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SUPREME COURT NO. 90486-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE HOSPITAL ASSOCIATION,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Appellant.

Filed *E*
Washington State Supreme Court

APR 23 2015

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BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF
WASHINGTON, LEGAL VOICE, MERGERWATCH, PLANNED
PARENTHOOD VOTES NORTHWEST, AND COMPASSION &
CHOICES OF WASHINGTON

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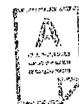
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I. IDENTITY AND INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union of Washington (“ACLU”) is a statewide, nonpartisan and nonprofit organization with more than 20,000 members that is dedicated to preserving and defending civil liberties, including access to reproductive and end-of-life health care. The ACLU also submitted comment letters and testified to the Washington State Department of Health (“DOH”) regarding the Proposed Rules pertaining to the Certificate of Need Regulations (“CON”) and Hospital Licensing Regulations, implementing Governor’s Directive 13-12, because the ACLU believed that passage of the rules was essential to protect access to reproductive and end-of-life health care.

Legal Voice is a nonprofit, public interest organization in the Pacific Northwest that works to advance the legal rights of all women through litigation, legislation, and the provision of legal information. Since its founding in 1978, Legal Voice has been dedicated to protecting and expanding women’s reproductive rights and access to affordable and comprehensive reproductive health services. To that end, Legal Voice has pursued legislation and participated as counsel and amicus in cases around the country that seek to protect health care and reproductive justice for women, girls, and LGBT individuals. Legal Voice serves as a regional expert on gender equity and reproductive health law and policy, including conscience-based refusals of health care.

Planned Parenthood Votes Northwest works on behalf of the four Planned Parenthood affiliates in Washington, Planned Parenthood of the

Great Northwest and Hawaii, Mount Baker Planned Parenthood, Planned Parenthood of Greater Washington and North Idaho, and Planned Parenthood Columbia Willamette, to promote and protect reproductive health, rights and justice. Planned Parenthood is the largest provider of reproductive health services in the state of Washington. Planned Parenthood Votes Northwest advocates for public policies that guarantee the right to choice and full and nondiscriminatory access to reproductive health care, and fostering and preserving a social and political climate favorable to the exercise of reproductive choice.

MergerWatch is a national non-profit organization committed to protecting and expanding access to comprehensive women's health services. MergerWatch assists community-based consumers and health practitioners in defending patients' rights including their access to comprehensive reproductive health services. MergerWatch focuses on protecting services at secular hospitals when those facilities propose business partnerships with religiously-sponsored hospitals that restrict care based on doctrine. Having worked extensively on such affiliations in Washington, MergerWatch supports the change to the CON regulations which is necessary to protect reproductive and end of life care in the state.

Compassion & Choices of Washington (C&C of WA) is a nonprofit organization working to improve care and expand choice at the end of life. C&C of WA helps patients and their loved ones face the end of life with calming facts and choices of action during a difficult time. C&C of WA collaborates with health care organizations and provider

groups to encourage best practices in providing care to dying patients. C&C of WA also pursues legal reform to promote access to comprehensive end-of-life care, including ensuring patients' decisions are documented and honored through the use of advance directives, health care powers of attorneys, and Physician Orders for Life-Sustaining Treatment (POLST); that patients have access to excellent pain management, palliative care and hospice services; that consolidation within the health care industry does not erode access to comprehensive end-of-life care, and that terminally ill adults are able to exercise their legal right to physician aid in dying under Washington's Death with Dignity Act. Compassion & Choices of Washington submitted comment letters to DOH regarding the Proposed Rules pertaining to the CON Regulations and Hospital Licensing Regulation, which C&C of WA believes are necessary to preserve access to needed end-of-life medical services.

II. ISSUE STATEMENT

Whether the Department of Health's recent amendment to the CON regulations was consistent with the program's statutory purpose, and a proper exercise of its authority, where consolidations have resulted in limiting access to health care services and information in Washington State, specifically in regards to reproductive and end-of-life health care.

III. INTRODUCTION

Washington has a proud history of protecting health care rights and bodily autonomy, including in the areas of reproductive rights and end-of-life choices. For example, the Reproductive Privacy Act (“RPA”), RCW 9.02, establishes that access to birth control and abortion are fundamental rights. Further, the Death with Dignity Act (“DWDA”), RCW 70.245, recognizes and protects the right of mentally competent, terminally ill adult patients with six months or less to live to request life-ending medication from physicians. Among the measures implemented by the State to protect these important rights is the CON program, which is designed to ensure that there is public oversight of changes that may impact the public’s access to health care services, including health care services protected by the RPA and DWDA. The Legislature created the CON program to “promote, maintain, and assure the health of all citizens in the state, provide accessible health services, health manpower, health facilities, and other resources while controlling increases in costs . . .” RCW 70.38.015(1).

In recent years, Washington has seen a flood of consolidation of ownership and control of its health care facilities, often involving mergers or affiliations of religious and secular health care entities. This has resulted in significant changes to, and reductions in, the health care information and services available to Washington patients, but because the entities have styled these transactions as something other than a “sale, purchase or lease,” they have avoided the public scrutiny inherent in the

CON process. As such, patients in Washington have been left to grapple with unanticipated and unprecedented reductions or eliminations of accessible health care services.

DOH's recent amendment of the CON regulations was developed after an extensive rulemaking process, during which DOH received more than a thousand public comments. DOH determined that including transactions *other than* those cast as a "sale, purchase, or lease" was a necessary step to achieve the stated purpose of the CON program—to "provide accessible health care services" to patients throughout Washington. Moreover, it was a reasonable measure designed to protect against the reduction of accessible health care services (*see, e.g.*, WAC 246-310-210(1)(a)) that has already resulted from recent religious and secular mergers or affiliations in Washington. Clarifying that the CON program encompasses transactions involving changes in control in health care systems, whether by "contract, affiliation, corporate membership restructuring, or any other transaction," was well within DOH's statutory authority. *Amici* therefore respectfully request that the Court reverse the lower court's ruling holding that DOH exceeded its authority.

IV. ARGUMENT

A. **The Consolidation of Health Care Systems Restricts Patient Access To Important Health Care Services.**

DOH and the CON program play an important role in ensuring that patients in Washington have access to a full range of health care services, and can exercise their rights protected by the RPA and DWDA. Through

the CON program, DOH can ensure that proposed health care system transactions do not diminish patient access to reproductive and end-of-life health care services. The purpose of the CON program is to ensure “access and quality” of health care. RCW 70.38.015. *See also King Cnty. Pub. Hosp. Dist. No. 2 v. Wash. State Dep’t of Health*, 178 Wn.2d 363, 366, 309 P.3d 416 (2013) (“The legislature intended the certificate of need requirement to provide accessible health services and assure the health of all citizens in the state while controlling costs.”).

In the past, control of a single hospital did not mean control of the entire community’s health care market, but that has changed due to consolidation of hospital ownership under fewer and fewer owners, and vertical integration where hospitals employ the vast majority of the physicians that work in a community. That consolidation makes a huge difference to Washington’s health care consumers, particularly those in rural communities where health care access is often limited to one facility. AR 264-65, 271, 1154. It results not only in a lack of any meaningful choice among health care providers for the patient, but a potentially dangerous situation when health care facilities restrict or deny needed health care information and services based on religious doctrine. Patients in these areas are then forced to travel before gaining access to important, and sometimes critical, health care services not provided at the only local health care facility.

Religious-secular health system transactions restrict patient access to health care services, including those protected by the RPA and the

DWDA. Religious doctrine—not good medical practice—governs the services, referrals, and even information that health care providers affiliated with a religious health care system may provide to the public. The Ethical and Religious Directives for Catholic Health Care Services (“ERDs”)¹ that apply to all Catholic-affiliated health care systems forbid or severely restrict many reproductive and end-of-life health services, including contraception, vasectomies, fertility treatments, tubal ligations, abortions, end of life services, and advance directives that are contrary to Catholic teachings. Adherence to ERDs may also increase the likelihood that LGBT individuals and families will face discrimination in seeking access to health care services consistent with their medical needs.

That religious-secular affiliations should result in a reduction or elimination of important health services is not surprising—the ERDs demonstrate some of the stark differences between secular and religious health care. Examples include:

- ERD 24, which states that advance directives that are contrary to Catholic teaching will not be honored;
- ERD 45, which states that abortions will never be permitted (including in cases involving ectopic pregnancy², rape, and danger to the life of the mother) (*see also* ERD 48);

¹ A copy of the ERDs can be found at <http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf> (March 23, 2015).

² Religious doctrine does not just impact the provision of services in hospitals and clinics but also in laboratories. During the rulemaking process DOH received comments indicating that PeaceHealth threatened to discontinue lab services designed to diagnose

- ERDs 40-42, which prohibit reproductive services such as artificial insemination and in-vitro fertilization, surrogacy, and fertility treatments;
- ERD 52, which provides that Catholic health institutions may not promote or condone contraceptive practices, but may provide for married couples instruction in “methods of natural family planning”;
- ERD 53, which prohibits sterilization;
- ERD 60, which prohibits Catholic health care institutions from condoning or participating in euthanasia or assisted suicide.

“Foremost among the Catholic Directives is the supremacy of Catholic theological doctrine over the American Medical Association’s Principles of Medical Ethics.” AR 186-87. Similar restrictions are found in PeaceHealth’s Statement of Common Values, available on its website.

<http://www.peacehealth.org/about-peacehealth/Pages/CommonValues.asp>

x These restrictions not only impact health care services available to patients, but in many situations interfere with the provision of information to patients. For example, many Providence Hospitals indicate on their websites that they will not provide information regarding the legal end-of-life option of DWDA. *See, e.g.*, <http://washington.providence.org/hospitals/st-josephs-hospital/for-patients-and-visitors/information-for->

ectopic pregnancies, conduct semen analysis for vasectomy patients, and determine appropriate wound care. AR 265.

patients/patient-rights/. When provider “gag” policies prevent caregivers from giving patients information, patients do not get adequate care.

These religious doctrines expressly prohibit the offering, and, in some instances the referring of patients to, health care services that are protected by the State of Washington, some of which were approved by the voters. *See* RCW 9.02 (RPA) and RCW 70.245 (DWDA). This is true regardless of how the transaction between the entities is styled. Put plainly, religious-secular health system affiliations can be detrimental to patients in the affected community, no matter how the health system labels the change in ownership and control.

B. Religious-Secular Health Care System Affiliations Have Resulted In Changes To Available Health Care Services.

Religious-secular health systems affiliations in Washington have already resulted in policy changes that curtail the availability of health care services and information. Washington has undergone a wave of consolidation of ownership and control of its health care facilities in recent years.³ Between 2009 and 2013, four secular regional medical centers completed affiliation agreements with three different Catholic health

³ Washington is not alone; the trend in health system affiliations has been reported nationwide. *See* <http://www.nytimes.com/2012/02/21/health/policy/growth-of-catholic-hospitals-may-limit-access-to-reproductive-care.html>. (April 8, 2015). And the problems arising from such affiliations are not limited to changes in service that can result from the extension of religious doctrine to previously-secular health care facilities. *See, e.g., Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 793 (9th Cir. 2015) (affirming district court's decision that hospital merger created substantial risk of anticompetitive price effects).

systems in the State of Washington without any state oversight. AR 248. *See also* <http://www.seattletimes.com/seattle-news/hospitalsrsquo-proposed-affiliation-with-catholic-systems-opposed/> (April 8, 2015). The percentage of acute-care hospital beds under Catholic control grew dramatically from 28% in 2010 to more than 40% in 2013. AR 248, 264. These affiliations have resulted in changes to, and a reduction in, health care services offered to Washington patients.

For example, Highline Medical Center (a secular facility) “affiliated” with the religious Franciscan Health System in 2012; because the transaction was not labeled a “sale, purchase, or lease,” DOH did not require that it be subject to CON review. AR 249-50. Yet the transaction resulted in the denial of patient access to medical services. After the transaction, Medical staff at Highline facilities are required to follow the ERDs, as stipulated in the affiliation agreement with Franciscan. AR 250 (citing to Highline Medical Center/Franciscan Health System Agreement, § 13.5.). *See also*, <http://www.doh.wa.gov/Portals/1/Documents/2300/HospPolicies/HighlineRH.pdf> (Highline reproductive health policy, which requires ethics committee approval prior to patient receiving Misoprostol to enable delivery of a nonviable fetus).

Similarly, when Harrison Medical Center, which services the geographically isolated Kitsap Peninsula, affiliated with Franciscan, Harrison agreed to a ban on abortion services and aid-in-dying as a condition of affiliating with the Catholic system. AR 250. *See also*

<http://www.doh.wa.gov/Portals/1/Documents/2300/HospPolicies/HarrisonEOL.pdf> (Harrison DWD policy, which states that employees may not provide counseling or prescribe medications under the DWDA). Again, because the transaction was labeled an “affiliation,” it was not required to go through the CON process. AR 248-49.

The record also reveals that affiliations of religious and secular health care facilities have resulted in refusals to offer lab services for Planned Parenthood (AR 265), refusals to perform or provide referrals for abortions (AR 235), refusals to provide information about aid in dying (<http://www.doh.wa.gov/Portals/1/Documents/2300/2013/CompassionComments.pdf>), and a reduction of on-site pediatric physicians (AR 180).

Affiliations of religious and secular health care systems can result in the elimination of health care services in Washington’s rural areas. For example, Providence Centralia Hospital in Centralia and PeaceHealth St. Joseph’s Hospital in Bellingham are sole community providers and subject to religious restrictions. AR 252. Religious restrictions that result in patients needing to travel for healthcare services not only disproportionately impacts low-income, elderly, and terminally-ill patients, but creates unsafe life-threatening delays for patients needing emergency care. AR 265.

Hospital affiliations are often intended to improve patient care, but when such affiliations involve religious health care systems, safeguards such as the CON program are needed to ensure that health care decisions are based solely on medically accepted standards of care and the law—not

religious directives. DOH has an obligation to ensure that health care services—some of which were specifically approved by the voters of Washington—are available to patients throughout Washington.

V. CONCLUSION

Washington's statutory scheme is designed to promote and maintain access to health care services for all citizens, and the CON program is a critical tool to achieve that end. Faced with evidence demonstrating that recent religious secular health care system affiliations in Washington have resulted in a reduction of available health care services, and after an extensive rulemaking process, DOH determined that such affiliations have an impact upon available health care services even when such transactions are not labeled a "sale, purchase, or lease." DOH's recent amendment to the CON regulations was consistent with the program's statutory purpose, and a proper exercise of its authority. DOH properly adopted rules recognizing that the CON program should be applied to other transactions to ensure that medically appropriate care is not limited by religious doctrine. *Amici* respectfully request that the Court reverse the superior court judgment.

DATED this 10th day of April, 2015.

Respectfully submitted,

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The Brief of Amici Curiae American Civil Liberties Union of Washington, et al. is attached.

Case Name: Washington State Hospital Association v. Washington State Department of Health

Case No.: 90486-3

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