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09461-8
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SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE HOSPITAL ASSOCIATION,

Appellant,

v.

STATE OF WASHINGTON; SUSAN N. DREYFUS, in her official
capacity as SECRETARY OF SOCIAL & HEALTH SERVICES;
DOUG PORTER, in his official capacity as DIRECTOR OF THE
WASHINGTON STATE HEALTH CARE AUTHORITY;
and JAMES L. MCINTIRE, in his official capacity as
TREASURER OF THE STATE OF WASHINGTON,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

The hospital safety net assessment is a fee and is therefore not subject to the limitations set forth in article VII, section 5 of the state constitution. Applying *Covell v. City of Seattle*, 127 Wn.2d 874, 879, 905 P.2d 324 (1995), the superior court correctly held that the hospital safety net assessment is a fee rather than a tax because (1) the only entities that pay the fee are hospitals that choose to participate in the Medicaid program; (2) the hospitals directly benefit from the fee by receiving higher Medicaid payment rates; and (3) all of the fees collected are deposited into a dedicated fund under the direction of the State Treasurer.

If the assessment had been enacted as a tax, rather than a fee, it would comply with article VII, section 5 of the state constitution for two reasons. First, article VII, section 5 has been applied only to property taxes and local excise taxes. If the assessment were a tax, it would not fall into either of these categories. Second, the constitutional provision requires that the object of the tax be clearly stated. RCW 74.60.030(1) plainly states that the object of the assessment is to fund Medicaid payment rates for hospitals. The Association has presented no evidence to support its allegations that the Legislature has “diverted” funds away from the specified purposes.

Finally, the superior court correctly held that H.B. 2069¹ does not conflict with or invalidate the pre-existing provisions of chapter 74.60 RCW because the bill retained the assessment's primary purposes of (1) generating increased federal funding; (2) paying hospitals more for their Medicaid services in 2011 than they received in 2009; and (3) ensuring that all fees collected are eventually paid to hospitals.

II. RESTATEMENT OF THE ISSUES PRESENTED

1. Article VII, section 5 of the Washington Constitution applies to taxes, not fees. Did the superior court correctly hold that the hospital safety net assessment is a fee rather than a tax because (a) the only entities that pay the fee are hospitals that choose to participate in Medicaid; (b) the hospitals directly benefit from the fee by receiving higher Medicaid payment rates; (c) all the fees are deposited into a dedicated fund under the direction of the Treasurer; and (d) all the funds are used solely for payments by the State to hospitals providing Medicaid services?

2. With the exception of local excise taxes, this Court has held that article VII, section 5 applies only to property taxes. Since there is no contention that the assessment is a property tax or a local excise tax, is article VII, section 5 inapplicable to the assessment?

¹ H.B. 2069, 62d Leg., 1st Spec. Sess. (Wash. 2011), *enacted as* Laws of 2011, ch. 35.

3. Article VII, section 5 requires the Legislature to clearly specify the object of any tax assessment. If the hospital safety net assessment is a tax, does RCW 74.60.030(1) clearly specify that the object of the assessment is to fund Medicaid payment rates?

4. Did the superior court correctly hold that the Legislature did not invalidate the entirety of chapter 74.60 RCW by amending it through H.B. 2069, when the bill adjusted the assessment program and continued to (a) generate increased federal funding; (b) pay hospitals more for their Medicaid services than they received in 2009; and (c) use all the funds to support payments to hospitals?²

III. RESTATEMENT OF THE CASE

A. The State And Federal Governments Jointly Administer And Finance The Medicaid Program

“The Medicaid program, which provides joint federal and state funding of medical care for individuals who cannot afford to pay their own medical costs, was launched in 1965 with the enactment of Title XIX of the Social Security Act[.]” *Arkansas v. Ahlborn*, 547 U.S. 268, 275, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006); *see generally* 42 U.S.C. §§ 1396-1396w-1; 42 C.F.R. § 430.0. Medicaid is “a cooperative federal-state

² The Association’s third issue, regarding ripeness, is no longer relevant because the State concedes that the issues are ripe for review at this point, even though they were not ripe at the time of the summary judgment hearings. Answer to Statement of Grounds for Direct Review at 4 n.7.

program whereby the federal government provides financial assistance to the states so they may furnish medical care to needy individuals.” *Indep. Acceptance Co. v. California*, 204 F.3d 1247, 1249 (9th Cir. 2000); *see also* 42 C.F.R. § 430.0.

To receive federal funds, the State must comply with federal Medicaid law. *Cal. Pharmacists Ass’n v. Maxwell-Jolly*, 596 F.3d 1098, 1102 (9th Cir. 2010), *vacated and remanded on other grounds*, 132 S. Ct. 1204 (2012). A “State Plan” must be submitted describing how the State will administer Medicaid and assuring compliance with federal law. *Cal. Pharmacists Ass’n*, 596 F.3d at 1102; 42 U.S.C. § 1396a(a); 42 C.F.R. § 430.12. The federal Centers for Medicare and Medicaid Services (“CMS”) must approve the State Plan and any amendments. 42 C.F.R. §§ 430.10, 430.14; *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 650, 123 S. Ct. 1855, 155 L. Ed. 2d (2003). CMS provides federal matching funds after approving the State Plan. 42 U.S.C. § 1396b(a); 42 C.F.R. §§ 430.1, 447.304(c); *In re Guardianship of Lamb*, 173 Wn.2d 173, 186, 265 P.3d 876 (2011).

The State Plan must designate a “single State agency” for its administration or supervision. 42 U.S.C. § 1396a(a)(5); 42 C.F.R. § 431.10(b)(1); *Samantha A. v. Dep’t of Soc. & Health Servs.*, 171 Wn.2d 632, 630, 256 P.3d 1138 (2011). As of July 1, 2011, the Health Care

Authority is the single state agency. RCW 74.09.530(1)(a); Laws of 2011, 1st Spec. Sess., ch. 15. Before that date, the Department of Social and Health Services was the designated agency. *Samantha A.*, 171 Wn.2d at 630.

B. The State Can Obtain Federal Medicaid Matching Funds In Connection With Fees Imposed On Medicaid Providers

Federal law allows states to impose “fees” or other special assessments on hospitals, nursing facilities, and other entities that participate in the Medicaid program, for the purpose of generating additional federal matching funds. 42 U.S.C. § 1396b(w); 42 U.S.C. § 1396b(w)(7)(A)(i), (ii); 42 C.F.R. §§ 433.55(a), 433.68; *Protestant Mem’l Med. Ctr., Inc. v. Maram*, 471 F.3d 724, 726 (7th Cir. 2006). Federal law denotes these assessments as “health care-related taxes,” but the term is broadly defined:

(a) A health care-related tax is a *licensing fee, assessment, or other mandatory payment* that is related to—

- (1) Health care items or services;
- (2) The provision of, or the authority to provide, the health care items or services; or
- (3) The payment for the health care items or services.

42 C.F.R. § 433.55(a) (emphasis added); *see also* 42 U.S.C. § 1396b(w)(7)(F).

As long as the State complies with federal requirements, CMS will furnish federal matching funds in relation to the State's collection of provider assessments. 42 U.S.C. § 1396b(w)(1)(A)(ii), (iii); 42 C.F.R. § 433.68(a); *Maram*, 471 F.3d at 726. For example, if the State collects \$100 from Medicaid providers, the federal government will send \$100 to the State in matching funds, resulting in the State having \$200 with which to support higher Medicaid payment rates.

C. The Legislature Enacted The Hospital Safety Net Assessment Program In 2010

To take advantage of the prospect of increased federal Medicaid funding, the Legislature enacted the hospital safety net assessment program, H.B. 2956, in 2010. Clerk's Papers (CP) at 156-90.³ The Legislature intended to (1) generate additional state and federal Medicaid funding and (2) increase Medicaid payment rates to hospitals. RCW 74.60.030(1); RCW 74.60.080(1); RCW 74.60.090(1); *see also* RCW 74.60.005(2)(a), (b) (general legislative intent).

The Legislature finds that Washington hospitals, working with the [Medicaid agency], have proposed a hospital safety net assessment to generate additional state and federal funding for the Medicaid program, which will be used to *partially restore recent reductions* in hospital reimbursement rates and provide for an *increase in hospital payments*. The Hospital Safety Net Assessment Fund (Fund) allows the state to *generate additional federal*

³ H.B. 2956, 61st Leg., 1st Spec. Sess. (Wash. 2010), *enacted as* Laws of 2010, 1st Spec. Sess., ch. 30 (*codified as* RCW 74.60).

financial participation for the Medicaid program and provides for increased reimbursement to hospitals.

CP at 198 (Final Bill Report on H.B. 2956) (emphasis added).⁴

The Legislature established “[a] dedicated fund” for the fees paid by hospitals. H.B. 2956, § 3(1) (*codified as* RCW 74.60.020(1)). The fund is known as the Hospital Safety Net Assessment Fund. *Id.*; *see also* *Wash. State Farm Bureau Fed’n v. Gregoire*, 162 Wn.2d 284, 292 n.10, 174 P.3d 1142 (2007) (“The state treasury is comprised of numerous accounts and funds established by law for various purposes.”). The fund is under the administrative control of the Treasurer. RCW 74.60.020(1).

Before collecting the fees from hospitals, the State was required to meet certain conditions, including federal approval. H.B. 2956, § 17 (*codified as* RCW 74.60.150). The federal approvals were in the form of Medicaid State Plan Amendments and a waiver, under 42 U.S.C. § 1396b(w)(3)(E) and 42 C.F.R. § 433.68(e), of the “broad-based” and “uniformity” requirements. CP at 348, 394-411 (Myers Decl.), ¶¶ 9, 10 (State Plan Amendments); CP at 221, 228-29 (Stith Decl.), ¶ 13.

After meeting the conditions, the State reversed the payment rate cuts it had imposed for inpatient and outpatient services as of July 1, 2009.

⁴ Bill reports are legislative history that can be considered in construing a statute. *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 727, 153 P.3d 846, *cert. denied*, 552 U.S. 1040 (2007).

H.B. 2956, § 9(1) (*codified as RCW 74.60.080(1)*); CP at 220 (Stith Decl., ¶ 7). The State then increased those rates as of February 1, 2010. H.B. 2956, § 10(1) (*codified as RCW 74.60.090(1)*); CP at 220. The rate increases applied to several types of hospitals, some paid under the “prospective payment system,” and some paid under other methods. H.B. 2956, § 10(1)(a)-(d).⁵

In addition, the Legislature specified that \$66.8 million from the assessment fund “may be expended in lieu of state general fund payments to hospitals.” H.B. 2956, § 3(3)(e) (*codified as RCW 74.60.020(3)(e)*) (emphasis added). The figure of \$66.8 million is the sum of \$49.3 million and \$17.5 million, both mentioned in the bill, with the latter available as a result of a special federal appropriation. Pub. L. No. 111-226, § 201, 124 Stat. 2389 (2010); 75 Fed. Reg. 66,763, 66,764 (Oct. 29, 2010).

D. The Legislature Amended The Hospital Safety Net Assessment Program In 2011

In 2011, through H.B. 2069, the Legislature amended the assessment statutes. CP at 191-96. H.B. 2069 does two things:

⁵ Under a prospective payment system, providers receive “a fixed amount for each discharge, based on the patient’s diagnosis, and regardless of actual cost.” *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 406 n.3, 113 S. Ct. 2151, 124 L. Ed. 2d 368 (1993). The Washington Medicaid program generally pays hospital services under a prospective payment system using “diagnosis-related groups.” WAC 182-550-3000(1). A diagnosis-related group is “a treatment category, a grouping of similar kinds of cases whose cost of treatment is expected to be similar.” *Sunshine Health Sys., Inc. v. Bowen*, 809 F.2d 1390, 1392 n.2 (9th Cir. 1987).

First, the bill reduced Medicaid rates from their levels of February 1, 2010, but still left them higher than they were on July 1, 2009. H.B. 2069, § 2(2)(a)(ii), (iii) (amending RCW 74.60.090(2)(a)(ii), (iii)). For hospitals paid under the prospective payment system, inpatient rates remain 3.96 percent higher than the 2009 rates, and outpatient rates are 27.25 percent higher. *Id.*

Second, the bill increased the amount from the assessment fund that can be used in lieu of the general fund for payments to hospitals. H.B. 2069, § 1(3)(e) (amending RCW 74.60.020(3)(e)). The Legislature increased the amount from \$66.8 million to \$199.8 million. *Id.* However, as under the 2010 bill, all expenditures from the assessment fund still must be made “to hospitals.” *Id.*

The amendments took effect July 1, 2011. H.B. 2069, § 4. The Health Care Authority delayed implementation of the bill until the federal government approved a State Plan Amendment. CP at 220 (Stith Decl., ¶ 10(b)).

Even after the passage of H.B. 2069, hospital payment rates are higher than the July 2009 level. H.B. 2069, § 2(2)(a)(ii), (iii); CP at 221 (Stith Decl., ¶ 10(c)); CP at 414 (Myers Decl., Ex. M-10); CP at 435 (Myers Decl., Ex. M-11). The statutes do not set any standards for the net total of money received for any hospital, and the level of rates resulting

from H.B. 2069 satisfies the standards required by the Ninth Circuit Court of Appeals under 42 U.S.C. § 1396a(a)(30)(A). CP at 207-09 (Senate Bill Report).

E. The Superior Court Granted Summary Judgment To The State And Denied Summary Judgment To The Association

The Association challenged the 2011 amendments, arguing that they either (1) violate article VII, section 5 of the Washington Constitution or (2) have the effect of constructively repealing the entire statutory chapter. CP at 1-2. The Association did not challenge the constitutional or statutory integrity of the assessment program as enacted in 2010.

The parties filed cross-motions for summary judgment on both issues. CP at 14-35, 131-55, 257-69, 283-99. The superior court denied the Association's motions and granted the State's motions. CP at 252-56, 329-32.

With respect to the first issue, the superior court determined under *Covell* that the assessment was a fee, not a tax, and therefore article VII, section 5 did not apply to the hospital safety net assessment program. CP at 252-54.

With respect to the second issue, the superior court relied on basic principles of statutory construction to hold that the Legislature did not repeal the statutes by simply amending them. CP at 331. The superior

court also determined that the Association did not present evidence to support its legal theory. *Id.*

In addition, the superior court held that the case was not ripe for review because the federal government had not yet approved the 2011 amendments to the program and, as a result, the State had not yet implemented any changes. CP at 253. Nonetheless, the superior court did rule on the underlying issues. *Id.* Federal approval of the 2011 amendments occurred on March 21, 2012, and the State is now implementing them.⁶ The State agrees the case is now ripe for review.

The Association filed a petition for direct review of both of the superior court's summary judgment orders.

IV. ARGUMENT

A. The Court Reviews The Superior Court's Orders De Novo

This Court undertakes a de novo review of a trial court's orders on summary judgment. *Bank of Am., N.A. v. Owens*, 173 Wn.2d 40, 48-49, 266 P.3d 211 (2011). Summary judgment is appropriate if the Court finds, after viewing all the evidence and making all reasonable inferences in the light most favorable to the nonmoving party, that (1) there is no genuine issue of material fact, (2) reasonable persons could reach only one

⁶ See *supra* note 1.

conclusion, and (3) a party is entitled to judgment as a matter of law. *Bank of Am.*, 173 Wn.2d at 49.

The moving party bears the initial burden of showing the absence of an issue of material fact. *Burton v. Twin Commander Aircraft LLC*, 171 Wn.2d 204, 222, 254 P.3d 778 (2011). “A material fact is one upon which the outcome of the litigation depends.” *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). If the moving party satisfies its burden, the nonmoving party must then “establish the existence of an element essential to [its] case, and on which that party will bear the burden of proof at trial[.]” *Burton*, 171 Wn.2d at 223 (citations omitted). If the nonmoving party does not succeed, then summary judgment must be granted. *Id.*

The Court should affirm both of the superior court’s orders because the State established that it is entitled to judgment as a matter of law.

B. The Legislature Properly Exercised Its Constitutional Authority In 2011 By Amending The Law It Enacted In 2010

The Association suggests that the Legislature was precluded from amending the 2010 legislation unless the industry agreed. CP at 259-61; Brief of Appellant (Br. Appellant) at 1-2 (Association’s view of political arrangements made in 2009 and 2010). The Association further asserts

that in 2010, the Legislature included a “poison pill” in H.B. 2956 to prevent the Legislature from amending the statutes in any subsequent session. Br. Appellant at 32; CP at 258 (warning of “legislative mischief”).

There was no constitutional, statutory, or contractual impediment to the Legislature exercising its inherent authority to enact H.B. 2069 in 2011. The Legislature enjoyed the same ability to amend the program in 2011 as it had to enact the program in 2010.

It is a fundamental principle of our system of government that *the legislature has plenary power to enact laws*, except as limited by our state and federal constitutions. Each duly elected legislature is fully vested with this plenary power. No legislature can enact a statute that prevents a future legislature from exercising its law-making power. *That which a prior legislature has enacted, the current legislature can amend or repeal.* Like all previous legislatures, it is limited only by the constitutions. To reason otherwise would elevate enactments of prior legislatures to constitutional status and reduce the current legislature to a second-class representative of the people.

Wash. State Farm Bureau Fed'n v. Gregoire, 162 Wn.2d 284, 290, 174 P.3d 1142 (2007) (emphasis added); *see also Brown v. Owen*, 165 Wn.2d 706, 722, 206 P.3d 310 (2009).

The *Farm Bureau* decision is dispositive. In that case, the plaintiffs asserted that the Legislature lacked authority to amend a statute that limited the State’s expenditures in a given fiscal year. *Farm Bureau*,

162 Wn.2d at 299. This Court emphatically rejected that argument. “[T]he legislature’s power to enact a statute is unrestrained except where, either expressly or by fair inference, it is prohibited by the state and federal constitutions.” *Id.* at 300-01 (alteration in original and citations omitted).

An exception to the Legislature’s plenary power exists if there is a constitutional or contractual limitation. *Id.* at 301; *Retired Pub. Employees Council of Wash. v. Charles*, 148 Wn.2d 602, 627, 62 P.3d 470 (2003) (“funding statutes are merely pieces of legislation, not constitutional provisions, so there is no limitation on the legislature to make changes, save the constitution”); *Gruen v. Tax Comm’n*, 35 Wn.2d 1, 54, 211 P.2d 651 (1949) (“It is, of course, a general rule that[] one legislature cannot abridge the power of a succeeding legislature, and succeeding legislatures may repeal or modify acts of a former legislature” except if contractual rights exist.). Those exceptions do not apply here because H.B. 2956 was legislation, not a bilateral contract, and because H.B. 2069 complies with the Constitution.

In light of this authority, it is simply not possible that the Legislature in 2010 could have included a “poison pill” that would prevent any future session of the Legislature from amending the assessment

program. Any such attempt would be ineffective under *Farm Bureau* and *Gruen*.⁷

In addition, the Court should respect the separation of powers and defer to the Legislature's policy choices:

When the legislature enacts laws, it speaks as the chosen representative of the people. It is neither our prerogative nor our function to substitute our judgment for the duly elected legislature's determination that the [subsequent] amendment[s] [were] in the best interests of Washington State.

Farm Bureau, 162 Wn.2d at 302 (citation omitted); *see also Roussio v. State*, 170 Wn.2d 70, 88, 239 P.3d 1084 (2010) (Legislature makes "public policy determinations"); *Dean v. Lehman*, 143 Wn.2d 12, 31 n.7, 18 P.3d 523 (2001) (concerns about burden of government fees "must be addressed to the Legislature").

In both 2010 and 2011, the Legislature made policy choices on the best way to pay hospitals for the services they provide to Medicaid recipients. The Court gives deference to the views of the Legislature, "a co-equal branch of government[.]" *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998). The Court presumes that H.B. 2069 is constitutional. *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006), *cert. denied*, 549 U.S. 1282 (2007). The Association

⁷ *See also Lockhart v. United States*, 546 U.S. 142, 147-50, 126 S. Ct. 699, 163 L. Ed. 2d 557 (2005) (Scalia, J., concurring) (collecting cases).

“bears the heavy burden of establishing [the statute’s] unconstitutionality” and must establish unconstitutionality “beyond a reasonable doubt[.]” *Id.*

The Association’s burden is even greater because this is a facial challenge, not an as-applied challenge. *Carlisle v. Columbia Irrigation Dist.*, 168 Wn.2d 555, 567 n.2, 229 P.3d 761 (2010). The Association must show “no set of circumstances exists in which the statute[s], as currently written, can be constitutionally applied.” *Id.* (citation omitted). This is not an as-applied challenge because when the lawsuit began, the State had not implemented the rate changes. CP at 220 (Stith Decl., ¶ 10(b)); *see also State v. Phillips*, 65 Wn. App. 239, 244, 828 P.2d 42 (1992) (issue of costs not ripe for review until State attempts to collect, when costs imposed).

The Court’s “fundamental objective in construing [RCW 74.60] is to ascertain and carry out the legislature’s intent.” *Arborwood Idaho L.L.C. v. City of Kennewick*, 151 Wn.2d 359, 367, 89 P.3d 217 (2004). The Legislature has clearly specified that the goals of the assessment program are to (1) generate additional federal Medicaid funding; (2) provide hospital payment rates as of July 2011 that exceed the levels of July 2009; and (3) ensure the assessment funds are paid to hospitals. RCW 74.60.020(3)(e); RCW 74.60.080(1); RCW 74.60.090(1).

The Association has not met its burden of establishing beyond a reasonable doubt that H.B. 2069 violates the Washington Constitution. First, the assessment is a fee, not a tax. Second, even if the assessment were a tax, it is not a property tax and therefore is exempt from article VII, section 5. Third, even if the assessment were a tax to which article VII, section 5 applies, the Legislature has specified the object of the assessment and has not diverted any assessment funds in violation of article VII, section 5.

C. The Safety Net Assessment Is A Fee, Not A Tax

The Association's basic premise is that the assessment was passed in 2010 as a tax and the State then violated the restrictions on taxes imposed by article VII, section 5 in 2011. CP at 5; Br. Appellant at 2, 19 n.13. However, the fact that the State collects money from hospitals for the assessment does not, itself, make the assessment a tax. "Not all demands for payment made by a governmental body are taxes." *Lehman*, 143 Wn.2d at 25.

A tax is imposed under a state's taxing power, while a fee is imposed under a state's regulatory power. Revenues from a *fee* are used *exclusively* for the purpose of financing regulation; revenues from a *tax* may be used for *other purposes*.

Franks & Son, Inc. v. State, 136 Wn.2d 737, 750, 966 P.2d 1232 (1998) (emphasis added).

The superior court correctly held that the assessment is a fee and that the constitutional provisions related to taxes are inapplicable.

1. It Is Irrelevant For Washington Constitutional Purposes That The Assessment Is A “Health Care-Related Tax” For Federal Medicaid Purposes

The Association contends the assessment is a tax under state constitutional law because it is a “health care-related tax” under federal Medicaid law. Br. Appellant at 23-24. The Association confuses what is necessary to secure federal Medicaid funds with what determines the applicability of article VII, section 5.

As discussed, the State can obtain additional federal funding by enacting what federal Medicaid law calls a “health care-related tax.” But the federal definition of a “health care-related tax” is broad and includes assessments, fees, and other payment obligations. 42 C.F.R. § 433.55(a). Therefore, the mere use of the word “tax” in the federal definition proves nothing.

In addition, an analysis from a federal agency that “does not consider any issue of Washington constitutional law and does not apply the *Covell* analysis” is not instructive in determining how to characterize a governmental charge. *Storedahl Props., LLC v. Clark County*, 143 Wn. App. 489, 506-07, 178 P.3d 377 (upholding county’s imposition of a clean-water charge), *review denied*, 164 Wn.2d 1018 (2008). There is no

evidence that the federal Medicaid agency considered Washington constitutional law, or any applicable Washington case law, when it approved the State Plan Amendments or the waiver.

In short, characterization of the assessment as a “health care-related tax” under federal Medicaid law is irrelevant to the question of whether the assessment is a tax for purposes of article VII, section 5.

2. The Assessment Is A Fee Under The Applicable Three-Factor Test

To determine whether the assessment is a tax or a fee, the Court employs a three-factor test enunciated in a line of cases beginning with *Covell*. *Covell*, 127 Wn.2d at 879. Under this test, the assessment is a fee.

a. The Primary Purpose Of The Assessment Is To Regulate Hospitals By Generating Funds That Are Then Used To Increase Their Medicaid Payment Rates

The first factor the Court examines is “whether the primary purpose of the [government] is to accomplish desired public benefits which cost money, or whether the primary purpose is to regulate[.]” *Covell*, 127 Wn.2d at 879 (citations omitted). If the primary purpose “is to raise revenue, rather than to regulate, then the charges are a tax.” *Id.* (emphasis added); *see also Lehman*, 143 Wn.2d at 27. “Conversely, if the primary purpose is regulatory, the charges are properly characterized as tools of regulation, rather than taxes.” *Covell*, 127 Wn.2d at 879

(emphasis added) (citations and internal quotation marks omitted); *see also Lehman*, 143 Wn.2d at 25.

The Court determines the primary purpose “from the language of the authorizing and implementing legislation.” *Covell*, 127 Wn.2d at 886. For example, in *Lehman*, a class alleged that the State’s collection of a portion of the funds sent by family members to prison inmates was an unconstitutional tax. The funds were divided into accounts for crime victim compensation, inmate savings, and into contributing to the State’s cost of incarceration. *Lehman*, 143 Wn.2d at 15-16. The Court disagreed, holding that (1) the primary purpose of the charges was to benefit inmates and their victims; (2) inmates were “direct recipients” of the deductions; and (3) “an incidental benefit” to the public did not transform the charges into a tax. *Id.* at 27.

The hospital safety net assessment is comparable to the facts in *Lehman*. The “direct recipients” of the assessment are the hospitals themselves, in the form of higher Medicaid payments. RCW 74.60.080(1); RCW 74.60.090(1). The “primary purpose[] of these charges is not to raise revenue but to benefit a small group of individuals[.]” *Lehman*, 143 Wn.2d at 27. All of the money must be used for payments “to hospitals.” RCW 74.60.020(3)(e).

In another case, the Court found that the primary purpose of a charge imposed by the Legislature on the gross income of trucking operations in Washington was a fee, rather than a tax. *Franks & Son*, 136 Wn.2d at 741. The fees were used to fund regulation of the trucking industry. *Id.* at 751. The assessment was a fee even if the fees were not fairly apportioned among the trucking companies, based on the regulatory burden created by each payor. *Id.* Although the fees were not individualized according to the benefit received by each payor, all of the charges were used to regulate the trucking industry. *Id.*

The same principle applies here, with the hospitals themselves as the only recipients of the funds collected under the assessment program. RCW 74.60.020(3)(e); RCW 74.60.080(1); RCW 74.60.090(1). The Legislature established a program narrowly tailored to hospitals and increasing their Medicaid payment rates. RCW 74.60.080(1); RCW 74.60.090(1). The “fundamental legislative impetus” of enacting the assessment was to “regulate” the hospitals by “providing them with a targeted service” in the form of increased payment rates. *Samis Land v. City of Soap Lake*, 143 Wn.2d 798, 807, 23 P.3d 477 (2001); *see also* RCW 74.60.080(1); RCW 74.60.090(1). As a result, the assessment meets the first factor of the *Covell* test.

In contrast to fees, taxes are used to raise revenue that may be used by the government to pay for expenses that have no relationship to the taxpayer. For example, a city's flat-rate ambulance charge was a tax when it had to be paid regardless of whether the taxpayer actually used an ambulance. *Arborwood*, 151 Wn.2d at 372. Similarly, a city imposed a tax when it assessed a utility charge on vacant lots that were not connected to water or sewer lines. *Samis Land*, 143 Wn.2d at 808. The charge was a tax because its primary purpose was to generate revenues, rather than provide any benefit or apply any regulation to the landowners. *Id.* at 809.

In contrast to a tax, the hospital safety net assessment is directly correlated with each hospital's level of care for Medicaid clients. The primary purpose is not to raise revenue for general purposes but to generate federal funding and increase hospital payments. RCW 74.60.030; RCW 74.60.080(1); RCW 74.60.090(1).

The Association claims the purpose of the assessment was to help "needy" individuals. Br. Appellant at 22. The claim cannot be reconciled with the Association's own characterization of the Legislature's intent as "unusual" in its "thoroughness[.]" Br. Appellant at 32 n.21. The intent, as the Association concedes, was to generate federal funding and increase hospital payment rates. Br. Appellant at 32 n.21. There is no evidence of any legislative intent to increase rates for any *other* Medicaid providers, to

increase the level of Medicaid benefits, or to increase eligibility for Medicaid services. Indeed, there is no evidence of any intent other than benefiting the hospitals themselves.

b. The Assessment Funds Are Allocated Solely For The Purposes Authorized By The Statutes

The second factor to consider in determining whether a charge is a fee or a tax is “whether the money collected” is “allocated only to the authorized regulatory purpose.” *Covell*, 127 Wn.2d at 879. “[T]he money collected from the fees must be segregated and allocated exclusively to regulating the entity or activity being assessed.” *Tukwila Sch. Dist. No. 406 v. City of Tukwila*, 140 Wn. App. 735, 747, 167 P.3d 1167 (2007) (citations and internal quotation marks omitted).

The assessment satisfies this factor because the fees collected from hospitals are deposited into a “dedicated fund,” the Hospital Safety Net Assessment Fund. RCW 74.60.020(1); *see also* RCW 43.84.092(4) (differentiating assessment fund and others from the general fund). The money “shall not be used or disbursed for any purposes other than those specified in” the chapter. RCW 74.60.020(1). Those purposes are dedicated solely to payments “to hospitals.” RCW 74.60.020(3)(e).

The State’s treatment of funds collected under the assessment is consistent with its treatment of other funds that qualify as fees under the

second *Covell* factor. *Lehman*, 143 Wn.2d at 28 (funds deposited and used only for specified purposes); *Cary v. Mason County*, 152 Wn. App. 959, 965, 219 P.3d 952 (2009), *reversed on other grounds*, 173 Wn.2d 697, 272 P.3d 194 (2012) (funds segregated “into an account used only for” specified purposes); *Storedahl Props.*, 143 Wn. App. at 502-03 (money deposited “in a special fund in the county treasurer’s office” and used “only for the cost and expense of” specified purposes); *Tukwila Sch. Dist.*, 140 Wn. App. at 747-48 (funds “deposited into a segregated single-purpose account” and used only for specified purposes). Because the assessment features an “exclusive allocation” of the funds collected, it satisfies the second *Covell* factor. RCW 74.60.020(3)(e); RCW 74.60.080; RCW 74.60.090.

c. A Direct Relationship Exists Between The Assessments And The Hospitals

The third factor under *Covell* is “whether there is a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer.” *Covell*, 127 Wn.2d at 879. “Where such a relationship exists, then the charge may be deemed a regulatory fee even though the charge is not individualized according to the benefit accruing to each fee

payer or the burden produced by the fee payer.” *Id.*; *see also Franks & Son*, 136 Wn.2d at 751.

A “direct relationship” exists between the assessment and the service received by hospitals, in the form of higher Medicaid payments. RCW 74.60.030(1) (“assessment is imposed” at specified levels “for the purpose of funding” higher rates). The statute has the effect of “tying” the assessment to those rates. *Lehman*, 143 Wn.2d at 28 (amounts deducted by State were tied to benefits received by inmates); *see also Storedahl Props.*, 143 Wn. App. at 503-04 (funds provided “a service to fee payers” rather than just the public); *Tukwila Sch. Dist.*, 140 Wn. App. at 749-50 (amount of storm water fee “directly related to the service provided” by the government).

When the government imposes a tax, there is no connection between the charge and the benefits received by, or regulation imposed on, the taxpayers. *Arborwood*, 151 Wn.2d at 373 (charge for ambulance service unrelated to use); *Samis Land*, 143 Wn.2d at 813 (utility charge unrelated to receipt of utility services). Here, with increased payments, hospitals receive “an identifiable service” in the form of Medicaid payments. *Samis Land*, 143 Wn.2d at 814.

An additional relationship between the fee charged and the service received by the hospitals is that the funds are used to protect hospital

payment rates from the vagaries of the general fund. Because of the overall statutory scheme, money from the assessment fund can be used “in lieu of” money from the general fund and the hospitals continue to receive payment rates that exceed their July 2009 levels, regardless of any shortfalls in the general fund. The money paid into the assessment fund stabilizes the rates and directly benefits the hospitals that pay. The assessment is a fee.

3. The Legislature Has Not Construed The Assessment As A Tax, And The Association Testified That The Assessment Is Not A Tax

The Court should also give weight to the fact that the Legislature did not consider the assessment a tax when it created the program in 2010 or amended it in 2011. *Brown*, 165 Wn.2d at 723 (Legislature is a “coequal branch” with “sufficient integrity” to ensure “the preservation of the constitution”) (citation omitted). The Association concedes as much. Br. Appellant at 16. There is no evidence that the Legislature was ever asked to treat either the 2010 or 2011 bills as tax legislation to which article VII, or any other tax provisions, would apply.

In addition, the Association itself told the Legislature in 2010 that the assessment was not a tax because the amounts charged could not be passed along to hospital patients:

This is an assessment, not a tax. The difference is that businesses pass taxes on to customers, but hospitals are prohibited from passing the costs of the assessments on to patients.

CP at 217 (House Bill Report on H.B. 2956) (emphasis added); *see also* RCW 74.60.070 (“Hospitals shall not increase charges or billings to patients or third-party payers as a result of the assessments under this chapter.”).

The Legislature did not amend RCW 74.60.070 in 2011; therefore, hospitals still cannot pass along the assessments to their patients. The rationale upon which the Association relied when lobbying the Legislature to pass the bill in 2010 remains valid for purposes of analyzing, and upholding, the 2011 amendments.⁸

D. If The Assessment Were A Tax, It Would Comply With The State Constitution

The hospital safety net assessment is a fee, with none of the attributes this Court has repeatedly identified as indicative of a tax. However, even if the assessment were a tax, it would comply with the state constitution because it was a proper exercise of the Legislature’s plenary power to enact taxes and direct how state revenue must be used.

⁸ It is disingenuous for the Association to say one thing to the Legislature when trying to get a bill passed in 2010, but then to contradict that statement in 2011. CP at 217 (describing the assessment as a fee in 2010); CP at 5 (describing it as a tax in 2011).

In addition, if the assessment were a tax, it would not be a property tax and therefore should not be subject to article VII, section 5.

The Association relies primarily on cases and attorney general opinions that involve the authority of municipalities, the legality of certain types of fund transfers, or the application of property taxes. Br. Appellant at 27. These authorities are inapposite. “The principle that the power of taxation is an essential and basic attribute of sovereignty is well established.” *Comm'l Waterway Dist. No. 1 v. King County*, 197 Wash. 441, 444, 85 P.2d 1067 (1938). The power of taxation “is possessed by the state without being expressly conferred by the people.” *State ex rel. King County v. State Tax Comm'n*, 174 Wash. 336, 341, 24 P.2d 1094 (1933). Because it is a legislative power, when the people through a constitution provide for a legislature with the power to make laws, “the power of taxation follows as a necessary part of the general power.” *Id.*

The legislative power to impose and authorize taxes is plenary, except as limited by the federal or state constitutions. *State ex rel. Mason Cnty. Logging Co. v. Wiley*, 177 Wash. 65, 73, 31 P.2d 539 (1934). A constitutional challenge to a tax statute presumes the statute is constitutional unless shown otherwise beyond a reasonable doubt. *Fifteen-O-One Fourth Ave. Ltd. P'ship v. Dep't of Revenue*, 49 Wn. App. 300, 304, 742 P.2d 747

(1987) (upholding tax statute against challenge based on article VII, section 1).

1. Article VII, Section 5 Applies Only To Property Taxes

The Association incorrectly contends that if the assessment is a tax, it violates article VII, section 5 of the state constitution. Br. Appellant at 29. That provision states: “No tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied.”

Article VII of the 1889 Constitution contained nine sections, of which section 5 is the only basis for the Association’s claims. CP at 5. Under cases that this Court has not overruled, article VII has historically only applied to *property* taxes. The hospital safety net assessment is not a property tax; therefore, article VII does not apply to it.

In one early case, the Court concluded that sections 1, 2, and 9 of article VII did not apply to a license tax imposed by the City of Tacoma.

Fleetwood v. Read, 21 Wash. 547, 554-55, 58 P. 665 (1899).

[U]nder the great weight of authority, a tax on occupation, business, etc., is not, in legal contemplation, a tax on property, which falls within the inhibition imposed by the usual constitutional provisions in relation to uniformity of taxation; and, in consideration of the fact that the state constitution is a limitation upon the actions and powers of the legislature instead of a grant of power, that the power of the legislature to tax trades, professions, and occupations is, in the absence of constitutional restriction, a matter within its

absolute control and resting entirely in sound legislative discretion.

Id.

In another early case, the Court held that a challenge to the former inheritance tax based on sections 1, 2, and 5 was untenable because each provision applied only to property taxes. *State v. Clark*, 30 Wash. 439, 445, 71 P. 20 (1902).

The . . . charge made upon the passing of the estate is not a tax on property. It is an impost or excise on the right to pass the estate and the privilege of the devisee to take. That it is not within the provision relating to the tax on property is well settled by practically unanimous authority.

Id.

Later, the Court again unequivocally concluded that article VII has “no application to license taxes upon occupations but relate[s] only to taxes levied upon property.” *City of Seattle v. King*, 74 Wash. 277, 279, 133 P. 442 (1913). Similarly, in *Standard Oil Co. v. Graves*, 94 Wash. 291, 304, 162 P. 558 (1917), *rev'd on other grounds*, 249 U.S. 389, 39 S. Ct. 320, 63 L. Ed. 662 (1919), the Court held article VII, sections 2 and 5 inapplicable to an oil inspection tax because “[i]t has become the settled doctrine of this state that the provisions of the state constitution, found in article 7, relative to taxation, refer to taxes upon property[.]” *See also Ernst v. Hingeley*, 11 Wn.2d 171, 182-83, 118 P.2d 795 (1941) (article VII, section 6 inapplicable to unemployment taxes); *Ajax v. Gregory*, 177

Wash. 465, 473-74, 32 P.2d 560 (1934) (article VII, section 6 inapplicable to liquor license fees); *State v. Hart*, 125 Wash. 520, 523, 217 P. 45 (1923) (article VII, section 2 inapplicable to distribution tax on fuel oil); *McQueen v. Kittitas County*, 115 Wash. 672, 676-77, 198 P. 394 (1921) (article VII, sections 1 and 2 inapplicable to license tax on dogs); *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 203-07, 117 P. 1101 (1911) (uniformity provisions of article VII inapplicable to workers' compensation contributions); *In re Garfinkle*, 37 Wash. 650, 656, 80 P. 188 (1905) (“a tax on trades, professions, and occupations [is] not a tax on property which [falls] within the inhibition imposed by the constitutional provisions in relation to uniformity of taxation.”).

In addition, the Court specifically held that article VII, section 5 was inapplicable to license fees on peddlers because the constitutional provision related only to taxes on property. *State v. Sheppard*, 79 Wash. 328, 329-31, 140 P. 332 (1914).

In two recent cases, this Court analyzed whether local excise taxes complied with article VII, section 5. *Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 804, 123 P.3d 88 (2005); *Okeson v. City of Seattle*, 150 Wn.2d 540, 558, 78 P.3d 1279 (2003). For more than 100 years prior to *Okeson*, case law firmly established that article VII, section 5 only applies to taxes on property. In applying article VII,

section 5 to local excise taxes, *Okeson* and *Sheehan* did not overrule the earlier authorities that restrict article VII to property taxes. The doctrine of stare decisis requires “a clear showing that an established rule is incorrect and harmful before it is abandoned.” *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 280, 208 P.3d 1092 (2009) (citations omitted). Where the Court expresses a clear rule of law, it should not be overruled sub silentio. *Id.* This case presents the Court an opportunity to reaffirm that article VII, section 5 applies only to property taxes.

The Association does not contend that the assessment is a property tax or a local excise tax. Instead, it cites out-of-state cases to support its position. Br. Appellant at 28. However, those cases do not support the proposition that article VII, section 5 applies to taxes other than property taxes. For example, *Carr v. Frohmiller*, 47 Ariz. 430, 56 P.2d 644 (1936), provides no support for the Association. Arizona cases hold that the Arizona counterpart to article VII, section 5 applies only to property taxes. *E.g.*, *Ariz. Farm Bureau Fed’n v. Brewer*, 226 Ariz. 16, 24, 243 P.3d 619 (Ct. App. 2010), *review denied* (2011); *City of Glendale v. Betty*, 45 Ariz. 327, 333-34, 43 P.2d 206 (1935). The tax at issue in *Carr* was an annual property tax levied on all taxable property in the state. *Carr*, 47 Ariz. at 435-37. The Arizona Court of Appeals recently distinguished *Carr* on precisely that basis. *Ariz. Farm Bureau*, 226 Ariz. at 24.

The Association's reliance on a Kansas case is equally misplaced. Br. Appellant at 28 (citing *Panhandle E. Pipeline Co. v. Fadely*, 183 Kan. 803, 332 P.2d 568 (1958)). In *Panhandle*, the pipeline company argued that the statute at issue violated article 11, section 5 of the Kansas constitution (the Kansas counterpart to article VII, section 5). *Id.* at 806. However, the court did not rest its decision on that constitutional provision; the court invalidated the statute as an attempt to levy a tax under the guise of a regulatory fee, in violation of a different provision of the state constitution. *Id.* at 807. Kansas cases interpreting provisions similar to article VII, section 5 actually support the argument that it should only apply to property taxes. *E.g.*, *State v. Matson*, 14 Kan. App. 2d 632, 640, 798 P.2d 488 (1990), *review denied* (1991); *Farmers Union Cent. Co-op. Exch. v. Dir. of Revenue*, 163 Kan. 266, 268, 181 P.2d 541 (1947); *State v. Wilson*, 101 Kan. 789, 168 P. 679 (1917).⁹

In addition, all of the Washington attorney general opinions cited on page 27 of the Brief of Appellant pertain to property taxes and therefore are consistent with article VII, section 5 only applying to property taxes.

⁹ Other state courts interpreting constitutional provisions similar to Washington's article VII, section 5 have also held that they apply only to property taxes. *E.g.*, *Solberg v. Davenport*, 211 Iowa 612, 232 N.W. 477, 479-80, 481-83 (1930); *Methodist Hosp. of Brooklyn v. State Ins. Fund*, 117 Misc. 2d 178, 188, 459 N.Y.S.2d 521 (N.Y. Sup. Ct. 1983), *aff'd*, 64 N.Y.2d 365, 374, 377, 476 N.E.2d 304, 486 N.Y.S.2d 905 (1985); *In re McPherson*, 104 N.Y. 306, 318-20, 10 N.E. 685 (1887).

In short, article VII does not apply to all taxes. The assessment is not a property tax. Even if *Okeson* and *Sheehan* remain good law, there has been no contention that the assessment is a local excise tax. Therefore, article VII should not apply to this case.

2. If Article VII, Section 5 Did Apply, H.B. 2069 Would Comply Because The Object Of The Assessment Is Clearly Stated

The State has shown that the assessment is a fee, not a tax, and, even if it were a tax, it would not be a tax to which article VII, section 5 applies. However, if the Court determines the provision is applicable, H.B. 2956 and H.B. 2069 both clearly stated the object of the assessment; therefore, the State has complied with article VII, section 5, which reads:

SECTION 5 TAXES, HOW LEVIED. No tax shall be levied except in pursuance of law; and *every law imposing a tax shall state distinctly the object of the same to which only it shall be applied.*

(Emphasis added.)

The Legislature has clearly and consistently stated that “the object” of the hospital safety net assessment is to generate additional federal funding and increase hospital payment rates. RCW 74.60.030(1); RCW 74.60.080(1); RCW 74.60.090(1); *see also* RCW 74.60.005(1), (3) (general intent of assessment).

The Association contends that H.B. 2069 unconstitutionally “diverts” money from the assessment fund. Br. Appellant at 18, 28-30. The Association’s characterization of the effect of the 2011 legislation is incorrect. Even in the original 2010 bill, the Legislature specified that the State had authority to use certain amounts collected under the assessment “in lieu of” general fund appropriations in order to support “payments to hospitals.” RCW 74.60.020(3)(e). The amounts were specified as \$66.8 million for the previous biennium and then \$199.8 million for the current biennium. *Id.*; *see also* H.B. 2069, § 1 (amending RCW 74.60.020(3)(e)). But under both the 2010 and 2011 bills, the money must be used to support payments “to hospitals.” RCW 74.60.020(3)(e). There is no evidence that the State has “diverted” funds away from the specified purposes into some unrelated project.¹⁰

Article VII, section 5 is directed not simply to the method of taxation, but rather to the relationship between the tax and its purpose. *Sheehan*, 155 Wn. 2d at 804. The Legislature could not require using the assessment money for non-Medicaid purposes because federal law would not allow it. The State cannot use federal Medicaid matching funds for non-Medicaid purposes. The Social Security Act spells out how the

¹⁰ The Association’s charts are incomplete, as they do not give sources for the numbers used and do not appear to account for these statutorily directed amounts. Br. Appellant, Apps. A-1, A-2.

federal government pays the states for their Medicaid expenditures. 42 U.S.C. § 1396b. The federal government does not provide any Medicaid funding “with respect to any amount expended for roads, bridges, stadiums, or any other item or service not covered under” a State Medicaid Plan. 42 U.S.C. § 1396b(i)(17); *see also* 72 Fed. Reg. 2236, 2239 (Jan. 18, 2007) (“Non-Medicaid populations and non-Medicaid services simply are not eligible for Federal reimbursements except where expressly provided for by the Congress.”). The purpose of this law is to prevent states from engaging in transfers of funds that inappropriately drive up the level of federal funding, but without a commensurate increase in services provided to Medicaid clients. 72 Fed. Reg. 2236, 2239 (Jan. 18, 2007). The State cannot divert the assessment money and yet still receive federal matching funds.

The Association also has not explained how it would have been constitutional to “divert” \$66.8 million under the 2010 bill but unconstitutional to “divert” \$199.8 million under the 2011 bill. Under both bills, the principles of the assessment are the same, and under both bills, all money collected must be paid to hospitals. RCW 74.60.020(3)(e).

The Association relies almost exclusively on RCW 74.60.005 in support of its legal theories. Br. Appellant at 8-11, 18, 29, 31-32, 37.

Although codified, RCW 74.60.005 is entitled “Purpose, Findings, and Intent.” Laws of 2010, 1st Spec. Sess., ch. 30, § 1. Such statements of purpose or intent “do not give rise to enforceable rights and duties.” *Judd v. Am. Tel. & Tel. Co.*, 152 Wn.2d 195, 203, 95 P. 3d 337 (2004). While perhaps helping the Court understand the Legislature’s goals, statutory intent sections are “without operative force” themselves. *Hartman v. Wash. State Game Comm.*, 85 Wn.2d 176, 179, 532 P.2d 614 (1975).

For purposes of article VII, section 5, the “objects” of the assessment are stated in RCW 74.60.020, RCW 74.60.030, RCW 74.60.080, and RCW 74.60.090, which have “operative force.” None of the monies in the assessment fund have been used or disbursed for any purposes other than those specified in those statutes. Therefore, no diversion of the funds within the meaning of article VII, section 5 has occurred.

In short, the Legislature distinctly stated the object of the assessment in both H.B. 2956 and H.B. 2069. Even if article VII, section 5 were applicable to the assessment, the assessment funds have been used only for the stated object of the assessment.

E. The 2011 Amendments To Chapter 74.60 RCW Did Not Invalidate The Entire Chapter

The Association's second cause of action is based on its erroneous contention that H.B. 2069 violates a provision of the general intent statute, RCW 74.60.005(3)(d). CP at 5-6; Br. Appellant at 32. The Association relies on a misguided supposition that the focus of the assessment statutes is on the level of general fund appropriations for Medicaid rates, rather than on the level of the payment rates themselves.

1. The Statutes Focus On The Level Of Hospital Payment Rates, Not The Level Of General Fund Appropriations

As mentioned, the Legislature established the assessment with the intent to generate additional federal Medicaid funding and increase hospital payment rates. RCW 74.60.030(1); RCW 74.60.080(1); RCW 74.60.090(1); *see also* RCW 74.60.005(3)(d) (description of general intent).

The Association contends that the statute establishes a floor level of funding for hospital rates from the general fund and that H.B. 2069 reduces the funding below that level. Br. Appellant at 2, 10. The Association is wrong on both assertions.

The focus of the chapter is on the level of payment rates, not on the level of appropriations from the general fund. RCW 74.60.080(1) (restoration of July 2009 rate cut); RCW 74.60.090(1) (rate increase in

February 2010). In any event, the Association presented no evidence that the level of general fund appropriations for the current biennium will fall short of its previous level. CP at 331 (superior court order dated February 8, 2012).

The Association itself has repeatedly acknowledged the Legislature's goals of generating federal funding and increasing hospital payments. CP at 3, 15, 18, 243, 260-61 (Association's view of legislative activity in 2009 and 2010); CP at 79-90 (counsel's analysis of legality of the State's rate cuts in 2009). The Association has not shown that the Legislature was focused on the level of general fund appropriations.

"The court's fundamental objective in construing a statute is to ascertain and carry out the legislature's intent." *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). The Court must "construe statutes such that all of the language is given effect." *Id.* The Court must "avoid readings of statutes that result in unlikely, absurd, or strained consequences." *Glaubach v. Regence BlueShield*, 149 Wn.2d 827, 833, 74 P.3d 115 (2003). The "spirit or purpose of an enactment should prevail." *Id.* (citation omitted).

The Legislature emphasized that it enacted the assessment to generate additional federal Medicaid funding and to then increase hospital payment rates. RCW 74.60.080(1); RCW 74.60.090(1); *see also*

RCW 74.60.005 (explanation of general intent). By harmonizing the statutes and construing the chapter as a whole, it is clear that the Legislature's focus was on the level of rates the State would pay hospitals for their Medicaid services. Even under H.B. 2069, the rates for the fiscal year beginning July 1, 2011, exceeded their level of July 1, 2009. CP at 221 (Stith Decl., ¶ 10(c)).

2. The Statutes Explicitly Allow The Use Of Assessment Funds In Lieu Of The General Fund For Making Payments To Hospitals

The Association's argument regarding RCW 74.60.150 is similarly flawed. Br. Appellant at 30-31. That statute lists five events that would result in termination of the assessment program. RCW 74.60.150(2)(a)-(e). The Association zeroes in on RCW 74.60.150(2)(e), Br. Appellant at 32-33, which prevents the assessment fund from being "used as a substitute for or to supplant other funds, *except as authorized by RCW 74.60.020(3)(e)*." (Emphasis added.)

In turn, RCW 74.60.020(3)(e) allows the State to expend \$199.8 million from the assessment fund in the current biennium "in lieu of state general fund payments to hospitals[.]" The contingency specified in RCW 74.60.150(2)(e) is tempered by the exception contained in RCW 74.60.020(3)(e). The statute explicitly allows the State to use

\$199.8 million of the assessment fund, in lieu of the general fund, to make payments to hospitals for Medicaid services.

The Association finds it dispositive that the Legislature did not amend RCW 74.60.150 in 2011. Br. Appellant at 33. However, the Legislature *did* amend the cross-referenced statute, RCW 74.60.020(3)(e), for the purpose of specifying that \$199.8 million may be used in lieu of the general fund to make payments to hospitals. H.B. 2069, § 1. Based on the plain language of the statute, it is perfectly appropriate for the State to use \$199.8 million from the assessment fund to “substitute for or to supplant” the general fund. *Id.* The statutes must be construed as a whole, rather than read in isolation. CP 254 (superior court order dated November 9, 2011, at 3 (lines 4-5)); *Lake*, 169 Wn.2d at 526.

The Association portrays the \$40 million “surplus” in the assessment fund as somehow separate and apart from the \$199.8 million specified in H.B. 2069, § 1(3)(e). Br. Appellant at 13. In fact, the \$40 million is simply one part of that overall figure. CP at 300-01 (Second Decl. of Stith dated January 17, 2012, ¶ 5). The \$40 million surplus is for the fiscal biennium that ends on June 30, 2013, not the biennium that ended on June 30, 2011. *Id.* The Association offered no evidence to rebut Ms. Stith’s testimony.

The Association also fails to construe the statute in its entirety. Br. Appellant at 34. Under the plain language of RCW 74.60.020(1)(b), it is only the “amounts remaining in the fund on July 1, 2013” that “shall be used to make increased payments” or be “refunded to hospitals[.]” If there are no amounts “remaining in the fund on July 1, 2013,” then there will be no funds to use to increase payments or to refund. The assessment is being enacted as envisioned, and specified, in statute.

3. The Legislature Did Not Invalidate The Chapter By Amending It

It would be absurd to conclude that the Legislature would enact amendments in 2011 that have the effect of invalidating the very statutes it was simply amending. There is no basis in the operative language of H.B. 2069 or its legislative history to support the Association’s argument.

Despite the plain language of multiple statutes, and despite its own acknowledgments of the Legislature’s intent, the Association maintains that the Legislature nonetheless swallowed a poison pill in 2011 by failing to appropriate enough money for hospital payments from the general fund. Br. Appellant at 2, 31 (citing RCW 74.60.150(2)).

When deliberating H.B. 2069 in 2011, the Legislature explained that the State “expected to spend \$3.7 billion during the 2011-13 fiscal biennium on inpatient and outpatient hospital services[.]” CP at 207

(Senate Bill Report). Only about 9 percent of that sum (or about \$368 million) was expected to come from the assessment fund. *Id.* This means that more than 91 percent (or \$3.3 billion) would come from the general fund, including federal matching funds. *Id.* Even if the Association were correct that the focus must be on the source of funds, it must necessarily prove that \$3.3 billion would be insufficient to pay for the level of rates that existed as of July 1, 2009. The Association offered no proof in this regard, relying solely on the Declaration of Andrew Busz. CP at 56-60. Mr. Busz did not discuss the Senate Bill Report or try to show that \$3.3 billion would be insufficient to pay for the July 2009 level of payment rates.

In a misleading argument, the Association observes that overall expenditures for the entire Medicaid program will be less in the current biennium than the amount needed “to maintain current service coverage and payment policies through 2013.” Br. Appellant at 33 (quoting Senate Ways and Means Committee report at CP 65). The committee report does not analyze the level of appropriations for only *hospital* services, and it is therefore irrelevant to the legal analysis of RCW 74.60.150.

4. There Is No Evidence That The Level Of Funding For Hospital Payments Will Be Less In The Current Biennium

Even if the Association is correct that the level of general fund appropriations is material, it cannot prove its allegation because there is no evidence that the level of general fund appropriations has been reduced. Br. Appellant at 36-37. Medicaid is an entitlement program – if a person qualifies for benefits, then the State must provide them. *Goldberg v. Kelly*, 397 U.S. 254, 262, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (welfare benefits “are a matter of statutory entitlement for persons qualified to receive them”); *see also* 42 C.F.R. § 431.205 (applying the Due Process standards outlined in *Goldberg* to the Medicaid program).

Because Medicaid is an entitlement program, and the ultimate level of funding for hospital services is invariably tied to utilization, the precise level of funding for the program for any given year cannot be known or determined until *after* that year ends.¹¹ Simply put, the exact level of

¹¹ The Legislature established the Caseload Forecast Council to project the number of residents entitled to receive Medicaid and other benefits each year. RCW 43.88C.020(1); *see also* RCW 43.88C.010(7)(a) (defines “caseload” to include “medical assistance”). Forecasts are developed at least three times per year and are used in creating the State operating budget. RCW 43.88C.020(2), (5). The State must adjust spending on mandatory entitlement programs, such as Medicaid, if the caseloads increase. *See, e.g.*, OFM 2011-13 Biennial Operating Budget Instructions (discussing “maintenance level” funding), http://www.ofm.wa.gov/budget/instructions/operating/2011_13/chapter5.pdf; *see also* RCW 43.88.030(1) (Governor’s proposed budget is based on the Council’s forecasts but can be changed if caseloads change); RCW 43.88.160(2) (along with the Council, OFM informs the Legislature of changes in expenditures due to caseload adjustments).

funding for hospital services on a year-to-year basis cannot be known with precision. The Association has not shown that the funding level has altered, and, on their face, the statutes prove that the payment rates are higher than the minimum required. RCW 74.60.090(2)(a).

V. CONCLUSION

The respondents request that the superior court's orders be affirmed.

RESPECTFULLY SUBMITTED this 23rd day of July, 2012.

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