



## DOES OHIO'S HEALTH CARE FREEDOM AMENDMENT PROHIBIT IT FROM ENACTING AN OBAMACARE EXCHANGE?

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### *Introduction: Ohio Cannot and Must not Implement an Exchange.*

On March 22, 2012, left-wing and Democrat Party front groups led a demonstration outside of the offices of the Ohio agency charged with deciding whether to implement a Patient Protection and Affordable Care Act ("Obamacare") exchange - - the Ohio Department of Insurance, headed by Lt. Governor Mary Taylor. "The federal health care law, the Affordable Care Act, is turning TWO years old yet Mary Taylor is still using it for political gain instead of developing an insurance exchange for Ohioans," they alleged.

Meanwhile, the Kasich Administration appears to be genuinely non-committal as to whether it will impose Obamacare through the implementation of an Obamacare state exchange in Ohio. These facts should startle any Ohioan who supports health care freedom and opposed the federal Act.

With the overwhelming passage of Issue 3 in November of 2011, Ohioans created a likely-insurmountable legal hurdle to state officials implementing Obamacare in Ohio through an Obamacare-compliant state health care exchange. The state's elected leaders will be hard-pressed to justify, to the courts and to the people of Ohio, implementing the principles of Obamacare through a state exchange, when more desirable options exist.

This paper briefly chronicles the constitutional and pragmatic reasons why Ohio's elected officials must, irrespective of the United States Supreme Court's ruling, listen to Ohio voters and reject the exchange. In short, neither the Ohio Constitution nor common decency permit the Kasich Administration to serve Ohioans' lives up to the impositions of Obamacare on a silver platter.

## ***Background: What Is an Insurance Exchange?***

According to the November 2010 Initial Guidance to States on Exchanges from the Department of Health and Human Services:

An Exchange is a mechanism for organizing the health insurance marketplace to help consumers and small businesses shop for coverage in a way that permits easy comparison of available plan options based on price, benefits and services, and quality. By pooling people together, reducing transaction costs, and increasing transparency, Exchanges create more efficient and competitive markets for individuals and small employers.

In combination with insurance market reforms, exchanges are intended to make the markets for individual and small-group insurance easier to navigate by enabling side-by-side comparisons of health plan benefits and costs. They are also intended to encourage competition among health plans and thus make coverage more affordable.

While this sounds innocuous enough, it does not describe what an *Obamacare* exchange is: the contours of that type of exchange are specifically delineated in the Act, and differ dramatically from the (wholly ineffective) exchanges voluntarily established by Utah and Massachusetts prior to 2010. Perhaps this is why only 17 states have implemented Obamacare exchanges thus far.

## ***Conflict between the Obamacare Exchange Requirements and the Ohio Bill of Rights***

In November of 2011, 66 percent of voters approved the Health Care Freedom Amendment as the 21<sup>st</sup> Section of Ohio's Bill of Rights. While some media and left-wing pundits occasionally derided the Amendment as "merely symbolic," here is what it actually states:

### ***Preservation of the freedom to choose health care and health care coverage***

*Section 21 (A) No federal, state, or local law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in a health care system.*

*Section 21 (B) No federal, state, or local law or rule shall prohibit the purchase or sale of health care or health insurance.*

*Section 21 (C) No federal, state, or local law or rule shall impose a penalty or fine for the sale or purchase of health care or health insurance.*

Given the above, the state of Ohio may not, amongst other things, (1) indirectly compel participation in a health care system; (2) prohibit the purchase or sale of health insurance; or (3) impose a penalty for the sale or purchase of health insurance.

But how does this relate to Ohio's possible implementation of an Obamacare exchange? Answer: through implementation of an Obamacare exchange, the state is necessarily voluntarily attempting to (1) indirectly compel participation in a health care system; (2) prohibit the purchase or sale of health insurance; and (3) impose a penalty for the sale or purchase of health insurance. This is because the state, if it *chooses* to implement an Obamacare exchange, will be bound by Obamacare's rules governing state exchanges. Those rules are codified in 42 U.S.C. Sections 18022-18041. Here are just a few examples of how state officials would violate the Ohio Constitution through enacting an Obamacare exchange:

1. **Though establishing an exchange, Ohio would be voluntarily assuming responsibility for enforcing the individual mandate.** Section 18031(d)(4)(H),(I); 76 Fed. Reg. 41910-11. Ohio would be volunteering to use state officials and resources to turn in to the federal government those who may not have "minimum essential coverage" as defined by HHS. This *indirectly* compels Ohioans to participate in Obamacare, in violation of Section (A) of the Health Care Freedom Amendment - - essentially, Ohio officials will be volunteering to enforce Obamacare's individual mandate, which is otherwise unenforceable in Ohio, on behalf of the Obama Administration.
2. **Only "qualified plans," as determined by HHS criteria, may be sold on the exchange and HHS can change these criteria at any time.** Section 18031(d)(2)(B)(i),(e). Because the exchange would be the only economically viable means for the vast majority of the currently-uninsured 1.5 million Ohioans to acquire the "minimum essential coverage" that Obamacare forces them to purchase, any limitation on the type of health insurance plans offered in an Ohio exchange would likely violate Sections (B) and (C) of the Health Care Freedom Amendment: first, Ohio officials will have voluntarily chosen to effectively foreclose the sale of health insurance options that do not adhere to the state exchange's mandates; and second, Ohio officials will have "penalized," with much higher premium costs and the loss of thousands of dollars in Obamacare "premium assistance," those who are forced to purchase an insurance plan outside of the exchange in order to acquire a plan of their choice.
3. **Only doctors and hospitals who "implement such mechanisms to improve health care quality as the HHS Secretary may by regulation require" may offer care under a "qualified plan" offered on an Ohio exchange.** Section 18031(h)(1)(B). Ohio's execution of this regulation with state officials and resources would likely violate Sections (B) and (C) of the Health Care Freedom Amendment, in the same manner that Ohio's implementation of the "qualified plan" limitations would do so.
4. **Any Ohio exchange may not "conflict with or prevent the application of regulations promulgated by the Secretary [of Health and Human Services]."** Section 18031(k). Thus, by enacting a state health care exchange, Ohio is essentially promising to bind its citizens to HHS regulations, irrespective of whether they reduce choice or compel participation in a health care system.

As a Senior Attorney for the Goldwater Institute recently put it "for the 13 states with Health Care Freedom Acts enacted in their constitutions or statutes, the legislatures may need to act to protect their citizens' right to healthcare choice by stopping their states from becoming complicit in the very

law they are seeking to strike down,” since “any state that establishes an exchange will be enforcing the individual mandate.”<sup>ii</sup>

### ***Bad Medicine for Ohioans***

But the constitutional concerns are only half of the story. There are a multitude of other good reasons why Ohio officials must abstain from becoming complicit in Obamacare:

**First, the notion of state autonomy and flexibility through establishment of an exchange is illusory.** As noted above, state exchanges “may not establish rules that conflict with or prevent application of regulations promulgated by HHS,” state exchanges must operate “as prescribed” by HHS, and state exchanges are subject to federal approval, oversight, and regulation. See Sections 18041(a),(b), (b)(2), and 76 Fed. Reg. 41870-71.

**Second, Ohioans must pay taxes or fees to support the cost of the exchange.** Both Obamacare and its regulations require any and all federal funding for state exchanges to end after 2014. The Act explicitly contemplates that Ohioans will pay for the exchange through “assessments,” “fees,” and “taxes.” See 76 Fed. Reg. 41874, 45 C.F.R 155.

**Finally, through forming an exchange, Ohio officials would make Obamacare much easier to enforce against Ohioans, while conversely, refusal to implement exchanges will make Obamacare extremely difficult to enforce, thereby hastening its repeal or significant overhaul.** This is true due in large part to a “glitch” in the bill, identified by legal and health care scholars after the bill’s passage (just this past fall, in fact).

Specifically, Obamacare creates “premium assistance,” taxes and credits and subsidies, to offset the costs of health insurance premiums that all agree Obamacare will cause (the Ohio Department of Insurance estimates that the Act could cause Ohioans’ premiums to rise by as much as 85 percent, while even left-wing groups concede that premiums will rise by over 12 percent). Essentially, these tax credits and subsidies were designed to mask the full extent of outlandish cost increases imposed on health insurance producers and consumers by the Act. However, they also comprise the bulk of the hundreds of billions of dollars in federal spending triggered by Obamacare.

Though perhaps inadvertently, Obamacare only authorizes this “premium assistance” to help Americans enrolled in *state-run* health care exchanges, meaning that this federal spending will be blocked, and the clamor for repeal will be immediate if states refuse to establish exchanges (this is because Americans would be threatened with experiencing the full effect of the cost increases imposed by Obamacare). Thus “states that refuse to create an exchange can block much of Obamacare’s spending and practically force Congress to reopen the law for revisions.”<sup>iii</sup>

Bolstering this conclusion is the fact that Congress has continued to block the required \$800 million in funding for any federal spending on a federal health care exchange (the federal exchange would step in where states do not create exchanges), meaning that if the states don’t implement Obamacare, and the Department of Health Human Services doesn’t have the funding to fully implement it, the full effect of Obamacare will never see the light of day.

These policy reasons alone would be sufficient justification for Ohio officials to refuse to impose an Obamacare exchange on Ohioans.

## ***Conclusion***

Thanks to the hard work of Ohioans in amending the Ohio Constitution, that document's Bill of Rights forbids Ohio officials from imposing Obamacare on Ohioans through implementation of a state Obamacare exchange: Section 21 forbids Ohio officials from restricting health insurance choices in a manner that an exchange would require, and further forbids Ohio officials from indirectly compelling Ohioans to purchase "minimum essential coverage."

Even in the absence of these constitutional safeguards, an Obamacare exchange remains an outrageously unwise policy option: it provides no autonomy for Ohio in controlling its own health care policy, heaps taxes, fees, and assessments upon Ohioans, and ultimately, renders Ohio complicit in ensuring smooth implementation of Obamacare within the state.

Ohioans have voted on these principles, and even elected our current Attorney General to challenge the constitutionality of Obamacare. State officials should not undermine these expressions by hand-delivering a victory for government health care in Ohio; instead it should bolster these efforts and send a message to Washington D.C.

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

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<sup>i</sup> See Diane Cohen, January 17, 2012 Policy Memo, <http://goldwaterinstitute.org/sites/default/files/Policy%20Memo%20011712%20Health%20Care%20Exchanges.pdf>.

<sup>ii</sup> Jonathan Adler and Michael Cannon, *Another Obamacare Glitch*, Wall Street Journal, Nov. 16, 2011, <http://online.wsj.com/article/SB10001424052970203687504577006322431330662.html>.