Nos. 4–20–0121, 4–20–0135, 4–20–0142,
4–20–0386, 4–20–0387, & 4–20–0388 (consol.)

IN THE ILLINOIS APPELLATE COURT, FOURTH DISTRICT

THE CARLE FOUNDATION, an Illinois not-for-profit corporation,

Plaintiff–Appellee–Cross-Appellant,

v.

ILLINOIS DEPARTMENT OF REVENUE; DAVID HARRIS, in his official capacity as Director of the Illinois Department of Revenue; the CHAMPAIGN COUNTY BOARD OF REVIEW; ELIZABETH BURGENER-PATTON, BRIAN RECTOR, and PAUL SAILOR, in their official capacities as members of the Champaign County Board of Review; PAULA BATES, in her official capacity as Champaign County Supervisor of Assessments; CUNNINGHAM TOWNSHIP; WAYNE T. WILLIAMS JR., in his official capacity as Cunningham Township Assessor; C.J. JOHNSON, in his official capacity as CHAMPAIGN COUNTY TREASURER; and the CITY OF URBANA,

Defendants–Appellants–Cross-Appellees,

and

CHAMPAIGN COUNTY,

Intervenor–Defendant–Appellant–Cross-Appellee.

On appeal from the Circuit Court of the Sixth Judicial Circuit, Champaign County, Illinois, Case No. 08 L 0202, Hon. Randall Rosenbaum, Judge Presiding

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AMICUS CURIAE BRIEF OF THE ILLINOIS HEALTH AND HOSPITAL ASSOCIATION

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STATEMENT OF INTEREST

The Illinois Health and Hospital Association ("IHA"), on behalf of its members, submits this amicus curiae brief in support of Plaintiff–Appellee–Cross-Appellant The Carle Foundation ("Carle"). The IHA is a statewide not-for-profit association whose membership includes over 200 hospitals and nearly 50 health systems. For more than 80 years, the IHA has served as a representative and advocate for its members, addressing the social, economic, political, and legal issues affecting the delivery of high-quality healthcare in Illinois.

As the representative of almost every hospital in the state, the IHA has a long-standing interest in the issues raised by this appeal. Both this Court and the Illinois Supreme Court allowed the IHA to file an amicus brief in the case that led to the enactment of section 15–86 of the Property Tax Code, the statute at issue before this Court. *See Provena Covenant Med. Ctr. v. Dep't of Revenue*, 384 Ill. App. 3d 734, 735 (4th Dist. 2008) ("*Provena I*"); *Provena Covenant Med. Ctr. v. Dep't of Revenue*, 236 Ill. 2d 368, 372 (2010) ("*Provena II*"); 35 ILCS 200/15–86. The IHA then became closely involved in negotiating and drafting section 15–86.

Later, in 2016, the IHA was granted leave to file an amicus brief when this case was before the Supreme Court. *See Carle Found. v. Cunningham Twp.*, 2017 IL 120427 ("*Carle III*"); *see also Carle Found. v. Cunningham Twp.*, 2016 IL App (4th) 140795 ("*Carle II*"); *Carle Found. v. Cunningham Twp*., 396 Ill. App. 3d 329 (4th Dist. 2009) ("*Carle I*"). Two years after that, the IHA participated as an intervenor–defendant in the Supreme Court case that upheld the constitutionality of section 15–86. *See Oswald v. Hamer*, 2018 IL 122203.

The IHA offers this amicus brief to provide information and arguments not addressed by the parties that will help this Court review the trial court's judgment.

INTRODUCTION

Charitable property-tax exemption has been a cornerstone of the Illinois hospital community for over 100 years. Traditionally, it has involved satisfying two requirements: charitable ownership, required by statute, and charitable use, required by the Illinois Constitution.

After the Illinois Supreme Court decided *Provena II*, Illinois hospitals and other interested parties, including the IHA, worked with the legislature to create a new category of charitable ownership for not-for-profit hospitals and hospital affiliates. Their efforts led to the enactment of section 15–86 of the Property Tax Code, which imposes a quantifiable service- and activity-based standard as a statutory precondition to property-tax exemption for hospitals. *See* 35 ILCS 200/15–86(c), (e). To be eligible for an exemption under section 15–86, the value of a hospital's qualifying services or activities for a given year must equal or exceed the hospital's estimated property-tax liability.

Once section 15–86 was enacted, additional litigation ensued. In *Carle III*, the Supreme Court declined, on jurisdictional grounds, to rule on the merits of this Court's decision in *Carle II* that section 15–86 was facially unconstitutional. *See Carle III*, 2017 IL 120427, ¶¶ 15–23. In *Oswald*, the Supreme Court upheld section 15–86 against the plaintiffs' constitutional challenge. *See Oswald*, 2018 IL 122203, ¶¶ 9–45.

This case, which is on appeal from a final judgment by the trial court, presents a much-needed opportunity to clarify the charitable-use test that Illinois not-for-profit hospitals must satisfy to qualify for property-tax exemption under article IX, section 6, of

the Illinois Constitution, an issue left unresolved by *Provena II*, *Carle III*, and *Oswald*. *See* Ill. Const., art. IX, § 6. This guidance is critical to the hospital community, the Department of Revenue ("DOR"), county boards of review, and local taxing districts as they continue navigating this area of the law. It also is important to charitable organizations other than hospitals, since all charitable organizations seeking property-tax exemption are subject to the constitutional requirement of charitable use.

The constitutional charitable-use test is distinct from the statutory charitable-ownership test. *See infra* Arg. Part I. It should depend on whether property is used for one or more of the charitable purposes Illinois courts have recognized for decades. It should not impose a minimum monetary quantum of charitable care on hospitals across the state. This is an issue the legislature addressed by enacting section 15–86, which contains a statutory charitable-ownership requirement. *See infra* Arg. Part II(A)(1)–(2).

The constitutional charitable-use test also should not rely upon the factors set forth in *Methodist Old Peoples Home v. Korzen*, 39 Ill. 2d 149, 156–57 (1968), other than to the extent that the sixth *Korzen* factor recites the constitutional charitable-use requirement. The other five factors define an "institution[] of public charity" under section 15–65 of the Property Tax Code. Those factors are irrelevant to charitable use. *See infra* Arg. Part II(A)(3).

For these reasons, and as discussed in further detail below, the IHA respectfully requests that the Court determine that if a hospital was organized for the charitable purpose of providing healthcare, and the hospital makes that care available to everyone in a community who needs and applies for it, regardless of their ability to pay, then the hospital should be deemed to satisfy the constitutional charitable-use test. Assuming the

hospital also satisfies the statutory charitable-ownership test, then it should qualify for a charitable property-tax exemption.

FACTS ABOUT ILLINOIS HOSPITALS

I. Hospital Ownership

Illinois has 208 community hospitals serving its 12.7 million citizens, including:

- One hundred fifty-nine hospitals operated by not-for-profit charitable organizations;
- Twenty-six hospitals operated by for-profit, investor-owned corporations; and
- Twenty-three hospitals operated by state or local governments.

See IHA, *Member Profile Database* (2022); U.S. Census Bureau, *Quick Facts for Illinois*, *available at* https://www.census.gov/quickfacts/IL%20(2019).[1]

II. Types of Hospitals

In addition to differences in ownership, Illinois hospitals vary tremendously in other ways. They generally fall into the following categories:

- ***Community hospitals*** range in size from 150 to over 400 beds. These are general acute-care hospitals, typically found in cities and suburbs, that offer a wide variety of services.
- ***Critical Access Hospitals ("CAHs")*** are mostly located in rural communities and have 25 or fewer beds. A CAH often is the only hospital in a county and may have a medical staff of 5 to 10 physicians. There are 51 CAHs in Illinois.
- ***Disproportionate-share hospitals*** or ***safety-net hospitals*** usually are located in inner-city areas or rural counties. They are referred to this way because they treat a disproportionately high number of patients who are on Medicaid or are uninsured.

[1] The Table of Contents and Statement of Points and Authorities contains live hyperlinks for all web-based materials.

- ***Specialty hospitals*** focus on particular areas of care, such as rehabilitation, psychiatric treatment, or pediatric treatment.

- ***Academic medical centers*** are several-hundred-bed teaching hospitals affiliated with medical schools. Illinois has 5 academic medical centers.

See IHA, *Member Profile Database* (2022).

III. General Statistics

In 2019, the most recent year for which statistics are currently available to the IHA, Illinois hospitals:

- Admitted 1.4 million inpatients, *see* Ill. Dep't Pub. Health, *Annual Hospital Questionnaire* (2019);

- Treated 114,000 outpatients every day, *see id*.;

- Treated 5 million patients in their emergency departments, *see id*.;

- Provided nearly $1 billion in charity care measured at cost, *see id*.; and

- Employed over 281,000 people in Illinois, *see* Am. Hosp. Ass'n/Health Forum, *Annual Survey of Hospitals* (2019).

IV. Financial Challenges

Illinois hospitals face tremendous financial challenges, as demonstrated by the following statistics for 2019:

- Approximately 7.3% of Illinois's population—i.e., 905,900 Illinoisans—are uninsured. *See* Kaiser Family Found., *Health Insurance Coverage of the Total Population for Illinois* (2019).

- Fifty-one percent of Illinois's not-for-profit hospitals have negative or thin—i.e., less than 2%—operating margins. *See* Ctrs. for Medicare & Medicaid Servs., *Healthcare Cost Report Information System (HCRIS), Medicare Cost Reports* (Sept. 2021).

- Thirty-three percent of patients at the typical Illinois hospital are covered by Medicare, which, on average, pays only 88% of the cost of treating Medicare patients. In other words, the typical hospital

loses money on Medicare and subsidizes the federal government's operation of this program. *See* Ill. Dep't Pub. Health, *Annual Hospital Questionnaire* (2019); Ctrs. for Medicare & Medicaid Servs., *Healthcare Cost Report Information System (HCRIS), Medicare Cost Reports* (2019).

- Twenty percent of patients at the typical Illinois hospital are covered by Medicaid, which, on average, pays 75% to 80% of the cost of treating Medicaid patients. *See* Ill. Dep't Pub. Health, *Annual Hospital Questionnaire* (2019); Ill. Dep't Healthcare & Family Servs., *Upper Payment Limit Calculation, Illinois Medicaid Payments Net of Hospital Tax Cost*.

- In 2019, Illinois hospitals paid a special assessment of $1.72 billion to the State of Illinois to help support the Medicaid program, meaning that the hospitals themselves contributed to a portion of their own Medicaid reimbursement. *See* 305 ILCS 5/5A–2.

- For the typical Illinois hospital, 53% of its patients are insured by federal or state programs that did not cover the cost of treating those patients. For some hospitals, especially in inner-city and rural communities, as many as 70% to 80% of their patients are covered by Medicare or Medicaid. *See* Ill. Dep't Pub. Health, *Annual Hospital Questionnaire* (2019).

ARGUMENT

This case calls on the Court to examine, clarify, and apply Illinois's constitutional charitable-use test. As discussed in further detail below, that test should be informed by the distinction between charitable ownership—a statutory principle—and charitable use—a constitutional one. The constitutional charitable-use test should depend on whether property is used for one or more of the charitable purposes Illinois courts have recognized for decades. It should not impose a minimum monetary quantum of charitable care on hospitals across the state. Nor should it rely upon the *Korzen* factors, other than to the extent that the sixth factor recites the constitutional charitable-use requirement.

I. Illinois's distinction between charitable ownership and charitable use should inform the Court's inquiry into the nature of the constitutional charitable-use test.

Two phrases permeate the law of charitable property-tax exemption in Illinois: "charitable-use test" and "charitable-ownership test." The phrase "charitable-use test" is shorthand for the provision in article IX, section 6, of the Illinois Constitution that says the legislature may exempt property from taxation if it is "used exclusively for . . . charitable purposes." Ill. Const. 1970, art. IX, § 6. The charitable-use test is constitutional in nature and cannot be overridden by the legislature.

The phrase "charitable-ownership test" is shorthand for the requirement in section 15–65 of the Property Tax Code that property must be owned by an "institution[] of public charity" in order to qualify for an exemption. 35 ILCS 200/15–65(a). Hospitals relied on section 15–65 to obtain exemptions before section 15–86 was enacted. That statute has not been repealed, and many types of charitable organizations still rely on it to seek property-tax exemption. The charitable-ownership test is a statutory requirement created by the legislature.

In very simplistic terms, these two tests have been characterized as follows:

- The constitutional charitable-use test looks at the *use* of property for charitable purposes.
- Courts have suggested that the constitutional charitable-use test falls within the judiciary's purview.
- The statutory charitable-ownership test looks at characteristics of the property's *owner*.
- The statutory charitable-ownership test falls within the purview of the legislature, which may add requirements that go beyond the constitutional charitable-use test.

As the Supreme Court acknowledged in *Oswald*, the meaning of, and differences between, constitutional charitable use and statutory charitable ownership support the conclusion that the legislature did not intend to ignore or abrogate the constitutional charitable-use requirement for property-tax exemption when it enacted section 15–86. *See Oswald*, 2018 IL 122203, ¶¶ 25–43. The legislature was merely exercising its authority to establish a new statutory charitable-ownership test to be applied in addition to, *not* in place of, the constitutional charitable-use test. *See id*.

A. To qualify for a charitable exemption, the constitutional charitable-use requirement must be met.

Article IX, section 6, of the Illinois Constitution states, in relevant part, that "[t]he General Assembly by law ***may exempt from taxation*** only the property of the State, units of local government and school districts and property ***used exclusively for*** agricultural and horticultural societies, and for school, religious, cemetery and ***charitable purposes***." Ill. Const. 1970, art. IX, § 6 (emphases added).

Article IX, section 6, does not require, as a condition of a charitable exemption, that property be owned by a charitable institution or by any particular type of owner. It requires merely that property be "used exclusively for . . . charitable purposes." *See id*. Charitable ownership is an additional statutory prerequisite to exemption that the legislature has imposed. *See, e.g.*, 35 ILCS 200/15–65(a); 35 ILCS 200/15–86(a)(1); *see also N. Shore Post No. 21 of the Am. Legion v. Korzen*, 38 Ill. 2d 231, 233 (1967) ("[I]n exempting property the legislature may place restrictions, limitations, and conditions on [property-tax] exemptions as may be proper by general law.").

B. For over a decade, confusion and turmoil have existed over the meaning of the constitutional charitable-use requirement.

Beginning in 2002, a controversy erupted over whether the constitutional charitable-use test required hospitals to provide a specific amount of so-called "charity care" (i.e., free or discounted services to low-income individuals). The Supreme Court had never held that the Illinois Constitution required a specific quantum of charity care. To the contrary, in *Quad Cities Open v. City of Silvis*, 208 Ill. 2d 498 (2004), the Court noted that "[a] charity is not defined by percentages" and upheld the charitable exemption of a golf tournament from a municipal amusement tax even though the tournament donated only an "exceedingly small fraction" of its revenue to charity. *Id*. at 516.

Despite this clear guidance from the Court, in 2006, the DOR's then-Director based the DOR's denial of Provena Covenant Medical Center's ("Provena") property-tax exemption on the small percentage of Provena's charity care compared to its overall budget. The DOR's administrative-law judge had recommended granting the exemption, correctly explaining that "[t]he Supreme Court . . . specifically rejected the argument that the percentage of charity care should be determinative of whether an institution is entitled to a charitable purposes exemption." *Dep't of Revenue v. Provena Covenant Med. Ctr.*, No. 04–PT–0014, Tax Year 2002, ALJ Recommendation (Oct. 17, 2005), at 50; *see also Provena I*, 384 Ill. App. 3d at 736. The Director nevertheless ruled that "[t]o obtain the exemption [Provena] was required to prove that its primary purpose was *charitable care*," concluding that "[Provena's] financial figures f[e]ll far short of meeting the primary purpose standard." *Provena I*, 384 Ill. App. 3d at 753 (emphasis added) (internal quotation marks omitted).

The Director's decision did two things. *First*, it transformed the constitutional requirement of using property primarily for "charitable purposes" to using property primarily for "charity care"—a significant shift. *Second*, it appeared to establish a new quantitative charitable-exemption test based on the amount of free and discounted care provided by a hospital. The Director's decision did not identify the amount of free and discounted care required to pass the test; it merely found that Provena had provided too little.

On judicial review, the circuit court reversed the Director's decision, concluding that Provena was entitled to a charitable exemption. *Id*. at 737. This Court subsequently reversed the circuit court's judgment and upheld the Director's decision. *Id*. at 769.

As the *Provena* case made its way through the various layers of administrative and judicial review, the uncertainty over the test for tax exemption threatened the entire financial foundation of not-for-profit hospital care. Hospitals were on notice that the DOR would focus on the percentage of their free and discounted care, but they had no idea what amount would be deemed adequate. In 2006, the hospital bond market stopped functioning in Illinois because of legislation proposed to address this uncertainty. *See* Karen Pierog, *Bond insurers balk over Illinois hospital bill*, Reuters News (Feb. 28, 2006) (reporting that "[t]wo municipal bond insurers . . . stopped insuring hospital bonds in Illinois due to legislation that would mandate levels of charity care in the state"); Yvette Shields, *Illinois Health Deals Stalled by Charity Care Proposal; Bond Insurers Hesitate Over Legislation*, The Bond Buyer (Mar. 2, 2006) (discussing stalled hospital deals where borrowers were unable to secure bond insurance because of the fiscal threat posed by state legislation that would require an increase in charity-care spending).

Construction and modernization projects worth hundreds of millions of dollars came to a halt, and the effects rippled out to workers, vendors, suppliers, and, most importantly, patients and communities that depended on hospitals for up-to-date healthcare. *See id.; see also* Tim Jones, *Illinois Says Hospitals No Longer 'Poorhouses' Shielded from Tax*, Bloomberg (Sept. 13, 2011) (discussing effects of DOR rulings denying property-tax exemptions based on hospitals' inadequate provision of charity care, including the postponement of a construction-bond sale and concerns about hospitals' inability to pay for newly built facilities).

C. In *Provena II*, the Supreme Court was unable to agree upon the proper test for deciding whether a hospital satisfies the constitutional charitable-use requirement.

In *Provena II*, a majority of the Supreme Court held that, based on the evidence before the Court, the DOR properly concluded that the property in question was not *owned by* a charitable institution and therefore was not entitled to a charitable exemption under the *statutory test*. *Provena II*, 236 Ill. 2d at 390–93, 411–12. A majority of the Court clarified that five of the six criteria first set forth in *Korzen* apply to determining whether property is owned by a "charitable institution," as required by section 15–65 of the Property Tax Code. *See id*. at 390, 411. In enumerating those five criteria, the majority stated that, in *Korzen*, the Court "identified the distinctive characteristics *of a charitable institution*"—namely, that "(1) it has no capital, capital stock, or shareholders; (2) it earns no profits or dividends but rather derives its funds mainly from private and public charity and holds them in trust for the purposes expressed in the charter; (3) it dispenses charity to all who need it and apply for it; (4) it does not provide gain or profit in a private sense to any person connected with it; and (5) it does not appear to place any

obstacles in the way of those who need and would avail themselves of the charitable benefits it dispenses." *Id*. at 390 (emphasis added).

Critically, the Court in *Provena II* reached no majority on the proper test for deciding whether a hospital satisfies the Illinois Constitution's charitable-use requirement, the sixth criterion set forth in *Korzen*. *See Korzen*, 39 Ill. 2d at 157 (stating that "the term 'exclusively used' means the primary purpose for which property is used and not any secondary or incidental purpose"). Three justices considered whether the plaintiff engaged in activity that helped reduce the government's burden of caring for needy individuals and whether the plaintiff provided more than a "*de minimis*" amount of "free or discounted care." *Provena II*, 236 Ill. 2d at 397–408. Two justices rejected the adoption of these criteria in evaluating charitable use. *Id*. at 412–17. Two justices did not participate in the Court's deliberations. *Id*. at 411.

D. In response to *Provena II*, the legislature, with input from key stakeholders, enacted section 15–86.

In response to the Supreme Court's decision in *Provena II*, after extensive negotiations involving the Office of the Governor, the DOR, the Illinois Attorney General, Cook County, patient-advocacy organizations, and the Illinois hospital community, the legislature enacted section 15–86 of the Property Tax Code. 35 ILCS 200/15–86.

Section 15–86's legislative findings expressly refer to the Supreme Court's decision in *Provena II*. The findings indicate that, "[d]espite the Supreme Court's decision in *Provena* . . ., there is ***considerable uncertainty*** surrounding the test for charitable property tax exemption, especially regarding the application of a quantitative or monetary threshold . . . ." 35 ILCS 200/15–86(a)(1) (emphasis added). The findings

further note that, "[i]n *Provena*, two Illinois Supreme Court justices opined that 'setting a monetary or quantum of care standard is a complex decision which should be left to our legislature, should it so choose.'" 35 ILCS 200/15–86(a)(2).

The findings go on to describe the state of the modern healthcare system in relation to tax-exemption law, noting that "[i]t is essential to ensure that tax exemption law relating to hospitals accounts for the complexities of the modern health care delivery system." 35 ILCS 200/15–86(a)(3). According to the legislature, "[h]ealth care is moving beyond the walls of the hospital." *Id*. "In addition to treating individual patients, hospitals are assuming responsibility for improving the health status of communities and populations," including "[l]ow-income communities," which "benefit disproportionately by these activities. . . ." *Id*.

The findings also discuss the legislative backdrop against which section 15–86 was developed. *See* 35 ILCS 200/15–86(a)(5). By "[w]orking with the Illinois hospital community and other interested parties," the legislature "developed a comprehensive combination of related legislation that addresses hospital property tax exemption . . . ." *Id*. That legislation also "significantly increase[d] access to free health care for indigent persons[] and strengthen[ed] the Medical Assistance program." *Id.; see also* P.A. 97–690, § 10 (amending Hospital Uninsured Patient Discount Act to require hospitals to provide low-income patients with free care for all medically necessary services exceeding $300); P.A. 97–688, § 5–60, p. 147 (enacting 305 ILCS 5/5A-2(b-5) to increase the assessment on hospitals to generate $1.19 billion to help fund the Medicaid program at that time).

Finally, the findings express the legislature's intent in enacting section 15–86. *See id*. According to the findings, the legislature intended "***to establish a new category of***

ownership for charitable property tax exemption to be applied to not-for-profit hospitals and hospital affiliates in lieu of the existing ownership category of 'institutions of public charity.'" *Id.* (emphasis added). The legislature also intended "to establish quantifiable standards for the issuance of charitable exemptions for such property." *Id.* It did not intend "to declare any property exempt ipso facto, but rather to establish criteria to be applied to the facts on a case-by-case basis." *Id.*

E. *Oswald* upheld section 15–86 as written.

In *Oswald*, a case in which the IHA participated as an intervenor–defendant, the Supreme Court upheld section 15–86 as written. *Oswald*, 2018 IL 122203, ¶¶ 40–45. The Court rejected the argument that section 15–86 was "facially unconstitutional because it mandatorily awards a property tax exemption based on satisfaction of its statutory criteria, without regard to whether the subject property satisfies the constitutional 'exclusive charitable use' requirement." *Id.*, ¶ 28. The Court reasoned that, although section 15–86 did not explicitly mention the constitutional charitable-use test, the Court was required to "presume[] that the legislature intended to comply with this constitutional limitation." *Id.*, ¶ 33. The Court further reasoned that the word "shall" in section 15–86 was "permissive and not mandatory" in order to "avoid the possible constitutional infirmity" of a mandatory construction. *Id.*, ¶ 38.

Under *Oswald*, "a hospital application seeking a section 15–86 charitable property tax exemption must document the services or activities meeting the statutory criteria." *Id.*, ¶ 39. In addition, "the hospital must show that the subject property meets the constitutional test of exclusive charitable use." *Id.* In discussing the constitutional charitable-use test, the Court in *Oswald* was careful to omit any mention of the ownership-related *Korzen* factors. *See id.*, ¶¶ 15–17. Instead, the Court referred to

Korzen's definition of "charity" and its statement that "the term 'exclusively used' 'means the primary purpose for which property is used and not any secondary or incidental purpose.'" *Id.*, ¶¶ 15–16 (quoting *Korzen*, 39 Ill. 2d at 157). The Court noted that these "'principles constitute the frame of reference to which [the Court] must apply [a] plaintiff's use of its property to arrive at a determination of whether or not such use is in fact exclusively for charitable purposes.'" *Id.*, ¶ 17 (quoting *Korzen*, 39 Ill. 2d at 157). That "frame of reference" is squarely before this Court in this case.

II. The constitutional charitable-use test should depend on whether property is used for one or more of the charitable purposes Illinois courts have recognized for decades.

The Supreme Court's inability to agree on the constitutional charitable-use test in *Provena II* created "considerable uncertainty surrounding the test for charitable property tax exemption . . . ." *See* 35 ILCS 200/15–86. Although section 15–86 was intended to eliminate that uncertainty for hospitals by imposing a quantifiable statutory charitable-ownership requirement, a state of confusion remains regarding the constitutional charitable-use test, as illustrated by the trial court's analysis in this case, where the court noted that "[a]ppellate decisions are all over the place," and "[t]he Illinois Supreme Court [has] provided little guidance." (*See* Cnty. Defs.' Dep. App'x at A-206.)

The need for guidance extends beyond this case. It will benefit the DOR, which is responsible for considering exemption applications under section 15–86 and has, in the past, suspended its determinations while monitoring this litigation. It also will benefit county boards of review, which make nonbinding recommendations to the DOR on exemption applications; local taxing districts; and hospitals.

As discussed below, the constitutional charitable-use test should depend on whether property is used for one or more of the charitable purposes Illinois courts have recognized for decades. It should not impose a minimum monetary quantum of charitable care on hospitals across the state. The legislature resolved that public-policy debate when it created a minimum monetary requirement under section 15–86 in accordance with the dissent's observation in *Provena II* that "[s]etting a monetary or quantum standard is a complex decision which should be left to our legislature, should it so choose." *Provena II*, 236 Ill. 2d at 415; *see* 35 ILCS 200/15–86(a)(2). The statutory standard adopted by the legislature is more demanding than the constitutional standard has ever been, as the Supreme Court acknowledged in *Provena II*. *See Provena II*, 236 Ill. 2d at 395 (noting that, with respect to charitable use, "Illinois law has never required that there be a direct, dollar-for-dollar correlation between the value of the tax exemption and the value of the good or services provided by the charity").

The wisdom of the *Provena II* dissent's observation regarding legislative control over setting a monetary standard for charitable care is underscored by the fact that the constitutional charitable-use requirement applies not just to hospitals, but to every type of charitable organization seeking exemption under the Property Tax Code. This includes, among others, YMCAs and YWCAs, scouting organizations, environmental and conservation organizations, and cultural organizations. *See, e.g., People v. Young Men's Christian Ass'n of Chi.*, 365 Ill. 118, 122 (1936) (YMCA); *People ex rel. Hellyer v. Morton*, 373 Ill. 72, 77 (1940) (conservation organization); *Girl Scouts of Du Page Cnty. Council, Inc. v. Dep't of Revenue*, 189 Ill. App. 3d 858, 861 (2d Dist. 1989) (scouting organization). Monetary standards that may be relevant to hospitals likely are not relevant

to scout camps, standards that work for scout camps likely do not apply to art museums, and so on. Courts should avoid the public-policy morass of establishing metrics for every type of charitable organization.

The constitutional charitable-use test also should not rely upon the factors set forth in *Korzen*, other than to the extent that the sixth *Korzen* factor recites the constitutional charitable-use requirement. *See Korzen*, 39 Ill. 2d at 156–57. The other five *Korzen* factors pertain to defining an "institution[] of public charity" under section 15–65 of the Property Tax Code. *See* 35 ILCS 200/15–65(a). They do not pertain to the constitutional charitable-use requirement.

A. Illinois case law supports a broad, nonquantitative conception of charitable use.

Illinois case law supports a broad, nonquantitative conception of the constitutional charitable-use requirement. Central to that conception are the principles that (i) a charitable hospital's property is a gift to the community as a whole, and (ii) charitable use includes providing healthcare to everyone in a community who needs and applies for it, regardless of their ability to pay.

1. A charitable hospital's property is a gift to the community for the benefit of the community as a whole.

There is a well-known phrase in charitable-property-tax-exemption law: "[A] charity is a gift to the general public." It is repeated in some form in virtually every Illinois Supreme Court case discussing charities from 1893 to 2018. *See Crerar v. Williams*, 145 Ill. 625, 648 (1893); *Congregational Sunday Sch. & Publ'g Soc. v. Bd. of Review*, 290 Ill. 108, 113 (1919); *YMCA*, 365 Ill. at 122; *Hellyer*, 373 Ill. at 77; *People ex rel. Cannon v. S. Ill. Hosp. Corp.*, 404 Ill. 66, 69 (1949); *Korzen*, 39 Ill. 2d at 156–57;

Quad Cities, 208 Ill. 2d at 510–11; *Provena II*, 236 Ill. 2d at 400–01; *Oswald*, 2018 IL 122203, ¶ 15.

Understanding this phrase is essential to understanding the Illinois Constitution's requirement that exempt property must be used for "charitable purposes." Ill. Const. 1970, art. IX, § 6. Unfortunately, repeated misunderstandings about the phrase, and especially the word "gift," have led to much of the confusion over the constitutional charitable-use requirement.

Some courts have applied the common vernacular definition of the word "gift" to conclude that charitable organizations exist to "give gifts"—that is, to "give away" free goods and services to individual members of the public. Under this approach, in the case of hospitals, the "gift" that must be "given away" is free or discounted medical care to low-income patients. This mistakenly gives rise to looking at the percentage of charity care provided by a hospital in determining whether the hospital qualifies for property-tax exemption, an approach the trial court took in this case, where the percentage of charity care was outcome-determinative for tax year 2004, nearly outcome-determinative for tax year 2005, and considered by the trial court with respect to each of the tax years in question. (*See* Cnty. Defs.' Dep. App'x at A-214–15, 249–52.)

a. The "gift" terminology originated in the law of wills and trusts.

In considering the word "gift," and the phrase "a gift to the general public," it is essential to recall that this terminology did not originate in tax-exemption cases, but rather in the law of wills and trusts. The Supreme Court's seminal case on the issue, *Crerar v. Williams*, involved a challenge to the will of industrialist John Crerar, who made a bequest to establish a library. *Crerar*, 145 Ill. at 637 ("I give, devise, and

bequeath all the rest, remainder, and residue of my estate, both real and personal, for the erection, creation, maintenance, and endowment of a free public library, to be called 'The John Crerar Library,' and to be located in the city of Chicago, Illinois . . . ."). Mr. Crerar's relatives challenged that provision of the will, preferring to receive the money devoted to the bequest for themselves. *Id*. at 635.

The "gift" under consideration in *Crerar* was Mr. Crerar's "gift" of a library to the people of Chicago. *See id*. at 648–49. The question before the Supreme Court was whether that "gift" was for a purpose recognized as charitable. *See id*. The Court concluded that Mr. Crerar's gift was, in fact, for a recognized "charitable purpose" and therefore survived the challenge by his relatives. *See id*. *Crerar* establishes that the word "gift" has nothing to do with "giving gifts" in the present tense. Rather, it relates to creating or establishing a charitable organization by means of a gift.

b. Nearly every charitable hospital began as a gift.

Like the John Crerar Library, nearly every charitable hospital began as a gift. Researching the history of a charitable hospital in Illinois generally will reveal that some person or group of people made a charitable gift to establish a hospital for the benefit of the community. Sometimes it was a wealthy farmer donating land; sometimes a merchant donating money; sometimes a widow leaving her house; or sometimes a group of people, like an ethnic group, pooling meager resources. Whatever the circumstances, charitable hospitals, including Carle Foundation Hospital, all began when someone gave "a gift to the general public" for the purpose of establishing a hospital. (R. 1648 (stating that a local resident named Margaret Carle Morris bequeathed money to create a sanatorium).)

The hospital itself is the gift, and the community—an "indefinite number of persons," to use *Crerar*'s phrase—is the beneficiary. *See Crerar*, 145 Ill. at 643.

That gift, be it land, money, or a building, is held in trust and in perpetuity for its beneficiaries, the people of the community. That is why charities, including charitable hospitals, are known as "charitable trusts" under Illinois law. *See* 760 ILCS 55/1 *et seq*. Their property is held in trust to carry out the original donor's charitable purpose.

In the case of charitable hospitals, the charitable purpose of the original gift is providing healthcare to the entire community. In some instances, the charitable purpose also includes providing medical education or conducting medical research, complementary goals aimed at improving the quality of the healthcare provided to the community. In all cases, a charitable hospital's board of trustees holds the hospital's property in trust for the community's benefit. The property is not owned by shareholders or private individuals for their own profit.

The original gift certainly can grow over the years. A $10,000 cash donation, or a two-story house, or 10 acres of land donated to establish a hospital 100 years ago may have grown into a $100 million enterprise thanks to the careful stewardship of a board of trustees. But the $100-million-dollar enterprise still is the "gift" held in trust for the members of the community.

c. A gift to the general public has characteristics that distinguish it from private property.

Confusion over the meaning of the phrase "a gift to the general public" is illustrated by the statement in *Provena I* that "[a] new Wal-Mart would be a gift in a comparable sense—with the added bonus that it would pay property taxes." *Provena I*, 384 Ill. App. 3d at 747. A new Walmart may be a "gift" in the sense that a community

feels lucky to have one, but the store is fully owned by the shareholders of Walmart. Walmart does not relinquish ownership of the property when it builds a store in a community. The store exists for one reason only—to generate a profit for Walmart's shareholders. Walmart's board of directors owes a fiduciary obligation to the *shareholders* to maximize their profit. The community has no voice in whether the company's store will remain open, how the company's property is used, whether that property will be sold, or what happens to the sale proceeds. If the financial interests of Walmart's shareholders are better served by closing the store, then the store will be closed, the property will be sold, and the proceeds will belong to the *shareholders*.

In contrast to Walmart, the board of trustees of a charitable hospital owes a fiduciary duty to the community to ensure that the gift given to the community is used to fulfill the original donor's charitable purposes. The board is not free to do what it pleases with the property of the charitable hospital. And the community has a voice, in the person of the Illinois Attorney General, to ensure that the property is used only for its intended charitable purposes. *See, e.g., Riverton Area Fire Protection Dist. v. Riverton Volunteer Fire Dep't*, 208 Ill. App. 3d 944, 948 (4th Dist.1991) (attorney general filed action seeking accounting of charitable assets, and injunctive relief, to ensure that corporate purpose of charitable trust was fulfilled).

This is why, when an Illinois charitable hospital is closed, the Illinois Attorney General may intervene on the community's behalf to ensure that the gift—the charitable property—continues to serve its intended purpose. Typically, the sale proceeds are used to establish a charitable foundation that continues to support the community's healthcare needs.

For example, when two not-for-profit hospitals were sold in Waukegan in 2006, the Attorney General "was responsible for ensuring that the primary purpose" of the "new charitable foundation" established with the sale proceeds would be to "benefit . . . the underserved residents of Waukegan and the surrounding area." *See* Illinois Attorney General Press Release, *Madigan Hails Creation of Charitable Foundation to Benefit Medically-Needy Residents of Northern Lake County* (June 23, 2006), *available at* https://illinoisattorneygeneral.gov/pressroom/2006_06/20060623b.html. Among other things, the Attorney General "negotiated the terms of the foundation to make certain that the board of directors w[ould] be broadly representative of the community served," ultimately "hail[ing] the court approval of the foundation." *See id.; see also* Letter to Illinois Attorney General Charitable Trust Bureau (July 24, 2014), *available at* https://www2.illinois.gov/sites/hfsrb/Projects/ProjectDocuments/Exempt/e-016-14/2014-07-24_e-016-14_ltr_regarding_request_to_attorney_general_for_approval_of_charitable_assets.pdf (asking the Attorney General's Charitable Trust Bureau to approve the disposition of certain charitable assets in connection with the sale of Maryville Behavioral Health Hospital so the assets could be used to support Maryville Academy's other charitable programs and mission, a transaction that was approved).

The fact that certain property is held in trust for the community provides half the answer to why the property of charitable organizations, including charitable hospitals, is not taxed. Society only taxes private property. It does not tax public schools, public libraries, public parks, or public facilities, such as fire stations or town halls. By the same token, it does not tax the property of a charitable trust because that property is dedicated to accomplishing a specific charitable purpose for society's benefit. Taxing

the charitable entity would diminish the ability of the gift—the corpus of the trust—to satisfy the original donor's charitable intent.

2. Charitable use includes providing hospital care to everyone in a community who needs and applies for it, regardless of their ability to pay.

To qualify for charitable property-tax exemption, it is not enough that a parcel of land, or the money used to purchase it, was donated to a community. The property also must continue to be used for a "charitable purpose." In the case of a charitable hospital, that "charitable purpose," the reason the donor made the gift in the first place, includes providing healthcare to *everyone* in the community who needs and applies for it, regardless of their ability to pay.

a. Illinois courts define "charity" broadly.

This conception of charitable use is consistent with Illinois courts' historical recognition that "charity" should be, and is, defined broadly. In *School of Domestic Arts & Sciences v. Carr*, 322 Ill. 562 (1926), the Supreme Court synthesized its prior case law on the definition of "charity." *Id.* at 568–69. Noting that it had "approved and adopted . . . the legal definition of a charity" from *Crerar*, the Court emphasized that "[a] charity, in a legal sense, may be more fully defined as a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons." *Id.* at 568 (internal quotation marks omitted). As noted in *Crerar*, this "benefit" may arise "either by bringing [those persons'] hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the bur[d]ens of government." *Id.* (internal quotation marks omitted).

The Court in *Carr* went on to state as follows: "A charitable use, where neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing and well-being of social man." *Id*. at 569; *see also People ex rel. Scott v. George F. Harding Museum*, 58 Ill. App. 3d 408, 415 (1st Dist. 1978) (quoting *Carr*); *People ex rel Hartigan v. Nat'l Anti-Drug Coalition*, 124 Ill. App. 3d 269, 274 (1st Dist. 1984) (defining "charity" as "includ[ing] almost anything that tends to promote the improvement, well doing and well being of social man").

In accordance with these principles, Illinois courts have held a wide variety of specific purposes to be "charitable," including, among others, aiding the poor-and-needy fund of a religious organization, *In re Estate of Muhammad*, 165 Ill. App. 3d 890, 895–98 (1st Dist. 1987); supporting a church or disseminating religious doctrine, *People ex rel. Smith v. Braucher*, 258 Ill. 604, 608 (1913); endowing a school or promoting education, *Bd. of Educ. of City of Rockford v. City of Rockford*, 372 Ill. 442, 449 (1939); endowing a public library, *Vill. of Hinsdale v. Chi. City Missionary Soc'y*, 375 Ill. 220, 231 (1940); creating a scholarship fund for needy students, *Morgan v. Nat'l Trust Bank of Charleston*, 331 Ill. 182, 190–91 (1928); endowing a home for orphans or foundlings, *First Nat'l Bank of Chi. v. Elliott*, 406 Ill. 44, 56 (1950); creating a public museum, *Harding*, 58 Ill. App. 3d at 415–16; donating public open space or parkland, *Stowell v. Prentiss*, 323 Ill. 309, 318 (1926); advocating on issues of public importance, *Garrison v. Little*, 75 Ill. App. 402, 414–16 (2d Dist. 1897); donating gifts to municipal bodies or for governmental purposes, *Dickenson v. City of Anna*, 310 Ill. 222, 231–32 (1923); and, most significantly for purposes of this case, promoting health and combating disease, *In re Estate of*

Tomlinson, 65 Ill. 2d 382, 388 (1976). *See also* Restatement (Second) of Trusts §§ 368–375 (1959).

b. The common law of trusts defines "charity" broadly.

Illinois courts' recognition that promoting health and combating disease is a charitable purpose is consistent with established principles of trust law. As one well-known scholar has noted, one "class of eleemosynary charitable trusts is that concerned with the improvement of public health and the cure or alleviation of disease. These causes are of great public interest and their advancement is regarded as highly advantageous to mankind." G. Bogert, *The Law of Trusts and Trustees* § 374 (3d ed. rev. 2008) ("Bogert"). Trusts of this nature have a long history. The Statute of Charitable Uses, enacted in 1601, contains a preamble mentioning multiple gifts relating to public health. *Id.*

When a settlor establishes a charitable trust to promote public health and combat disease, "[t]he settlor may provide for the relief of sickness in general, or he may limit his aid to those members of a described large group who suffer from illness or those who are victims of certain diseases . . . ." *Id.* The particular variations of these trusts all share a key commonality: "[I]t is not necessary that [they] be limited to assistance to the poor." *Id.* This is because "[s]ociety is interested in having *all its members, rich and poor*, in good physical condition, capable of being productive, caring for themselves and enjoying life." *Id.* (emphasis added). To that end, "[i]t is to the advantage of the state to have as many agencies as possible operating to bring about *health for the entire community*." *Id.* (emphasis added).

c. Using property to operate a hospital satisfies the constitutional charitable-use requirement if the property was donated for that purpose and remains accessible to the entire community.

Using property to operate a hospital falls within the general principles described above—namely, promoting people's "well-doing and well-being" and promoting society's interest "in having all its members, rich and poor, in good physical condition, capable of being productive, caring for themselves and enjoying life." *Carr*, 322 Ill. 562 at 568–69; *Hartigan*, 124 Ill. App. 3d at 274; Bogert, § 374. It also falls within the specific charitable purpose recognized in *Tomlinson*—promoting health and combating disease. *See Tomlinson*, 65 Ill. 2d at 388.

Within the scope of this well-recognized charitable purpose, hospital property satisfies the constitutional charitable-use requirement as long as it is used to provide hospital care to everyone in the community who needs and applies for it, regardless of their ability to pay. *See, e.g., Lutheran Gen. Health Care Sys. v. Dep't of Revenue*, 231 Ill. App. 3d 652, 660, 664 (1st Dist. 1992) (hospital property that met accessibility requirement was used for charitable purposes). In an unbroken string of cases dating back to 1893, *see Crerar*, 145 Ill. at 644, the Supreme Court has expressly rejected the approach that a property's charitable use is determined by the dollar value of free goods and services provided to individual citizens. As recently as 2004, the Court noted that "[a] charity is not defined by percentages . . . ." *Quad Cities*, 208 Ill. 2d at 516. Although *Quad Cities* did not involve property taxation, the Court in *Quad Cities* analyzed what it means to be "charitable" by relying on the same precedents used in property-tax-exemption cases, including *Crerar* and *YMCA*. *See id*.

Indeed, a careful reading of the Supreme Court's case law shows that a "charitable purpose" is not limited to "mere almsgiving," but rather "benefits the rich as well as the poor." *Congregational Sunday Sch.*, 290 Ill. at 113. A donor who gives money or land to build a hospital does so for the benefit of everyone in the community, not just for the poor. As long as the hospital remains accessible to the entire community, it does not need to provide a particular minimum monetary amount of free care to retain its charitable property-tax exemption.

This accessibility has the important effect of "reducing the burdens of government," a corollary of the foundational definition of "charity" in Illinois's case law on this issue. *See Oswald*, 2018 IL 122203, ¶ 15 (defining "charity" as "a gift to be applied . . . for the benefit of an indefinite number of persons, persuading them to an educational or religious conviction, for their general welfare—or in some way reducing the burdens of government") (internal quotation marks omitted); *Provena II*, 236 Ill. 2d at 390–91 (same).

Government today provides substantial public funding, through Medicare and Medicaid, to help charitable hospitals care for the ill and infirm. *See* Ill. Dep't Pub. Health, *Annual Hospital Questionnaire* (2019); Ctrs. for Medicare & Medicaid Servs., *Healthcare Cost Report Information System (HCRIS), Medicare Cost Reports* (2018). Illinois charitable hospitals use their charitable assets to subsidize these programs, absorbing and paying for shortfalls in government funding. As a result, in carrying out their traditional charitable purpose—providing healthcare to everyone in the community who needs and applies for it, regardless of their ability to pay—charitable hospitals serve as an important instrument for government to care for the sick.

These considerations support defining "charitable use" to include open access to everyone in the community who needs medical care, regardless of their socioeconomic status. They do not support imposing a minimum monetary quantum of charitable care on hospitals across the state. Although the legislature may impose that condition in defining charitable ownership, as it has done in section 15–86, courts need not—and should not—do so in applying the Illinois Constitution's charitable-use requirement.

3. Charitable use does not depend on the *Korzen* factors, other than to the extent that the sixth factor recites the constitutional charitable-use requirement.

Before the trial court, various parties suggested that the constitutional charitable-use requirement depends on the *Korzen* factors. It does not, other than to the extent that the sixth factor recites the constitutional charitable-use requirement. *See Korzen*, 39 Ill. 2d at 157 (stating that "the term 'exclusively used' means the primary purpose for which property is used and not any secondary or incidental purpose").

In *Korzen*, the plaintiff, an Illinois not-for-profit corporation, filed a complaint seeking a declaratory judgment that the "old peoples home" it operated was tax exempt. *Korzen*, 39 Ill. 2d at 150. The complaint was based on section 19.7 of the Revenue Act of 1939, which is now codified at section 15–65 of the Property Tax Code. *See id*. at 153–54. Under section 19.7, "'[a]ll ***property of institutions of public charity***, all property of beneficent and charitable organizations . . ., and all ***property of old people's homes***" was exempt from taxation "'when such property [was] ***actually and exclusively used for such charitable and beneficent purposes***, and not leased or otherwise used with a view to profit . . . .'" *Id*. at 154 (emphasis added) (quoting Ill. Rev. Stat. 1965, ch. 120, ¶ 500.7).

The circuit court denied the plaintiff's request for an exemption and dismissed the plaintiff's complaint. *Id*. at 150. On a direct appeal, the Supreme Court affirmed. *Id*. at 543. Among other things, the Court emphasized that the plaintiff imposed stringent health requirements on residents seeking admission; charged residents an admission fee and a monthly service charge, both of which determined the nature of their accommodations; and did not guarantee the residents ongoing care. *See id*. at 157–59. These factors weighed against granting the plaintiff a charitable exemption. *See id*.

In its analysis, the Supreme Court distinguished between the constitutional charitable-use requirement and the statutory requirements of section 19.7 of the Revenue Act, noting that "[t]he legislature could not declare that property used by an old peoples home is . . . ipso facto property used exclusively for charitable purposes and therefore tax exempt." *Id*. at 155. The Court stated that "[i]t is the province of the courts, and not the legislature, to ascertain whether or not the particular property, including property used as an old peoples home is 'used exclusively for charitable purposes' within the meaning of the constitutional provision." *Id*. The Court then identified "guidelines and criteria" from previous decisions to be "generally applied" in conducting the exemption analysis. *Id*. at 156.

Unfortunately, the Supreme Court did not specify whether the factors identified in its opinion pertained to the constitutional charitable-use requirement or the statutory charitable-ownership requirement. At one point, the Court said the factors were "for resolving questions of purported charitable use." *Id*. at 156. But in the very next sentence, consistent with the "institutions of public charity" language in section 19.7 of the Revenue Act, the Court described five of the factors as involving the concept of an

"institution." *See id*. at 156–57. Only the sixth factor referred to the concept of "use." *See id*. at 157 ("[T]he term 'exclusively used' means the primary purpose for which property is used and not any secondary or incidental purpose.").

After *Korzen* was decided, it remained unclear whether its factors were statutory or constitutional in nature. *See, e.g., Eden Ret. Center, Inc. v. Dep't of Revenue*, 213 Ill. 2d 273, 290 (2004) (*Korzen* factors "resolve the *constitutional* issue of charitable use") (emphasis in original). In *Provena II*, however, the Supreme Court clarified that five of the six *Korzen* factors apply to the statutory charitable-ownership test under section 15–65 of the Property Tax Code, not the constitutional charitable-use test under article IX, section 6, of the Illinois Constitution. *See Provena II*, 236 Ill. 2d at 390, 411. Specifically, the Court noted that under "[s]ection 15–65 of the Property Tax Code, eligibility for a charitable exemption requires not only that property be 'actually and exclusively used for charitable or beneficent purposes, and not leased or otherwise used with a view to profit,' but also that it be owned by an institution of public charity or certain other entities, including 'old peoples homes' . . . ." *Id*. at 390 (internal citation omitted). The Court went on to recite the five ownership-related *Korzen* factors, noting that, in *Korzen*, it "identified the distinctive characteristics of a *charitable institution* . . . ." *Id*. (emphasis added) (stating that a charitable institution "(1) . . . has no capital, capital stock, or shareholders; (2) . . . earns no profits or dividends but rather derives its funds mainly from private and public charity and holds them in trust for the purposes expressed in the charter; (3) . . . dispenses charity to all who need it and apply for it; (4) . . . does not provide gain or profit in a private sense to any person connected with it; and (5) . . . does

not appear to place any obstacles in the way of those who need and would avail themselves of the charitable benefits it dispenses").

Since *Provena II* was decided, several appellate-court decisions have referred to all six *Korzen* factors in determining whether the constitutional charitable-use test was met. *See, e.g.*, *Midwest Palliative Hospice & Care Ctr. v. Beard*, 2019 IL App (1st) 181321, ¶¶ 21–22; *Meridian Vill. Ass'n v. Hamer*, 2014 IL App (5th) 130078, ¶¶ 6–7; *Franciscan Communities, Inc. v. Hamer*, 2012 IL App (2d) 110431, ¶ 39. None of those decisions adequately explained why they did not follow *Provena II*'s analysis of *Korzen*.

Midwest Palliative, for example, noted that *Provena II* was superseded by statute, but nothing in section 15–86 of the Property Tax Code, a legislative enactment, could have superseded the Supreme Court's formulation of the charitable-use test, which is constitutional in nature. *See Midwest Palliative*, 2019 IL (1st) 181321, ¶ 21. *Meridian Village*, for its part, acknowledged that certain aspects of *Provena II* were precedential but neglected to mention *Provena II*'s discussion of the *Korzen* factors. *See Meridian Vill.*, 2014 IL App (5th) 130078, ¶¶ 14, 18. And *Franciscan Communities* described the charitable-use section of *Provena II* as a "plurality opinion" that was "not binding," even though five justices did, in fact, agree that the *Korzen* factors apply to determining whether a hospital is a "charitable institution." *See Franciscan Communities*, 2012 IL App (2d) 110431, ¶ 18; *see also Provena II*, 236 Ill. 2d at 390, 411.

Consistent with *Provena II*, this Court should reaffirm that the constitutional charitable-use requirement does not depend on the *Korzen* factors, other than to the extent that the sixth factor recites the constitutional charitable-use requirement. The first five factors all pertain to defining an "institution[] of public charity" under section 15–65 of

the Property Tax Code. *See* 35 ILCS 200/15–65(a); *Provena II*, 236 Ill. 2d at 390, 411. In the hospital context, section 15–86 supplanted those factors as the statutory charitable-ownership test for property-tax exemption. *See* 35 ILCS 200/15–86.

The sixth *Korzen* factor simply recites the constitutional charitable-use requirement. *See Korzen*, 39 Ill. 2d at 157. Satisfying that requirement depends on (i) whether property is used for a historically recognized charitable purpose and, (ii) where that purpose is promoting health and combating disease, whether the care provided in furtherance of the purpose is available to everyone in a community who needs and applies for it, regardless of their ability to pay, or relatedly, whether the charitable property is used for the complementary goals of providing medical education or conducting medical research. It does not depend on satisfying the five ownership-related *Korzen* factors.

B. Illinois public policy supports a broad, nonquantitative conception of charitable use.

In addition to the decades of Illinois case law discussed above, Illinois public policy supports a broad, nonquantitative conception of charitable use.

1. Dramatic differences among Illinois communities support a flexible charitable-use standard.

An appropriate charitable-use analysis takes into account the full range of activities and services provided by a hospital in meeting the needs of its community. Decisions about those services and activities are made by hospital trustees, acting as representatives of the local community, based on analyzing and balancing local needs and hospital resources. Although free and discounted care certainly is needed in every Illinois

community, the extent of that need can vary tremendously from community to community.

The United States Census Bureau reported the following percentages of people living below the poverty line in the following pairs of adjacent Illinois counties in 2019:

- Cook 13.8%
- DuPage 6.6%

- Champaign 19.2%
- Piatt 7.3%

- Jackson 25.7%
- Randolph 13.8%

See Index Mundi, *Illinois Poverty Rate by County*, *available at* https://www.indexmundi.com/facts/united-states/quick-facts/illinois/percent-of-people-of-all-ages-in-poverty#map.

These statistics give rise to the inference that the number of people applying for charity care will differ dramatically from community to community and hospital to hospital, and even from year to year as the economic climate changes. Conducting the charitable-use analysis based on a straight mathematical calculation erroneously suggests that there is a single correct percentage of charity care that must be dispensed by every hospital in Illinois to be considered "charitable enough" to deserve property-tax exemption, regardless of how many people actually "need and apply" for that care. There is not a single correct percentage, and defining the charitable-use analysis in this way ignores the realities of the services hospitals provide across the state.

2. Dramatic differences among Illinois hospitals support a flexible charitable-use standard.

As discussed above, *see supra* Facts About Illinois Hospitals, Parts I–II, there are enormous differences among Illinois hospitals. Community hospitals, CAHs, safety-net

hospitals, specialty hospitals, and academic medical centers are as diverse and varied as the communities they serve. The wide variation among Illinois hospitals further demonstrates the wisdom of a flexible and balanced charitable-use analysis that is not based purely on a monetary threshold.

3. Taxing charitable-hospital property wastes charitable assets.

If the board of a charitable hospital decided to use the hospital's resources to open an elementary school or build soccer fields or construct a jail, then the Illinois Attorney General likely would seek to enjoin those projects on the basis that the board was "wasting charitable assets"—that is, not using the assets for the charitable purpose of the organization. *See* 760 ILCS 55/15; *see also Riverton*, 208 Ill. App. 3d at 948.

Requiring a charitable hospital to pay property taxes will divert its charitable assets away from its charitable purpose of providing healthcare to its community and violate the intent of the people who made the charitable gift to establish the hospital. The hospital's assets could be used by local governments to operate schools, build athletic fields, or imprison criminals, all of which are worthy activities but unrelated to the charitable purpose for which the hospital's assets are held in trust for the public.

4. Taxing charitable-hospital property decreases scarce healthcare resources.

As a group, Illinois charitable hospitals operate on extremely thin margins. Their revenue barely exceeds their cost of doing business. Fifty-one percent of Illinois's not-for-profit hospitals have negative operating margins or margins of less than 2%. *See* Ctrs. for Medicare & Medicaid Servs., *Healthcare Cost Report Information System (HCRIS), Medicare Cost Reports* (Sept. 2021).

Imposing the additional cost of property taxes will cause some hospitals currently operating in the black to go into the red and will cause hospitals already operating in the red to lose even more money. No less than their investor-owned counterparts, charitable organizations must bring in more revenue than they spend if their charitable purposes are to be served at all in the long run, as buildings and equipment need to be updated, replaced, and expanded to serve community needs.

5. Taxing charitable-hospital property makes it more difficult for hospitals to borrow needed funds.

To ensure high-quality patient care, hospitals must upgrade equipment; expand and improve facilities, such as emergency departments and operating rooms; replace aging buildings; and invest in new medical technology. These projects cost millions of dollars, and most hospitals must borrow the necessary funds.

Institutions that lend money to hospitals constantly assess the Illinois hospital community to determine whether it is a good, safe, and profitable place to invest. Their assessment boils down to the same things a bank looks at when deciding whether to give a person a mortgage: income, expenses, and debt.

Imposing property taxes on charitable hospitals, and reducing their already minuscule operating margins, will make them less attractive to lenders, especially in comparison to hospitals in other states that do not have the additional burden of property taxes. As a result, paying property taxes could severely reduce, or even wipe out, the average Illinois hospital's operating margin. Diminishing hospitals' operating margins reduces their "debt capacity"—i.e., the amount they can borrow—both individually and collectively.

CONCLUSION

The people of Illinois are fortunate to have been given the gift of 159 not-for-profit charitable hospitals. Over half of those hospitals operate in the red or on razor-thin margins. Yet, like Carle, they consistently have generous charity-care policies, make automatic charity-care determinations, and provide charitable care, as well as, in many instances, medical education and research.

Illinois's not-for-profit charitable hospitals play a vital role in safeguarding the health, safety, and welfare of Illinoisans. The charitable property-tax exemption plays an equally vital role in preserving the health of those hospitals and ensuring that the public assets they hold in trust are used entirely for their intended charitable purpose of providing hospital services to the people and communities of the state.

For these reasons, the IHA respectfully requests that the Court determine that if a hospital was organized for the charitable purpose of providing healthcare, and the hospital makes that care available to everyone in a community who needs and applies for it, regardless of their ability to pay, then the hospital should be deemed to satisfy the constitutional charitable-use test. Assuming the hospital also satisfies the statutory charitable-ownership test, then it should qualify for a charitable property-tax exemption.

Dated: February 8, 2022

Respectfully submitted,

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SUPREME COURT RULE 341(c)
CERTIFICATE OF COMPLIANCE

I, the undersigned, an attorney, certify that the **Amicus Curiae Brief of the Illinois Health and Hospital Association** conforms to the requirements of Illinois Supreme Court Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of filing and service, is 37 pages.

Dated: February 8, 2022

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I, Seth A. Horvath, an attorney, certify that on February 8, 2022, I caused a true and correct copy of the **Amicus Curiae Brief of the Illinois Health and Hospital Association** to be filed electronically with the Clerk of the Illinois Appellate Court, Fourth District, using Odyssey eFileIL.

I further certify that, on February 8, 2022, I caused a true and correct copy of the **Amicus Curiae Brief of the Illinois Health and Hospital Association** to be served on the other participants in this appeal, named below, by (1) submitting it to the Odyssey eFileIL system, on which those participants are registered service contacts, and (2) transmitting it to those participants by electronic mail.

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Under penalties as provided by law in accordance with section 1–109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this Certificate of Filing and Service are true and correct to the best of my knowledge, information, and belief.

Dated: February 8, 2022

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