NO. 97557-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

PEACEHEALTH ST. JOSEPH MEDICAL CENTER AND
PEACEHEALTH ST. JOHN MEDICAL CENTER,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

APPELLANTS' ANSWER TO AMICUS CURIAE MEMORANDA SUPPORTING PETITION FOR REVIEW

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I. INTRODUCTION

On November 6, 2019, this Court granted three motions for leave to file amicus curiae memoranda in response to Appellants' Petition for Review in this case. The memoranda of (1) Harborview Medical Center ("HMC"), (2) the Washington State Hospital Association ("WSHA"), and (3) Seattle Children's Hospital and Seattle Cancer Care Alliance ("SCH/SCCA") as amici curiae were therefore filed. The Court granted the parties an opportunity to file answers to the amicus memoranda not later than November 26, 2019.

By filing this answer, Appellants ("PeaceHealth") hereby adopt the arguments and authorities set out in the amicus memoranda. PeaceHealth also responds by pointing out how the amicus memoranda highlight (1) the lack of any factual basis for distinguishing this case from the controlling Commerce Clause precedent of the U.S. Supreme Court, *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 117 S. Ct. 190, 137 L. Ed. 2d 852 (1997), and (2) additional aspects of the substantial public importance of the issues in the case.

II. ARGUMENT

A. The SCH/SCCA Amicus Memorandum Highlights the Specious Rationale of the Department and Court of Appeals for Avoiding Commerce Clause Scrutiny in This Case.

The amicus memorandum submitted by SCH/SCCA reiterates the fundamental federal nature of Medicaid in noting that Washington public and nonprofit hospitals are required to provide services to Medicaid patients regardless of state of residency. *See* Memorandum of Amici Curiae Seattle Children's Hospital and Seattle Cancer Care Alliance in Support of Petition for Review at 9 (citing 42 C.F.R. § 431.52).[1] The SCH/SCCA brief then notes correctly that, for this reason, the business and occupation ("B&O") tax deduction from gross income for Medicare and Medicaid reimbursements pursuant to RCW 82.04.4311 cannot be a "quid pro quo" for receiving reimbursements from Washington's Medicaid program. *See id.* at 9-10.

The SCH/SCCA memorandum thus directly debunks the Department's specious argument that the B&O tax deduction is a regulatory mechanism to support the Washington Medicaid program. *See*

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[1] *See also* 42 U.S.C. § 1396a(a)(10(A) (requiring all state Medicaid plans to cover services specified in 42 U.S.C. § 1396d(1) and (2) – namely, inpatient and outpatient hospital services); 42 U.S.C. § 1395dd(b) (requiring all hospitals with emergency departments to treat any person, whether or not eligible for Medicaid, with an emergency medical condition).

Answer to Petition for Review ("Answer") at 16 ("The B&O tax deduction is a statutory quid pro quo offered to nonprofit hospitals for providing services covered under Washington's Apple Health program."). The Department similarly attempts to mislead this Court with the idea that the B&O tax deduction is "a tax incentive for providing services covered under Washington's Apple Health program." *Id.* at 12. The Department's false narrative on this theme is flat-out inconsistent with federal law; there can be no "incentive" in the B&O deduction, because hospitals are required to serve Medicaid beneficiaries and Washington's Medicaid plan is required to cover hospital services. It also misstates the statutory history, given that the Medicaid program (like Medicare) was initiated in 1965, long before adoption of even the initial health or social welfare deduction under RCW 82.04.4297 in 1979 (*see* 1979 Laws ch. 196 § 5), let alone the enactment of RCW 82.04.4311 in 2002.

The Department has never introduced any evidence from the State's health care authorities to back the claim that the "tax deduction . . . supports the State's efforts to provide public assistance health services to Washington residents." Answer at 15. As SCH/SCCA point out, the discrimination imposed by the Department between serving Washington residents and residents of other states has no bearing on the State's costs in providing Medicaid benefits. *See* Memorandum of Amici Curiae Seattle

Children's Hospital and Seattle Cancer Care Alliance in Support of Petition for Review at 10.

The claimed immunity from Commerce Clause scrutiny therefore fails, because the discriminatory tax policy advocated by the Department is entirely unrelated to the financing or scope of the State's Medicaid or children's health programs. The Court of Appeals' decision is inconsistent with *Camps Newfound*, *see* Petition at 12-14, and review should be granted to resolve this important issue of constitutional law.

B. Collectively, the Amicus Curiae Memoranda Highlight in New Ways Why This Case Involves an Issue of Substantial Public Importance.

PeaceHealth's Petition for Review established that the issue in this case directly impacts numerous hospitals in addition to PeaceHealth. PeaceHealth identified specifically other hospitals in border areas, which are part of Oregon's trauma care system, HMC as the only the Level I trauma center for Alaska, Idaho, and Montana as well as Washington, and hospitals in Seattle that provide medical care to specialized patient groups such as children and cancer patients. *See* Petition for Review at 15-19.

The amicus memorandum of HMC provides additional detail regarding the scope and purposes of HMC's service to low-income populations in the Pacific Northwest and the impact that the deduction can have in supporting the uncompensated costs of caring for these

populations. HMC is operated by the University of Washington pursuant to contracts authorized by RCW 36.62.290. *See* UW Medicine, "Harborview Medical Center; We're on a Mission," https://www.uwmedicine.org/locations/harborview-medical-center (last viewed November 25, 2019). HMC's support for PeaceHealth's Petition, via the filing by the State Attorney General's Office, shows that the State has a substantial stake in this issue on both sides of the ledger.

The memoranda of HMC and SCH/SCCA together illustrate another dimension of the importance of the issue. These amici have divergent tax reporting practices on the point. HMC reports that it has paid B&O tax on receipts from out-of-state Medicaid patient programs. Harborview Medical Center's Amicus Curiae Brief in Support of Granting Review at 1. Seattle Children's Hospital, on the other hand, reports that the Court of Appeals' decision, if allowed to stand, would *increase* its tax burden substantially and divert resources otherwise available for providing uncompensated and undercompensated care to Medicaid and other patients. Memorandum of Amici Curiae Seattle Children's Hospital and Seattle Cancer Care Alliance in Support of Petition for Review at 2.

The tax and finance professionals who manage tax reporting for these and other hospitals evidently have either different understandings of what the statute allows or a divergent sense of the risks of interpreting the

statute incorrectly. Their uncertainty deserves a resolution based on a reasonable judicial evaluation of the constitutional issues at stake. Given this diversity in practice and the impact of the issue on public and nonprofit hospitals' finances, it would be unfair to the State's public and nonprofit hospitals not to review the Court of Appeals' superficial and false rationale for validating the Department of Revenue's discriminatory position under the Commerce Clause. *See* Petition for Review at 5-6, 14.

Finally, the WSHA amicus memorandum shows that the issue affects all public and nonprofit hospitals in the State, not just those near borders or those that offer highly specialized care. Medicaid is such an indelibly federal program that Washington, like other states, does not even get to determine who its "residents" are for purposes of benefits from the Washington program. "Residency" is determined by a federal rule. *See* Brief of *Amicus Curiae* The Washington State Hospital Association at 4 (citing 42 C.F.R. § 435.403). Under the federal rules, for example, a foster child placed in a Washington home by another state's foster care program remains a "resident" of the other state. *Id.* Other states' "residents" could therefore be living anywhere in Washington, in the ordinary sense, and the Department of Revenue would add to the cost of providing hospital care to such individuals in the community by denying the B&O tax deduction for the other states' Medicaid reimbursements.

The foregoing factors show that the issue in this case is statewide in significance and has substantial impact on the way hospitals manage the costs of uncompensated hospital care for low-income patients. The substantial public importance of the issue is clear. The Court should grant review.

III. CONCLUSION

For the above-stated reasons, this Court should accept review.

RESPECTFULLY SUBMITTED this 26th day of November, 2019.

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CERTIFICATE OF SERVICE

I, Diane Wright, hereby certify under penalty of perjury under the laws of the State of Washington that on the date below I caused to be served via electronic mail the below listed parties with the following document: *Appellants' Answer to Amicus Curiae Memoranda Supporting Petition for Review.*

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Appellants' Answer to Amicus Curiae Memoranda Supporting Petition for Review

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