No. 90545-2

SUPREME COURT
OF THE STATE OF WASHINGTON

PUBLIC HOSPITAL DISTRICT NO. 1 OF KING COUNTY,

Appellant,

v.

UNIVERSITY OF WASHINGTON; U.W. MEDICINE,

Respondents.

MEMORANDUM OF AMICI CURIAE, WASHINGTON STATE SENATORS HASEGAWA, KEISER, KLINE, McCOY, MULLET & ROACH, AND WASHINGTON STATE REPRESENTATIVES CODY, GREGERSON, HARGROVE, & SANTOS IN SUPPORT OF ACCEPTANCE OF REVIEW

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I. INTRODUCTION

This case presents the issue of whether the democratically elected members of a municipal corporation may divest the corporation of the governing powers vested in it by the Legislature and voters by entering into a contract that purports to (1) delegate the corporation's core governing functions to a separate board, the majority of which is unelected, and (2) bind successor officials to that board's decisions. May elected commissioners, without a public vote, transfer a municipal corporation's governing powers by contract such that they, and thus the people they represent, no longer have genuine control over its operation, yet are still taxed for it?

The citizens' election of representatives to govern a municipal corporation means something profound in our system of government. For an election to have meaning, the elected officials must retain their core governing powers, such as to tax, spend, budget, and incur debt, and must be accountable to the voters in the exercise of those powers. Review by this Court is warranted to determine if the Court of Appeals' published decision in this case undercuts such basic principles, particularly as the result will likely affect all local governments.

This memorandum of amici curiae is submitted under RAP 13.4(h) on behalf of ten Washington state legislators from both political parties who are familiar with the statutory structure and relationship of municipalities to the voters and the provision of health care services through municipal corporations, including public hospital districts:

- ***Sen. Bob Hasegawa*** **(D., 11th Dist.)**, Ranking Member, Governmental Operations Comm.; Member, Commerce & Labor Comm.; Member, Ways & Means Comm.;
- ***Sen. Karen Keiser*** **(D., 33rd Dist.)**, Asst. Ranking Member on Capital Budget - Ways & Means Comm.; Member, Health Care Comm.;
- ***Sen. Adam Kline*** **(D., 37th Dist.)**, Ranking Member, Law & Justice Comm.; Member, Natural Resources & Parks Comm.;
- ***Sen. John McCoy*** **(D, 38th Dist.)**, Member, Governmental Operations Comm.; Member, Energy, Environment & Commc'ns Comm.; Member, Rules Comm.;
- ***Sen. Pam Roach*** **(R., 31st Dist.)**, Chair, Governmental Operations Comm.; Member, Law & Justice Comm.; Member, Financial Institutions, Housing & Ins. Comm.;
- ***Sen. Mark Mullet*** **(D., 5th Dist.)**, Vice Co-Chair, Financial Institutions, Housing & Ins. Comm.; Early Learning & K-12 Educ. Comm.; Member, Transp. Comm.;
- ***Rep. Eileen Cody*** **(D., 34th Dist.)**, Chair, Health Care & Wellness Comm.; Member, Appropriations Comm.; Member, Appropriations Subcomm. on Health & Human Svcs.;
- ***Rep. Mia Gregerson*** **(D., 33rd Dist.)**, Vice Chair, Local Gov't Comm.; Member, Community Dev., Housing & Tribal Affairs Comm.; Member, Higher Educ. Comm.;
- ***Rep. Mark Hargrove*** **(R., 47th Dist.)**, Asst. Ranking Minority Member, Transportation Comm.; Member, Educ. Comm.; Member, Higher Educ. Comm.;
- ***Rep. Sharon Tomiko Santos*** **(D, 37th Dist.)**, Chair, Educ. Comm.; Member, Business & Financial Svcs. Comm.; Member, Community Dev., Housing, & Tribal Affairs Comm.

II. REASONS WHY REVIEW IS WARRANTED

The Court of Appeals' approval of the Strategic Alliance Agreement ("Agreement") between Public Hospital District No. 1 of King County ("District") and U.W. Medicine makes it a template for municipal corporations of all kinds to delegate their governing powers to unelected bodies. This case thus raises issues of substantial public interest that this Court should decide. *See* RAP 13.4(b)(4). The legislative amici curiae are uniquely qualified to speak to these issues.

A. Whether a Municipal Corporation May Delegate Its Core Governing Powers Warrants Review by This Court.

1. All Manner of Municipal Corporations Derive Their Governing Powers from Analogous Authorizing Legislation.

Municipal corporations derive their powers from the Legislature. *Town of Othello v. Harder*, 46 Wn.2d 747, 752, 284 P.2d 1099 (1955). The Legislature authorized local communities to create public hospital districts, such as the District, in 1945. RCW 70.44.910 (1945 WASH. LAWS, ch. 264). The purpose of such districts is to "own and operate" hospitals and health care facilities to provide hospital and health care services "for the residents of such districts and other persons." RCW 70.44.003.

The Legislature has similarly authorized school districts (title 28A) fire protection districts (title 52 RCW), port districts (title 53 RCW), public utility districts (title 54 RCW), and water-sewer districts (title 57 RCW), among others, all of which are governed by locally-elected commissioners. Likewise, cities and counties are authorized by statute and governed by locally elected representatives. *See* RCW 35.02.078. Towns or cities may, in turn, create municipal corporations such as public facilities districts (ch. 35.57 RCW), metropolitan municipal corporations (ch. 35.58 RCW), and metropolitan park districts (ch. 35.61 RCW).

Although the legal authority to create municipal corporations comes from the Legislature, they are created by and derive their authority from the people, the voters of their districts. They are the epitome of local

control. As McQuillin confirms, "The characteristic feature of a municipal corporation beyond all other is the power and right of local self-government." 1 MCQUILLIN, MUN. CORP. § 2:9 (3d ed., 2012 supp.).[1] In a representative government, elections are the people's opportunity to participate by choosing their representatives. The hospital district statute requires a majority vote of the people in a district to create a public hospital district, to choose the number of commissioners to govern it, and to elect the commissioners. RCW 70.44.040(1).[2] These elections mean little if the commissioners may then cede governing power to an unelected body and purport to bind successor elected officials to that arrangement.

The Court of Appeals' decision suggests that the District's remedy is to seek amendment of the statutes involved in this case. And U.W. Medicine asserts that the Court of Appeals' published decision can have no effect outside the context of this case because other government entities "have their *own* authorizing legislation."[3] But the statutes that authorize municipal corporations of all kinds are closely analogous, such that the

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[1] Municipal corporations are thus congruent with Washington's history as a populist state embodied in its 1889 Constitution, which was initially imbued with the principles of local control and accountability, then strengthened in 1912 by the referendum and initiative amendments. *See* Utter & Spitzer, THE WASHINGTON STATE CONSTITUTION (2002), at 11-12 (generally), 50-51 (referenda and initiatives), 146-47 (loan of public credit prohibited). There is a genuine question whether the Strategic Alliance Agreement violates article VIII, section 7 of the Washington Constitution as a gift of the District's property or loan of its credit to any "individual, association, company or corporation." It is not clear from the record that the persons gaining control of the District—the trustees appointed from U.W. Medicine—are exempt from article VIII, section 7's prohibition. Those individuals do not themselves make up a public entity that *might*—arguably—be exempt from the prohibition against the loan or gift of public credit or property.

[2] Only district residents may be commissioners. RCW 70.44.040(2).

[3] Answer to Petition for Review at 19 (italics in original).

Court of Appeals' decision can be viewed as allowing all manner of municipal corporations to delegate their powers by contract. The Legislature would need to amend *all* of the various statutes authorizing municipal corporations. Amici curiae never anticipated that a court could or would hold that any of the statutes authorizing municipal corporations allow elected officials to relinquish the corporation's governing powers. This is an issue of substantial public interest that this Court should decide. *See* RAP 13.4(b)(4).

2. This Court Should Determine Whether Delegating Core Governing Powers Is within Municipal Corporations' Limited Authority to Enter Into Contracts.

Municipal corporations generally are authorized to enter into contracts with other entities or agencies in carrying out their powers and duties. A hospital district has the authority to enter into a contract with another district or governing body "for carrying out" its powers. RCW 70.44.060(7). This Court should accept review to determine the extent to which that authority, while broad, is circumscribed under the statutes by the principle that a municipal corporation must retain the ultimate authority to exercise its own governing powers. Amici curiae maintain that a fundamental difference exists between entering into a contract "for carrying out" certain powers and delegating the authority to exercise legislative powers to an unelected body.

The United States Supreme Court has long recognized that the "legislative power vested in municipal bodies is something which cannot be bartered away in such a manner as to disable them from the

performance of their public functions." *Wabash Railroad v. City of Defiance*, 167 U.S. 88, 100 (1897). Similarly, this Court has held that "[w]here the enabling legislation under which a municipal or quasi-municipal corporation derives its power confides legislative or discretionary functions in particular officials or boards, *such functions may not be delegated to others.*" *Roehl v. Pub. Util. Dist. No. 1 of Chelan County*, 43 Wn.2d 214, 240, 261 P.2d 92 (1953) (italics added); *see also Municipality of Metro. Seattle v. Div. 587, Amalgamated Transit Union*, 118 Wn.2d 639, 643, 826 P.2d 167 (1992); AGO 2012, No. 4.[4]

While a municipal corporation may delegate the performance of duties of a "purely ministerial or administrative nature," it is forbidden to delegate its legislative or discretionary functions. *Roehl*, 43 Wn.2d at 240. "[I]f a public corporation enters into a contract that barters away or otherwise restricts the exercise of its legislative or police powers, then the contract is *ultra vires* and *void ab initio*." *Vermont Dep't of Pub. Svc. v. Mass. Municipal Wholesale Elec. Co.*, 151 Vt. 73, 558 A.2d 215, 220

[4] *Accord King County v. Taxpayers of King County*, 133 Wn.2d 585, 611, 949 P.2d 1260 (1997) ("When the Legislature or state constitution has granted a power to the legislative authority of a municipality, the municipality may not limit the scope of that power, or surrender any of it under Const. art. XI, § 11, our state supremacy clause."); *Nollette v. Christianson*, 115 Wn.2d 594, 608-09, 800 P.2d 359 (1990) ("Unless authorized by statute or charter, *a municipal corporation*, in its public character as an agent of the state, *cannot surrender, **by contract or otherwise**, any of its legislative and governmental functions and powers, including a partial surrender of such powers.*"), quoting 2 MCQUILLIN, MUNICIPAL CORPORATIONS § 10.38 (3d rev. ed. 1988) (emphasis added)); *City of Raymond v. Runyon*, 93 Wn. App. 127, 137, 967 P.2d 19 (1998) ("Public powers cannot be surrendered or delegated[.]").

(1988).[5] This Court has refused to sanction the delegation of discretionary functions to another entity. *See, e.g., Chemical Bank v. Wash. Pub. Power Supply Sys. (WPPSS)*, 99 Wn.2d 772, 788, 666 P.2d 329 (1983) ("[A]lthough this court recognizes the need for delegating duties in the context of joint development rights, ...we are not prepared to sanction a virtual abdication of all management functions and policy decisions to an operating agency."). The Court of Appeals' opinion here does precisely what this Court forbade, and condones the delegation of critical legislative functions—like the power to tax, spend, budget, and incur debt—to a board of substitute decision makers, the majority of whom are unelected.

The District is a municipal corporation governed by five elected commissioners who are empowered to operate a hospital. The District's current website accurately describes a public hospital district as "owned and governed by local citizens."[6] Yet under the Agreement with UW Medicine, the commissioners purported expressly to allow the District's health care system to become a "component entity of UW Medicine." § 2.2(b). Under the Agreement, the "District Healthcare System" is not governed "by local citizens" but by a "board" of trustees, the majority of whom are not commissioners elected from within the District, but are appointed by the U.W. Medicine CEO. §§ 3.2, 3.4(a). The "board" has

[5] An unauthorized contract is void and unenforceable under the ultra vires doctrine. *Noel v. Cole*, 98 Wn.2d 375, 378, 655 P.2d 245 (1982), *superseded by statute on other grounds as stated in Dioxin/Organochlorine Ctr. v. Pollution Control Hrgs. Bd.*, 131 Wn.2d 345, 360, 932 P.2d 158 (1997).

[6] http://www.valleymed.org/district (last visited 9/22/2014).

"overall oversight responsibility" for the District and is supposedly authorized to exercise most of the District's powers and to act in its name. §§ 3.1(a), 3.6. The "board" has authority to re-delegate to others most of its powers and duties. § 3.6.

Under this Agreement, the "board" explicitly has "total control over the application of District Revenues and the use of District Assets." § 5.2(b). The District, through its elected commissioners, does "***not*** have the right to acquire or Transfer any District Assets, since ***such rights have been vested in the Board.***" § 5.2(f) (emphasis added). *See also* § 7.2(a)(iv) (District relinquishes authority to transfer its assets). The "board" controls the budget and may incur liabilities and indebtedness on the District's behalf, for which, nevertheless, the *District* is solely responsible. §§ 3.1(b)(viii) & (xii), 3.6(i), § 4.18(a). For certain enumerated purposes, the District must "take any and all actions necessary to authorize, and incur Indebtedness, or issue, or cause to be issued, Bonds as requested by the Board." § 4.18(c). The "board" may *dispose* of the District's interests in real property *without* the District's approval. § 4.19. Although the District commissioners may serve on the "board," they are less than a majority; ***and the "board" has authority to remove and replace them with a successor "who need not be a Commissioner of the District.***" §§ 3.2, 3.7(b) (emphasis added).

The net effect is to reduce the District commissioners to silent butlers. Even the District's powers to tax and spend—powers that lie at the heart of any meaningful concept of legislative power—are delegated as

the District must now comply with budgets established by the "board." Amici curiae are concerned with the implications of the Court of Appeals' decision for public hospital districts and other municipal corporations in this state. This is an issue of substantial public importance that this Court should decide. RAP 13.4(b)(4).

B. Whether a Municipal Board May Contractually Bind Successor Elected Officials in the Exercise of Their Governing Powers Warrants Review by This Court.

The initial term of the Agreement is nearly 15 years—far beyond the terms of any of the District commissioners. § 10.1. In addition, the agreement purports to be terminable by the District only upon U.W. Medicine's default. § 10.2(ii). The Agreement thus purports to bind successor commissioners, raising the question whether a municipal board may bind successor elected officials in the performance of their core governing functions. This Court has repeatedly held that the Legislature cannot prevent the future exercise of its law-making power. *Wash. State Farm Bureau Fed. v. Gregoire*, 162 Wn.2d 284, 302, 174 P.3d 1142 (2007), citing *Gruen v. State Tax Comm'n*, 35 Wn.2d 1, 54, 211 P.2d 651 (1949), *overruled on other grounds by State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wn.2d 645, 384 P.2d 833 (1963); *see also* AGO 2013, No. 4.[7] Whether a municipal corporation can nevertheless do so is

[7] Courts in other jurisdictions have applied this rule to invalidate contracts relating to performance of governmental functions. *See, e.g., City of McDonough v. Campbell*, 289 Ga. 216, 710 S.E.2d 537, 538 (2011); *City of Newburgh v. McGrane*, 82 A.D. 3d 1225, 920 N.Y.S.2d 160, 162 (2011); *Chopmist Hill Fire Dep't v. Town of Scituate*, 780 F. Supp. 2d 179, 187 (D. R.I. 2011); *Altoona Housing Authority v. City of Altoona*, 785
(Footnote continued next page)

an issue of substantial public importance that this Court should decide. RAP 13.4(b)(4).

III. CONCLUSION

This Court should grant review to determine whether a municipal corporation may remove the locally created municipal corporation from genuine control by and accountability to the people who created it, without giving that public any say in the decision. If municipal corporation boards and governing bodies may "delegate" their core powers to the extent that occurred here and bind successor officials, that constitutes a fundamental change in the nature of municipal corporations, accomplished by means of a mere contract by the governing officers rather than by statute or vote of the people of the district. Any local government could relinquish its core governing powers to any unelected and unaccountable entity. That change would eviscerate and destroy the public control and local accountability that is the essence of municipal corporations, something amici curiae as elected officials do not believe the law allows.

Respectfully submitted this 22nd day of September, 2014.

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By _____

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A.2d 1047, 1052 (Pa. Comm. Ct. 2001); *see also* 10A MCQUILLIN, MUNICIPAL CORPORATIONS § 29.102 (3d rev. ed., 2012 supp.).

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Dear Clerk:

Attached for filing are ***Replacements*** of the following documents that were filed earlier today with this Court:

- *Motion for Leave to File Memorandum of Amici Curiae; Washington State Senators Hasegawa, Keiser, Kline, McCoy & Roach, and Washington State Representatives Cody, Gregerson, Hargrove & Santos, in support of Acceptance of Review;*
- *Memorandum of Amici Curiae Washington State Senators Hasegawa, Keiser, Kline, McCoy & Roach, and Washington State Representatives Cody, Gregerson, Hargrove & Santos, in support of Acceptance of Review; and,*
- *Declaration of Service.*

Case Name: Public Hospital District No. 1 of King County v. University of Washington; U.W. Medicine

Cause #: 90545-2

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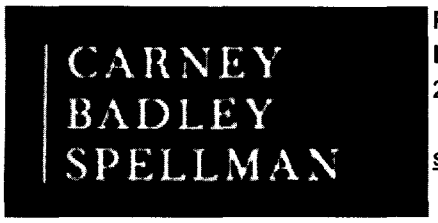

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