exists under which the statute would be valid."). As it has been traditionally conceived, the test requires the Court to consider every possible circumstance in which legislation can be applied, and construe it as constitutional if there is one in which it can validly be applied. *Derrico G.*, 2014 IL 114463, ¶ 57. The problem with this formulation is that it "completely divorces review of the constitutionality of a statute from the terms of the statute itself, and instead improperly requires a court to engage in hypothetical musings about potentially valid *applications* of the statute." *Carle Foundation v. Cunningham Township et al.*, 2016 IL App (4th) 140795, ¶ 158, *rev'd on other grounds*, 2017 IL 120427. (Original emphasis).

Amici's criticism of the "no set of circumstances" test is even sterner than that of the *Carle Foundation* appellate court. In *Amici*'s view, the fundamental difficulty with deciding facial constitutionality by searching for hypothetically valid applications of legislation is that it subverts the textual reconciliation process this Court has consistently stated is required to determine whether it is "reasonably possible" for legislation to be construed as constitutional. Why? Because "reason" requires an analysis of legislative language and constitutional provisions, while reliance on hypotheticals involves speculation about circumstances and conditions that are not included in the text of the legislation under review. For this reason, they are inherently incompatible methods of constitutional analysis as a court cannot engage in one and adhere to the other.

A related drawback with determining facial validity by searching for hypothetically valid applications of legislation is that it invites the Judiciary to rewrite a statute by conjecturing about scenarios in which it can be applied in conjunction with terms and

conditions that Legislature did not explicitly included in the legislation's text. *Amici*'s concern in this regard is not theoretical or unfounded. This is precisely what happened in Ms. Oswald's case when the appellate court, after conceding the Legislature did not expressly mandate that nonprofit hospitals comply with the Exclusive Use Clause of Article IX, § 6, nevertheless upheld Section 15-86's facial constitutionality by hypothesizing that one set of circumstances in which it may be validly applied is where a nonprofit hospital makes primarily charitable use of its property and also meets the legislation's eligibility criteria. See *Oswald*, 2016 IL App (1st) 152691, ¶¶ 28, 47. Employing speculation to rewrite otherwise facially insufficient legislation, however, is not only a non-textual approach to statutory construction − it is absolutely forbidden by the separation of powers doctrine of Article I, § 2 of the Illinois Constitution. Ill. Const. 1970, art. I, sec. II; see also *In re M.M.*, 156 Ill. 2d 53, 69 (1993) ("We have no authority either to amend or to annex a statute. (citation omitted) Any alteration to the statute, regardless of any perceived benefit or danger, must necessarily be sought from the legislature."); and *People v. One 1988 GMC*, 2011 IL 110236, ¶ 13 ("[r]ule of construing a statute so as to uphold its constitutionality when reasonably possible is not a license to rewrite legislation" citing *In re Branning*, 285 Ill. App. 3d 405, 410 (4th Dist. 1996)).

In sum, our courts cannot continue to apply the "no set of circumstances" test and, at the same time, engage in the textual analysis required to determine if it is "reasonably possible" to reconcile the terms of legislation with constitutional provisions. If the "no set of circumstances" test is to retain analytical value, something has to give; and that "something" is the quixotic search for hypothetically valid applications of a statute.

C. The "no set of circumstances" test can be reconciled with the Court's obligation to construe legislation as constitutional if "reasonably possible" by discontinuing the search for hypothetically valid applications of the statute under review.

The Fourth District panel that decided *Carle Foundation* expressed grave concern over the continued use of the "no set of circumstances" test, noting that the United States Supreme Court, the originator of the phrase, made it clear that it is not the test for facial validity of legislation. See, *Carle Foundation*, 2016 IL App (4th) 140795 ¶ 146 – 149. The appellate court even suggested that the "no set of circumstances" test be scrapped altogether in favor an approach to constitutional construction based on an analysis of the text of the legislation under review. *Id*; ¶ 157 - 64. Though this Court reversed the appellate court, it did so on procedural grounds, and without ever addressing the lower court's disdain for the continued use of the "no set of circumstances" test. See *Carle Foundation v. Cunningham Township*, 2017 IL 120147, ¶ 34 - 36.

Amici fully appreciate the *Carle Foundation* appellate court's frustration with the "no set of circumstances" test. Yet, despite its flaws, the test need not be totally abandoned because, as *Amici* explained in Section I(A) of this brief, facial validity, in large part, depends on our courts' ability to reconcile the language of the statute in question with the constitutional limitations placed on the General Assembly's power to legislate. See *Maddux v. Blagojevich*, 233 Ill. 2d 508, 522 (2009) ("The constitution operates as a limitation upon the General Assembly's sweeping authority, not as any grant of power (citation omitted); thus the General Assembly is free to enact any legislation that the constitution does not expressly prohibit (citation omitted)"). So, rather than "throw the baby out with the bath water," the Court can conform the "no set of circumstances" test to its obligation to uphold legislation's facial validity "whenever reasonably possible" by

discarding the search for hypothetical circumstances in which a statute may be validly applied, and replacing it with the understanding that a statute whose text cannot be reconciled with the constitutional limitations on the General Assembly's authority to legislate in a particular field cannot be validly applied under any circumstances.

Truth be told, this Court has already taken steps to restructure the "no set of circumstances" test in the manner *Amici* suggest. In *Kakos,* initially discussed in Section I(A) of *Amici*'s brief, the Court stated that "a challenger of legislation must establish that no set of circumstances exists under which the Act may be valid." *Kakos,* 2016 IL 120377, ¶ 9. Having said that, the Court determined the constitutionality of legislation amending the Code of Civil Procedure and Counties Code, not by searching for its hypothetically valid applications, but by construing the phrase "as heretofore enjoyed" in Article I, § 13 of the Illinois Constitution, Ill. Const. 1970, article I, § 13, and conducting a historical analysis to determine if the 12 person jury requirement carried over from previous incarnations of the State Constitution. *Id*. at ¶ 13-24. Once the Court surmised that the Framers intended to carry over this requirement, it concluded that "there is no set of circumstances" under which legislation imposing a limitation of 6 jurors in cases where the amount in question is under $50,000 "could be valid" because its numerical limitation on the number of jurors conflicts with the express dictates of the Constitution. *Id*. at ¶ 29.

Because of the groundwork it laid in *Kakos*, the Court need not disregard *stare decisis* to correct the deficiencies in the "no set of circumstances" test. Instead, all that is necessary is that the Court explicitly declare what *Kakos* already established – that a text-centered formulation of the "no set of circumstances" test − one devoid of "hypothetical musings −" must be applied in cases where it is claimed that statutory language cannot be

reconciled with the constitutional restrictions on the Legislature's authority to legislate in a particular field. If defined in the manner suggested above, the "no set of circumstances" test is the ideal vehicle to assess the facial constitutionality of Section 15-86.

Application of the reconfigured "no set of circumstances" test to Ms. Oswald's appeal necessarily begins with the recognition that Article IX, § 6 of the Constitution curtails the Legislature's authority to enact property tax exemption legislation. Ill. Const. 1970, article IX, §6; *Eden Retirement Center v. Department of Revenue*, 213 Ill. 2d 273, 284-85 (2004) ("The legislature's power to tax is plenary; it is restricted only by the federal and state constitutions. [citation omitted]. The power to exempt from taxation is concomitant with the power to tax. The legislature, having the inherent power to tax, also has the inherent power to grant exemptions from those taxes."). With the foregoing principle in mind, Section 15-86 should then be examined to see if it falls within the parameters of the express limitations which Article IX, §6 places on the Legislature's authority to enact charitable property tax exemption legislation.

If, upon examination, the Court finds that the plain language of Section 15-86 does not mandate compliance with Article IX, §6's exclusive charitable use requirement, yet at the same time purports to qualify nonprofit hospitals which satisfy Section 15-86(c)'s balancing test for charitable exemptions, it should conclude that the Legislature acted beyond the scope of its constitutional authority when it enacted this legislation, and, therefore, it is never "reasonably possible" to conceive of a set of circumstances in which it can be validly applied. Conversely, if the Court determines that the plain language of Section 15-86 mandates satisfaction of the Exclusive Use Requirement, then the statute should pass constitutional muster. Thus, it is entirely possible for this Court to continue

to use the "no set of circumstances" test to assess the facial validity of Section 15-86 and other legislation, and remain faithful to the obligation to construe statutes as valid whenever it is "reasonably possible" to do so.

II. CONTEMPORARY NONPROFIT HOSPITALS ARE GENERALLY NOT CHARITABLE INSTITUTIONS. THEREFORE, THE LEGISLATIVE ATTEMPT TO CHARACTERIZE THEM AS A "NEW CATEGORY" OF CHARITABLE OWNERSHIP IS INHERENTLY FLAWED.

Though a majority of this Court has yet to agree on a method to determine primary charitable use of real property, there is one point upon which there is no dispute: in order to qualify for a charitable property tax exemption, nonprofit hospitals must bear the distinct characteristics of a charitable institution set forth in *Methodist Old Peoples Home v. Korzen*, 39 Ill. 2d 149 (1968). *Provena*, 236 Ill. 2d at 390, 411 (2010). Nonprofit hospitals may have had humble beginnings as institutions that exclusively served the indigent, but they have morphed into multibillion-dollar conglomerates that essentially operate in the same manner as their for-profit counterparts, provide very little uncompensated care relative to their overall expenditures, handsomely compensate their top-level executives, and derive the lion's share of their revenue from patient and third-party payment instead of public or private donations. Consequently, the Legislature's attempt to characterize these and similar entities as a "new category" of charitable owners stands the requirement that property must be owned by a "charitable institution" in order to qualify for a charitable property tax exemption on its head.

America's hospitals were initially connected with almshouses and served exclusively the poor and those who lived on society's fringes. Barbara Mann Wall, *History of Hospitals*, Penn Nursing Science p. 1, also available at www.nursing.upenn.edu/nhhc/Pages/History of Hospitals.aspx. However, the days when

hospitals conjured images out of a Dickens novel are long gone. Bearing precious little resemblance to the institutions of the 19th Century and the first half of the 20th Century, modern nonprofit hospitals have become an integral part of what Kaiser Permanente CEO, George Halvorson, termed the "healthcare industry." George C. Halvorson, *The Culture to Cultivate*, Harv. Bus. Rev., July 2013, also available at https://hbr.org/2013/07/the-culture-to-cultivate/ar/1.

Nonprofit hospitals are more than just central components of the "healthcare industry" − they are the predominant non-federally owned community hospital[1] entities making up 58.5% of all community hospitals in the United States. American Hospital Association, *2017* Fast Facts on U.S. Hospitals, www.aha.org/research/rc/stat-studies/fast-facts.shtml. By contrast, for-profit non-government community hospitals constitute 21% of the total; and state and local owned community hospitals 20%. *Id*. When governmental hospitals are excluded from consideration, the dominance of the nonprofit hospital is brought into even sharper focus as they make up 73% of the private nongovernmental hospitals, while their for-profit counterparts make up slightly less than 27%. *Id*.

The rise of the nonprofit hospital to its current place of prominence in the "health - care industry" was not the product of a burgeoning altruistic spirit among medical care providers. It was, instead, the result of certain competitive advantages the nonprofit

[1] "Community hospitals are defined as all nonfederal, short-term general, and other special hospitals. Other special hospitals include obstetrics and gynecology; eye, ear, nose, and throat; rehabilitation; orthopedic; and other individually described specialty services. Community hospitals include academic medical centers or other teaching hospitals if they are nonfederal short-term hospitals. Excluded are hospitals not accessible by the general public, such as prison hospitals or college infirmaries." American Hospital Association, *2017* Fast Facts on U.S. Hospitals, www.aha.org/research/rc/stat-studies/fast-facts.shtml

organizational form affords over the for-profit model, chief among them being *the avoidance of property taxes*, the ability to issue tax-exempt bonds, as well as protection of the collective financial interests of physicians. Frank A. Sloan, *Not-for-Profit Ownership and Hospital Behavior*, Handbook of Health Economics, 2000 at p. 1148-52; see also Guy David, *The Convergence between For-Profit and Nonprofit Hospitals in the United States*, University of Pennsylvania Wharton School of Business, May 2005 at p. 13-4, 28-9. According to a 2014 Urban Institute report, nonprofit hospitals made up only 2.4% of the nonprofit organizations submitting 990 Forms to the Internal Revenue Service in 2012, yet they produced 50.2% of the 1.44 trillion dollars in revenue generated by all nonprofit organizations nationally and owned 34.8% of the assets belonging to all nonprofits nationally. Brice C. McKeever and Sarah Pettijohn, *The Nonprofit Sector in Brief 2014*, October 2014 at p. 6, also available at www.urban.org/.../ 413277- The - Nonprofit - Sector - in - Brief --.PDF.

While their charters and articles of incorporation frequently speak of social responsibility and community welfare, these lofty pronouncements mask the reality that nonprofit hospitals are often very profitable enterprises that generate the lion's share of their revenue from charging fees for the delivery of medical services. See Frank Sloan and Robert A. Vraciu, *Investor-Owned and Not-For-Profit Hospitals: Addressing Some Issues*, Health Affairs 2, no. 1 (1983) at p. 31; Rummana Alam, *Not What the Doctor Ordered: Nonprofit Hospitals and the New Corporate Governance Requirements Of The Form 990*, 2011 U. Ill. L. Rev. 229, 258, December 29, 2010, also available at illinoislawreview.org/wp-content/ilr-content/articles/2011/1/Alam.pdf. In 2013, 7 of the 10 most profitable hospitals in the United States were nonprofits. Ge Bai, Ph.D., CPA and

Gerald Anderson, *A More Detailed Understanding of Factors Associated with Hospital Profitability*, Health Affairs, May 2016, vol. 35, no. 5, p. 889-97. Moreover, nonprofit hospitals, like their for-profit counterparts, maximize earnings by engaging in price markups. In 2013, the average cost-to-charge ratio for nonprofit hospitals was 3.79, meaning that they charge $379 for services that cost $100 to deliver. Ge Bai, Ph.D. and Gerald Anderson, *U.S. Hospitals Are Still Using Chargemaster Markups to Maximize Revenues*, Health Affairs, September 2016, vol. 35, no. 9, p. 1658-64.

The primary difference between private nonprofit hospitals and their for-profit counterparts then is not that one makes a profit (*i.e.*, the margin between revenue and expenses) and the other doesn't; it is in how the profits they realize are disbursed. For-profits distribute the margin to the equity stakeholders while nonprofit hospitals use the margin to finance business operations and to compensate upper management by converting monetary income to perks. David (2005) at p. 14. And even though CEOs may argue that the margin is essential to the fulfillment of the mission of nonprofit hospitals, '"No margin, no mission' can quickly be transformed into "The margin is the mission."' Richard Gunderman, Md., PhD, *Why Are Hospital CEO's Paid So Well?*, The Atlantic, October 16, 2013 p. 4-5 available at https://wwwtheatlantic.com/health/arhive/2013/10/why-are-hospital-ceos-paid-so-well/280604. Thus, even though pressure to "stay true to their mission" exists, IRS rules and personal interests of management are powerful motivators for the maximization of profits. Brian Vansant, *Institutional Pressures to Provide Charity Care and the Earnings Management Behavior of Nonprofit Hospitals*, Auburn University, April 2013 at p. 10.

The compensation received by the upper-level managers of nonprofit hospitals deserves closer examination. According to a 2014 Becker's Hospital Review report, in 2011-12, the compensation for the CEOs and top administrative staff of the country's 25 highest-grossing hospitals added up to more than $52.7 million − an average of $2.1million per executive. Bob Herman, *Compensation of the 25 Top-Grossing Nonprofit Hospitals*, Becker's Hospital Review, March 11, 2014, also available at www.beckershospitalreview.com/compensation-issues/ceo-compensation-of-the-25-top-grossing-nonprofit-hospitals. However, in 2012, Jeffrey Romoff, the CEO of the University of Pittsburgh Medical Center received $6.07 million in total compensation. *Id*. Closer to home, in 2011, Dean Harrison, the CEO of Northwestern Memorial Hospital, received $4.61 million in total compensation. *Id.* These compensation packages could, in theory, be justified if they bore a substantial relationship to patient outcomes, but that is not the case.

According to a 2013 study published by the Journal of American Medical Association (JAMA), while doctors' compensation is based on "quality scores," hospital boards have not tied CEO compensation to patient outcomes or the level of community benefit bestowed. Karen E. Joynt, MD, MPH, Sidney T. Le, BA, E. John Orav, PHD, Ashish K. Jha, MD, MPH, *Compensation of Chief Executive Officers at Nonprofit U.S. Hospitals*, available at JAMA Intern Med. 2014;174(1):61-67.doi:10.1001/jamainternmed.2013.11537. The JAMA study found that there is no relationship between executive compensation, the quality of medical care delivered, readmission rates, or patient mortality rates. *Id*. Thus, any notion that exorbitant compensation is required to attract and retain "the best and the brightest" is put to rest by

the reality that there is no corollary nexus between the amount nonprofit hospital executives are paid, the fate of patients, or the community benefit provided by these institutions. Interestingly, the lack of any correlation between executive compensation and favorable patient outcomes prompted ballot measures in California and Arizona to limit the pay of nonprofit hospital CEOs to $450,000 which were ultimately withdrawn in the face of opposition by the states' hospital associations. https://oag.ca.gov/system/files/initiatives/pdfs/15-0111(Hospital); gttps://ballotpedia.org/Arizona_Hospital_Executive_Compensation.Arizona Hospital Executive Compensation Act; https://ballotpedia.org/California_Hospital_Executive_Compensation_Limit_Initiative (2016); https://ballotpedia.org/Arizona_Hospital_Executive_Compensation_Act_(2016).

There are other ways in which nonprofit hospital executives operate their institutions "like a business, like for-profit executives to a much larger degree." Molly Gamble, *The Dying Rivalry: How For-Profit and Non-Profit CEO's Are Becoming More Compatible*, Becker's Hospital Review, October 2012, also available at www.beckershospitalreview.com/hospital-management-administration/the-dying-rivarly. For instance, nonprofit hospitals employ the same corporate organizational structure and vernacular as their for-profit counterparts. See Sloan and Vraciu (1983) at p. 26. And, they increasingly rely on private equity for access to capital to fund their infrastructure improvements and boost their investments, while private equity profits on its investment in the healthcare industry. Jim McLaughlin, *Private Equity and Nonprofit Hospitals: Strange Bedfellow or Savings Grace?* Becker's Hospital Review, March 26, 2013.

Additional similarities between nonprofit and for-profit hospitals also require the Court to carefully review the Legislature's claim that nonprofit hospitals are a "new category" of charitable real property ownership. For example, both nonprofit hospitals and their for-profit counterparts participate in acquisitions and mergers. Gamble (2012). Motivated by profit, these mergers often result in an increase in the cost of medical care, and in some cases, the deterioration in the quality of medical care. Martin Gaynor, Ph. D. And Robert Town, Ph. D., *The impact of hospital consolidation − Update*, Robert Wood Foundation, The Synthesis Project, June 2012, available at www.policysynthesis.org. Nonprofits and for-profits also collaborate with each other on joint ventures further blurring the distinction between the two. Gamble (2012).

Particularly relevant to the determination of exclusive charitable use is the fact that there isn't a significant difference in the amount of uncompensated medical care that nonprofits and for-profits provide, as a 2006 congressional study concluded that neither devoted more than 6.4% of their total care to uncompensated medical treatment. Cong. Budget Office, *Nonprofit Hospitals and the Provision of Community Benefits*, p.14- 15 (2006); see also Peter Cram, Levent Bayman, Ioana Popescu, Mary S. Vaughan-Sarrazin, Xueya Cai, and Gary E. Rosenthal, *Uncompensated care provided by for-profit, not-for-profit, and government hospitals*, U.S. National Library of Medicine, National Institute of Health, l. 34-36 (2010), also available at www.ncbi.nlm.nhi.gov/pubmed/20374637. Finally, despite the fact that revenues grew significantly between 1980 and 2012, the amount of uncompensated charity care hospitals provide increased only 1% over that time period. American Hospital Association, *Uncompensated Hospital Care Cost Fact Sheet*, January 2014, p. 3, also available at www.aha.org/content/14/14uncompensated care.pdf.

By no means do *Amici* suggest that nonprofit hospitals can never be charitable institutions that make primarily charitable use of their property. For example, St. Jude Children's Research Hospital, which provides extensive medical care to children suffering from some of the most serious and life-threatening diseases, receives 82% of its funding from private and public donations and does not charge families for treatment, food, or lodging. See https://www.stjude.org. But St. Jude is the exception, not the rule, and if it were located in Illinois, it would qualify for a general charitable exemption under Section 15-65 of the Property Tax Code, 35 ILCS 200/15-65, even if Section 15-86 had never been enacted because it actually delivers completely free medical care to its patients.

In conclusion, the business model most contemporary nonprofit hospitals employ is antithetical to the concept of "charity. Consequently, Section 15-86 should be viewed skeptically as the legislative product of the "Illinois hospital community's" attempt to circumvent the constitutional requirement reiterated in *Provena* that only property owned by a "charitable institution," and put to primarily charitable use, qualifies for a charitable property tax exemption.

III. PROPERTY TAX EXEMPTIONS FOR NONPROFIT HOSPITALS INCREASE RATHER THAN LESSEN THE BURDEN OF PUBLIC SCHOOLS, AND CAN HAVE A NEGATIVE IMPACT ON THE EDUCATIONAL OUTCOMES OF LOW-INCOME CHILDREN.

The Education Article of the Illinois Constitution places the primary responsibility for financing public education squarely on the shoulders of State government. Ill Const. 1970, article X, § 1. Notwithstanding the constitutional mandate, property tax revenue, not State aid, is the primary source of funding for Illinois' public school districts. In school year 2015-16, state aid accounted for only 34.7% of the funding for elementary and secondary public education while "local revenue" in the form of property taxes accounted

for 55.2%. See ILL. STATE BD. OF EDUC., 2016 ANNUAL REPORT, *State, Local and Federal Resources* at p. 7 (2017). Efforts to alter the current public education funding system by way of constitutional amendment and judicial decree have proved unsuccessful. See *Constitution of the State of Illinois, Amendments and Conventions Proposed*, ILL. Gen. Assembly (Sept. 16, 2011); see also Nicholas Infusino, *Breaking Through the Courtroom Door: Reexamining the Illinois Supreme Court's Public Education Finance Cases*, 34 Loy. CLRJ, Vol. 1, 86, 88-9 (Spring 2013). Thus, for the foreseeable future, Illinois public school districts must rely on property tax revenue for the majority of their funding.

In *Korzen*, this Court explained that the *sine non qua* of "charity" is that it "in some way reduces the burdens of government." *Korzen*, 39 Ill. 2d at 156-57. However, by supplanting the constitutional requirement that nonprofit hospital property be used primarily for charitable purposes with a balancing test that does not require primary charitable use, Section 15-86 increases rather than lessens the burden public schools must bear because it significantly relaxes the standard nonprofit hospitals must satisfy in order to qualify for obtain charitable property tax exemptions. As a result, this legislation will inevitably lead to a shrinking of the tax base available to fund public education; negatively impact the ability of school districts to borrow; and most important, it will shift the tax burden onto residential property owners and tenants which ultimately impacts the educational outcomes of children living in economically unstable communities.

A. Property tax exemptions for nonprofit hospitals have a significant impact on public school funding.

Granting and maintaining property tax exemptions for nonprofit hospitals in Illinois has an indisputably detrimental effect on the overall property tax revenues for school districts and all other non-home rule taxing bodies in the State by eliminating the equalized

assessed values ("EAV") of those numerous and large institutions from the overall EAV of the territory within such taxing bodies. Property tax revenues are generated by the applications of tax rates to EAV (35 ILCS 200/18-40, 18-45). Therefore, as a general rule, lower EAV means lower tax revenues. And taking nonprofit hospitals off the tax rolls lowers EAV.

Many Illinois counties, however, are subject to the provisions of the Property Tax Extension Limitation Law ("PTELL"; 35 ILCS 200/18-185 *et seq.*). Where it applies, PTELL imposes a "limiting rate" (sometimes referred to as the "tax cap") on the aggregate of most of a non-home-rule taxing district's levies. The limiting rate is determined by multiplying the district's previous year tax extension by the previous year's Consumer Price Index ("CPI"), and then dividing that product by the current year EAV, less that EAV which is the result of new construction or other non-market factors. The net result is that such taxing districts do not automatically benefit financially from the inflationary growth in EAV, beyond the amount of the most recent CPI. As EAV goes up, aggregate tax rates are forced down; conversely (and has been the case in the real estate market for much of the last several years), as EAV goes down, permissible aggregate tax rates go up. Under this scenario, it may, at first blush, appear that removal of the value of real property of large institutions such as hospitals from the tax rolls should have no impact on the revenue streams of school districts and other taxing bodies, but only on who bears the burden of paying those taxes.

But the scope of the tax cap is not universal. First, PTELL does not apply at all to 63 of the 102 counties in the State. See Department of Revenue, http://www.revenue.state.il.us/LocalGovernment/PropertyTax/PTELL_counties.pdf; 35

ILCS 200/18-213. For taxing districts in these counties, the general rule still applies – less EAV means less potential tax revenue. School districts in these 63 counties still have maximum tax levy rates for many of their operating funds, rates which are defined as percentages of EAV (see 105 ILCS 5/17-2). So, for instance, if a school district in a county not subject to PTELL has a maximum educational tax rate of 2.00%, and there is a hospital in that district with an assessed value of $5 million dollars, then the issue of the taxability of that hospital makes a difference of $100,000 in the annual revenues which that school district may obtain for educational purposes.

Further, even in the 39 counties which are subject to PTELL, exemptions for hospitals are hardly revenue-neutral for school districts and other non-home-rule taxing bodies. PTELL imposes a limiting rate only on certain operating fund levies. There is no tax cap under PTELL, for instance, on debt service levies (35 ILCS 200/18-185, definitions of "aggregate extension"). And since the limit on debt incurred by school districts is defined as a percentage of the EAV of those districts (see 105 ILCS 5/19-1, the "debt limitation"), the amount of a district's EAV determines the amount of money which it can borrow through long-term debt such as building bonds. (There are, of course, other examples of certain types of taxing bodies being permitted to impose certain levies other than debt service which are not subject to the limiting rate, such as the park district levy for joint recreational programs for persons with disabilities, 35 ILCS 200/18-185, definitions of "aggregate extension."). So again, the taxability of hospital property makes a measurable difference in school districts' bonding authority and, therefore, impacts the financial well-being of those districts.

Moreover, the number of hospitals in Illinois and the size of those hospitals are not static. New hospitals will be and are being built and existing hospitals are expanding. As new hospitals are built and existing hospitals expand through new construction, the resulting increase in EAV is treated as "new property" under PTELL, which EAV is exempt from the calculation of the limiting rate (35 ILCS 200/18-185, definitions of "new property" and "limiting rate"). These new facilities, then, can bring in new revenue to taxing bodies even in PTELL counties, but if and only if those hospitals are not exempt from taxation.

Finally, even in those counties subject to PTELL and even for those levies which are subject to the limiting rate imposed by PTELL and even for existing hospital facilities, allowing tax exemptions for hospitals has a difficult-to-quantify and yet very real financial impact. Exempting hospitals from financing the services of local government while those hospitals are still demanding all the benefits of those services − such as police and fire protection and the educational and recreational services for those employees, patients, and their families drawn into the community by the hospitals – radically shifts the burden of taxation. See Section III(B) of *Amici*'s brief. As local small businesses and homeowners struggle to manage that burden, the value of their businesses and homes decrease. *Id.* That can contribute to an exodus of commerce and families from the community. *Id.*

To work properly in this age of fierce competition between communities for stable tax bases, property taxes and the burdens which they impose must be fair. However, exempting large money-making institutions such as nonprofit hospitals from property taxes is inherently unfair and places those communities where they are located at a disadvantage.

School districts in such communities will inevitably suffer as their businesses leave and their EAV declines.

B. Shifting the tax burden from nonprofit hospitals to residential property owners contributes to housing destabilization which has a detrimental impact on the educational outcomes of low-income students.

When valuable nonprofit hospital property is removed from the tax rolls, not only does the tax base available to finance local government shrink, the burden shifts to residential property owners and small businesses to finance local governmental services. See Daphne A. Kenyon and Adam H. Langley, *Nonprofit PILOTS (Payment in Lieu of Taxes)*, Lincoln Institute of Land Policy, August 2016, available at http://www.lincolninst.edu/publications/policy-briefs/nonprofit-plots-payments-lieu-taxes; David Brunori and Michael Bell, *Report on Real Property Taxes and Exemption Organizations in Baltimore*, Baltimore Efficiency and Economy Foundation, p. 4-5, June 2012, also available at http://www.beefbaltimore.org/wp-content/uploads/2012/10/BEEF_Property; Mike Maciag, *Tax-Exempt Properties Rise as Cities Cope with Shrinking Tax Bases*, p. 2-3, November 2012, also available at http://www.governing.com/topics/finance/gov-tax-exempt-properties-rise.html. Despite paying reduced or no property taxes, nonprofit hospitals continue to consume local governmental services at the expense of the other property owners in the communities in which they are located. *Id*.

For many residential property owners, the increased property tax obligation resulting from the shift in tax burden causes a corresponding increase in the amount required to maintain the escrow account established by the mortgage holder. *Why Escrow Payments Increase*, U.S. News and World Report, July 29, 2011, also available at

http://money.usnews.com/money/blogs/my-money/2011/07/29/why-ecrow-payments-increase. Those who cannot afford to maintain the escrow account face the risk of foreclosure. See *Foreclosure Fraud: How You Can Be Driven to Default Even if You Pay On Time*, available at www.cbsnews.com/news/foreclossure-fraud-how-you-can-be-driven-to-default-even-if-you-pay-on-time. Even if residential property owners are not required to maintain a mortgage escrow account, if they are unable to pay the tax increase, they still may lose their home to foreclosure via the delinquent tax sale process. See 35 ILCS 200/21-75 and 200/22-5.

The problem of housing loss due to foreclosure is particularly acute in low-income and minority communities where despite the uptick in the national economy following the Great Recession of 2008, homeowners remain vulnerable to displacement. See Patrick Bayer, Fernando Ferreira, and Stephen L. Ross, *The Vulnerability of Minority Homeowners in the Housing Boom and Bust*, p. 3, 5, National Bureau of Economic Research Working Paper Series, May 2013, also available at http://www.nber.org/papers/w19020; Robert Hennelly, *America's Foreclosure Crisis Isn't Over*, CBS News Money Watch, January 26, 2016, available at http://wwwcbsnews.com/news/americas-foreclosure-crisis-isn't-over/. Residential tenants are also affected when nonprofit hospitals do not pay property taxes because rental property owners pass the additional cost resulting from the increased tax obligation on in the form of rent increases. Leah J. Tsoodle and Tracy M. Turner, Ph.D., *Property Taxes and Residential Rent*, Journal of Real Estate Economics, 2008, 36(l), pp. 63-80. The impact of rent increases on low-income tenants is particularly severe because not only are they often unable to afford the increases, increased rents also reduces the availability of affordable housing. *Id*. Because nonpayment of rent is one of the primary

reasons why tenants are evicted, shifting the property tax burden to residential property owners contributes to the destabilization of the living situations of economically vulnerable families.

How does housing instability impact the education of children living in low-income households? Studies by the Brookings Institute, the Tax Policy Center, and the Urban Institute, reveal that housing instability results in mid-year school changes which lowers children's reading and mathematics achievement; increases the need for special attention to these children to the detriment of the remaining students; and increases high school dropout rates. See, Julia B. Isaacs, *The Ongoing Impact of Foreclosures on Children*, First Focus, Brookings, April 2012, p. 6-7; David Figlio, Ashlyn Aiko Nelson, and Stephen L. Ross, *Do Children Lose More than a Home?* available at www.taxpolicycenter.org/events/upload/Figlio-Nelson-Ross-paper.pdf; and Mary Cunningham and Graham McDonald, *Housing as a Platform for Improving Educational Outcomes among Low-Income Children*, Urban Institute, May 2012 at p. 2, 4-9.

Nearly 50% of Illinois public school students are classified as low-income and more than 14% are homeless. See Illinois State Board of Education 2016 Report Card, available at https://isbe.net/Documents/2016StateReportCard.pdf. In School Year 2013-14, 54,452 Illinois school children experienced homelessness. Christine Endres and Melissa Cidade, *Federal Data Summary, School Years 2011-12 to 2013-14: Education for Homeless Children and Youth*, University of North Carolina – Greensboro National Center for Homeless Education Housing, p. 7, November 2015, also available at http://nche.ed.gov/downloads/data-comp-1112-1314.pdf. Certainly, tax exemptions for nonprofit hospitals are not responsible for all of the homelessness experienced by Illinois

school children. There is, however, an undeniable link between property tax exemptions for nonprofit hospitals, increased property tax liability for residential property owners, and housing instability. So, to some extent, these tax breaks exacerbate the difficulties public school districts face in educating economically and socially disadvantaged children.

Ostensibly, Section 15-86 was enacted to help offset the cost the nonprofit "healthcare industry" bears in providing medical care for those living in poverty. But, the reality is that nonprofit hospitals provide very little charity care relative to their overall expenditures; and make no mistake about it − "charity" in this context means uncompensated medical care. See *Provena,* 236 Ill. 2d at 401 ("When patients are treated for a fee, consideration is passed. The treatment therefore would not qualify as a gift. If it were not a gift, it could not be charitable.").

Given the fact that Section 15-86 does not require that nonprofit hospitals be truly charitable institutions, or that they make primarily charitable use of their property in order to qualify for a tax exemption, the detrimental impact on public education in the communities in which nonprofits hospitals are located easily eclipses the charitable benefits nonprofit hospitals provide. So, ironically, by making it easier for the nonprofit sector of the Illinois "healthcare industry" to avoid property taxation, the Legislature actually increased – not reduced − the financial and social burden Illinois public school districts; public school students, in general, and low-income school children, in particular, must bear.

CONCLUSION

In light of the foregoing considerations, *Amici* join the Plaintiff-Appellant in urging that this Court reverse the appellate court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the requirements of Rules 341(a) and (b) and Rule 345(b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 31 pages.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies, pursuant to Supreme Court Rule 341(e), that one (1) copy of *Amici curiae*'s brief was served upon each of the following by email service this 30th day of October, 2017:

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