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No. 97557-4

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

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

Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

**BRIEF OF AMICI CURIAE
SEATTLE CHILDREN'S HOSPITAL AND
SEATTLE CANCER CARE ALLIANCE**

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I. IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae Seattle Children's Hospital and Seattle Cancer Care Alliance are nationally-recognized nonprofit hospitals that provide highly specialized care to patients from Washington and across the Northwest.

Founded in 1907, Seattle Children's Hospital's mission is to provide hope, care, and cures to help every child live the healthiest and most fulfilling life possible, regardless of their family's ability to pay. Seattle Children's Hospital serves as the pediatric and adolescent academic medical center for Washington, Alaska, Montana, and Idaho—the largest geographic region of any children's hospital in the country. During the 2019 fiscal year, Seattle Children's Hospital served approximately 173,000 patients, approximately 41% of whom received benefits through Medicaid.

Seattle Cancer Care Alliance was established in 1998 as a union of patients and doctors, physicians and researchers, care and cures in the pursuit of better, longer, and richer lives for patients throughout the Northwest. A world-class treatment center, Seattle Cancer Care Alliance unites doctors from alliance partners, including Fred Hutchinson Cancer Research Center, Seattle Children's Hospital, and UW Medicine, at six locations in the greater Seattle area. Its vision is to lead the world in translating scientific discovery into the prevention, diagnosis, treatment, and cure of cancer. From July 1, 2018, to June 30, 2019, Seattle Cancer Care

Alliance served over 41,000 patients and survivors, approximately 9% of whom received benefits through Medicaid.

As hospitals with a high degree of specialized expertise, amici attract many patients from outside Washington. Thousands of amici's patients are not Washington residents, and many of those patients receive Medicaid through other states' programs. Out-of-state Medicaid receipts thus comprise a substantial portion of amici's revenue—and a substantial portion of amici's unreimbursed costs of caring for patients. For example, in the 2018 fiscal year alone, the unreimbursed costs of caring for out-of-state patients with Medicaid benefits reached approximately \$16.8 million for Seattle Children's Hospital and over \$3.3 million for Seattle Cancer Care Alliance. If the decision below is affirmed, amicus Seattle Children's Hospital would be required to pay an additional \$2.5 million per year.

The outcome of this case therefore will substantially impact amici's annual tax burden and resources to treat patients who are unable to pay for the costs of their care.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Washington is home to nationally-recognized nonprofit hospitals that provide specialized care to patients from across the Northwest without regard for their ability to pay. Providing that care is expensive, however—even after being reimbursed by government assistance programs, such hospitals are left with millions of dollars in unreimbursed costs.

To partially relieve this burden, the Washington Legislature enacted RCW 82.04.4311, which permits public and nonprofit hospitals to deduct amounts received as compensation for services covered by government-subsidized health service programs. The plain intent of this deduction is to benefit hospitals by reducing their costs of unreimbursed care. But the interpretation urged by the Department of Revenue (“Department”), and adopted in the decision below, undermines that purpose by increasing the costs of unreimbursed care borne by nonprofit hospitals. The resulting burden falls particularly hard on nonprofit hospitals that offer deep expertise in highly specialized care, thereby attracting a large volume of out-of-state patients whose home-state hospitals lack the necessary expertise.

The Department’s interpretation also discriminates against interstate commerce by burdening nonprofit hospitals’ provision of care to disadvantaged patients who reside in other states. By exempting reimbursements for the cost of caring for Washington residents who receive government assistance, the Department’s interpretation effectively would penalize nonprofit hospitals that provide care to a substantial volume of disadvantaged out-of-state patients. Such a tax regime plainly discriminates against interstate commerce in violation of the dormant Commerce Clause. *See Camps Newfoundland/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 595, 117 S. Ct. 1590, 137 L.Ed.2d 852 (1997). The Department’s attempts

to excuse this discriminatory outcome using the “government function” and “market participant” exceptions fail. The government function exception applies only when the government discriminates in favor of its own public enterprise that operates for the benefit of its residents—here, the exemption is available to public and nonprofit hospitals, and the discrimination is between care provided to in-state versus out-of-state patients. Finally, the deduction is not *direct* participation by the state in the market for health services, as required to fall under the “market participant” exception.

The Department’s interpretation unconstitutionally discriminates against interstate commerce and would reduce the funds that nonprofit hospitals have at their disposal to provide life-saving care to *all* disadvantaged patients, residents of Washington and other states alike. The decision below should be reversed.

III. ARGUMENT

This Court should reverse the decision below because the court of appeals’ adoption of the Department’s erroneous interpretation of RCW 82.04.4311 undermines the intent of the Washington Legislature to benefit nonprofit hospitals and discriminates against public and nonprofit hospitals that provide medical care to out-of-state patients in contravention of the dormant Commerce Clause of the U.S. Constitution.

A. The Department’s interpretation would undermine the intent of the Washington Legislature by burdening nonprofit hospitals’ provision of care to disadvantaged out-of-state patients.

Courts’ “fundamental objective” in conducting statutory interpretation “is to ascertain and carry out the Legislature’s intent.” *State, Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Traditional tools of statutory construction show that the Washington Legislature enacted RCW 82.04.4311 for the express purpose of reducing the costs borne by Washington public and nonprofit hospitals in providing medical care to patients who receive government assistance. Yet the interpretation urged by the Department, and adopted by the court of appeals, undermines this legislative purpose: it increases the unreimbursed costs absorbed by nonprofit hospitals who care for disadvantaged patients, and particularly burdens institutions like amici who provide highly specialized care to patients from a wide geographical region.

1. The Washington Legislature enacted RCW 82.04.4311 to reduce nonprofit hospitals’ unreimbursed costs of caring for disadvantaged patients.

When the Washington Legislature enacted RCW 82.04.4311 in 2002, it made an express finding “that the provision of health services to those people who receive federal or state subsidized health care benefits by reason of age, disability, or lack of income is a recognized, necessary, and vital governmental function.” Laws of 2002, ch. 314, § 1. As a result, the Legislature concluded “that it would be inconsistent with that governmental

function to tax amounts received by a public hospital or nonprofit hospital qualifying as a health and social welfare organization, when the amounts are paid under a health service program subsidized by *federal or state government.*” *Id.* (emphasis added).

These legislative findings “serve[] as an important guide in understanding the intended effect of operative sections.” *Hartman v. Wash. State Game Comm’n*, 85 Wn.2d 176, 179, 532 P.2d 614 (1975). In this instance, that guidance shows that the Legislature intended the exemption in RCW 82.04.4311 to extend to reimbursements paid under “medical assistance” and “children’s health” programs subsidized by “government” writ large, not just Washington.

This interpretation is buttressed by comparison to the other programs enumerated in RCW 82.04.4311, which provides that eligible health organizations

may deduct from the measure of tax amounts received as compensation for health care services covered under the federal medicare program authorized under Title XVIII of the federal social security act; medical assistance, children’s health, or other program under chapter 74.09 RCW; or for the state of Washington basic health plan under chapter 70.47 RCW.

RCW 82.04.4311(1). The first program is expressly limited to the “*federal medicare program.*” *Id.* (emphasis added). The third program is expressly

limited to “the *state of Washington* basic health plan.” *Id.* (emphasis added). These express modifications make clear that the Legislature knew how to apply adjectives to limit a health care program to one offered by the federal or Washington government.

Yet the Washington Legislature chose *not* to apply similar modifications to “medical assistance” or “children’s health,” which are enumerated without limitation or adornment. That the statute goes on to list “other program[s] under chapter 70.09 RCW” does not change the analysis; as petitioners explain, application of the “last antecedent” rule means the restrictive clause applies only “other program[s].” PeaceHealth Supp. Br. 14-15. The Legislature plainly “knew how to” expressly limit care programs to federal or Washington offerings by using a limiting adjective, so its “cho[ice] not to do so” for “medical assistance” or “children’s health” shows it intended a broader interpretation for those programs. *Associated Press v. Wash. State Legislature*, 194 Wn.2d 915, 928, 454 P.3d 93 (2019). This broader interpretation is consistent with the Legislature’s express intent to benefit qualifying health organizations.

Finally, the legislative history of RCW 82.04.4311 confirms the Legislature intended to decrease the unreimbursed costs incurred by nonprofit hospitals in caring for disadvantaged patients. *See, e.g., State v. Groom*, 133 Wn.2d 679, 688, 947 P.2d 240 (1997) (legislative history is an

“indicator of legislative intent”). As petitioners argue, the bill that became RCW 82.04.4311 represented a new approach to exempting nonprofit hospitals from the obligation to pay taxes on receipts from government programs—one that focuses on the services provided rather than the source of payment of funds. *PeaceHealth Supp. Br.* 16-19. Unlike the predecessor statute, RCW 82.04.4297, the exemption in RCW 82.04.4311 does not turn on the source of the funds as being from the federal or Washington government, but rather broadly exempts “medical assistance,” i.e., Medicaid, and “children’s health,” i.e., CHIPS.

2. The Department’s interpretation would undermine legislative intent by reducing the funds available to care for disadvantaged patients.

The Department’s interpretation would require Washington nonprofit hospitals not only to shoulder millions of dollars in unreimbursed costs of caring for out-of-state patients who receive Medicaid benefits, but also to incur tax liability for those out-of-state patients’ Medicaid receipts. This result is contrary to the plain language of RCW 82.04.4311 and the Legislature’s express intention not to tax “amounts . . . paid under a health service program subsidized by federal or state government.” *Laws of 2002, ch. 314, § 1.*

The resulting heightened tax burden is particularly substantial for institutions like amici that provide highly specialized treatment to patients on a regional basis. Washington is fortunate to have within its borders

nationally-recognized nonprofit hospitals that provide specialized care, such as pediatrics and oncology, to patients without regard for their ability to pay. Within those specialized fields, providers and hospitals develop still deeper levels of expertise to treat certain conditions, particularly rare or uncommon conditions.

For example, Seattle Children's Hospital treats more types of relapsed or refractory childhood cancers using T-Cell immunotherapy, a treatment that modifies patient T-Cells in a way that enables them to detect and destroy cancer cells, than any other facility in the country. *See Research and Clinical Trials: T-Cell Immunotherapy for Cancer*, Seattle Children's Hospital, <https://www.seattlechildrens.org/clinics/cancer/research-and-clinical-trials/t-cell-therapy> (last updated July 2019). Seattle Cancer Care Alliance similarly is internationally recognized for its leadership in the development of T-Cell immunotherapy for cancer patients. *See FAQ for FDA-approved CAR T-cell Therapies*, Seattle Cancer Care Alliance, <https://www.seattlecca.org/immunotherapy/car-tcell-therapy-faq> (last visited Apr. 9, 2020).

Not every hospital can develop deep expertise on every condition, however, particularly rare conditions or conditions that require the most advanced research for effective treatment. For that reason, patients with such conditions frequently travel great distances, including across state

boundaries, to receive care from a facility with the depth of expertise required to most effectively treat their specific condition. *See, e.g., Help with Travel Costs*, U.S. Dep’t of Health & Human Servs., Nat’l Ctr. for Advancing Translational Scis., <https://rarediseases.info.nih.gov/guides/pages/118/help-with-travel-costs> (last visited Apr. 9, 2020) (patients with “rare medical condition[s] often need to travel to receive care at a special medical center or to take part in a research study”). Patients from Washington may travel elsewhere to receive specialized care—for example, Washington health care facilities, including amici, may refer patients with uncommon or rare conditions to out-of-state facilities with deep clinical expertise in treating those specific conditions. Similarly, thousands of patients every year travel from outside Washington to Seattle to seek care from amici and other highly specialized health care facilities.

By interpreting the tax structure to make it more expensive for Washington institutions to treat out-of-state patients who receive government assistance, the Department seeks to abuse Washington’s privileged position as home to critical regional health care resources and would create a risk that deep expertise and new research will become less available to patients who cannot afford to pay for the intensely specialized care they need. Amici rely heavily on Medicaid receipts from Washington and other states to defray the cost of providing life-saving care to patients

without regard to their ability to pay. Taxing out-of-state Medicaid receipts reduces the resources available to provide unreimbursed care for patients who are unable to pay for their own treatment—regardless of their state of residency. This outcome is antithetical to the plain purpose of RCW 82.04.4311, which is to reduce the burden nonprofit hospitals shoulder in providing care to disadvantaged patients.

B. The Department’s interpretation of RCW 82.04.4311 discriminates against interstate commerce.

The Department’s interpretation of RCW 82.04.4311 not only frustrates the Legislature’s stated purpose but also discriminates against interstate commerce by taxing nonprofit hospitals based solely on the residency of the disadvantaged patients they treat. Washington is host to significant regional medical institutions, including several like amici that have developed specialized expertise that benefits at-risk patients from around the Northwest. The Department’s interpretation of the statute, adopted by the court of appeals, exploits this privileged position to tax hospitals on Medicaid receipts only when the patient is a nonresident. This is precisely the type of discrimination that the U.S. Supreme Court held unconstitutional in *Camps Newfound*, 520 U.S. 564.

In *Camps Newfound*, the Court held that the dormant Commerce Clause invalidated a Maine property tax regime that exempted property owned by charitable institutions *except* if those organizations operated

principally for the benefit of nonresidents. *See id.* at 567, 595. The Court easily concluded that the statute discriminated against interstate commerce because it expressly granted a tax benefit to organizations that served mostly in-state residents but penalized those that primarily served residents of other states. *Id.* at 575. Even if the tax regime did not deter charitable institutions from primarily focusing on nonresidents, the discriminatory burden imposed on nonresidents by increasing tax burdens on the charitable institutions who serve them was enough to run afoul of the dormant Commerce Clause. *Id.* at 575-83.

So too here. The Department's interpretation of RCW 82.04.4311 similarly would grant a tax benefit to nonprofit hospitals that serve disadvantaged patients residing primarily in Washington but penalize those that serve disadvantaged patients residing in other states. In doing so, the deduction essentially would impose a discriminatory burden on out-of-state patients through the nonprofit hospitals that provide them care.

Perhaps recognizing that it would be futile to contest the discriminatory nature of its interpretation, the Department instead argues that its discrimination against nonresident patients and the hospitals that serve them is permissible because the deduction qualifies for the "government function" or "market participant" exceptions to the dormant Commerce Clause. Both arguments fail.

1. The “government function” exception does not apply.

The “government function” exception applies only when a state acts to benefit *its own public services* against private and other competitors, all of which would be placed in the same less-privileged position. For example, in *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, the Court upheld against dormant Commerce Clause challenge county ordinances that required all trash haulers to deliver waste to facilities owned and operated by a government-created public benefit corporation. 550 U.S. 330, 334, 127 S. Ct. 1786, 167 L.Ed.2d 655 (2007). Similarly, in *Department of Revenue of Kentucky v. Davis*, the Court upheld a Kentucky state income tax regime that exempted interest on bonds issued by Kentucky but taxed interest on bonds from any other issuers. 553 U.S. 328, 331, 128 S. Ct. 1801, 170 L.Ed.2d 685 (2008).

In both cases, the Court concluded that the laws were not discriminatory because they favored state-run enterprises while treating all other enterprises the same. *Davis*, 553 U.S. at 343; *United Haulers*, 550 U.S. at 342. Benefiting public enterprises that provide public goods and services serves legitimate interests other than economic protectionism, such as raising money to support public projects or implementing specific waste policies. *Davis*, 553 U.S. at 341-43; *United Haulers*, 550 U.S. at 341-42. Accordingly, the Court held that neither law discriminated against interstate commerce. *Davis*, 553 U.S. at 343; *United Haulers*, 550 U.S. at 345.

Here, by contrast, the state is *not* favoring its own public enterprise against all other competitors; the exemption in RCW 82.04.4311 applies to public *and* nonprofit hospitals. Rather, the state is discriminating based on *patient residency* by providing a greater tax benefit to nonprofit hospitals who serve disadvantaged Washington patients and effectively penalizing nonprofit hospitals who also serve disadvantaged patients from other states. Neither the statute in *Davis* nor the ordinances in *United Haulers* discriminated based on residency—the law applied irrespective of the residency of a bond purchaser (in *Davis*) or the headquarters of a waste hauling company (in *United Haulers*).

The Department attempts to elide over this key distinction, arguing that there can be no discrimination because the deduction relates to an underlying activity—provision of health care—that is a traditional government function. But that argument proves too much. Regulating alcohol likewise is a traditional government function, but the dormant Commerce Clause still prohibits tax exemptions that benefit in-state production of alcoholic beverages. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 265, 104 S. Ct. 3049, 82 L.Ed.2d 200 (1984). The exception applies when governments “provide public goods and services *on their own*,” not whenever the underlying activity serves the public good. *Davis*, 553 U.S. at 340 (emphasis added). It does not apply here.

2. The “market participant” exception does not apply.

The Department also argues, erroneously, that its interpretation of RCW 82.04.4311 is beyond the reach of the dormant Commerce Clause because the deduction supports the state’s participation in the market for health care services. There is no dispute that the state acts as a market participant when it directly subsidizes the provision of health care, but the state’s decisions about how to allocate that subsidization are not at issue here. *See White v. Mass. Council of Constr. Emp’rs, Inc.*, 460 U.S. 204, 103 S. Ct. 1042, 75 L.Ed.2d 1 (1983) (state acted as market participant not subject to dormant Commerce Clause when it imposed less burdensome documentation requirements on in-state scrap metal processors to obtain bounties than on out-of-state scrap metal processors) (cited in Department Supp. Br. 17, 19-20).

The question is not, as the Department contends, whether the deduction relates to the state’s participation in the market. Rather, the relevant inquiry is “whether the *challenged program* constituted *direct state participation* in the market.” *Id.* at 208 (emphasis added) (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 435 n.7, 100 S. Ct. 2271, 65 L.Ed.2d 244 (1980)) (internal quotation marks omitted). What is being challenged here is the state’s action as a *regulator* to exempt from taxation certain receipts received by nonprofit and public hospitals—the *deduction* is not participation in the marketplace. *See Camps Newfound*, 520 U.S. at 593 (“A

tax exemption is not the sort of direct state involvement in the market that falls within the market-participation doctrine.”).

The Court’s analysis in *Davis* does not disturb this conclusion. In *Davis*, the tax exemption was inextricably intertwined with the state’s role as a bond issuer because the exemption was required to incentivize market participants to purchase bonds issued by the state and thereby increase funds for public projects. *See Davis*, 553 U.S. at 351. No similar incentive is present here: public and nonprofit hospitals are required to provide services to Medicaid patients and they may not discriminate against Medicaid patients based on their state of residency. *See* 42 C.F.R. § 431.52. Thus, the RCW 82.04.4311 deduction does not—and cannot—act as an incentive or a quid pro quo to hospitals in exchange for treating Washington Medicaid patients. Further, hospitals’ business and occupation tax costs have no bearing on Washington’s Medicaid reimbursement rates or program expenditures. Imposing such a tax on Seattle Children’s Hospital for treating an Alaska Medicaid patient and not a Washington Medicaid patient does not “support” Washington’s Medicaid program. On the contrary, the discriminatory tax means that fewer resources are available to provide unreimbursed care to all patients.

Notably, the Department makes little effort to defend the decision below, which concluded with virtually no analysis that its discriminatory

interpretation of RCW 82.04.4311 would not violate the Commerce Clause because the law “ultimately benefits the state finances.” *PeaceHealth St. Joseph Med. Ctr. v. State*, 9 Wn. App. 2d 775, 449 P.3d 676, 681 (2019), *review granted*, 194 Wn.2d 1016, 455 P.3d 134 (2020). Such an exception “would swallow the rule against discriminatory tax schemes”—any discriminatory deduction or exemption likewise would benefit state finances. *Camps Newfound*, 520 U.S. at 594. In sum, the “market participant” exception cannot save the Department’s interpretation from failing dormant Commerce Clause scrutiny.

Because statutes should be construed “to avoid constitutional doubt,” this Court should reject the Department’s discriminatory interpretation of RCW 82.04.4311 to avoid potential constitutional issues arising under the dormant Commerce Clause. *Utter v. Bldg. Indus. Ass’n of Wash.*, 182 Wn.2d 398, 434, 341 P.3d 953 (2015).

IV. CONCLUSION

For the foregoing reasons, amici respectfully request that this Court reverse the decision below and hold that the deduction in RCW 82.04.4311 encompasses out-of-state Medicaid reimbursements.

Respectfully submitted.

DATED: April 10, 2020.

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Today I electronically filed the foregoing document via the Washington State Appellate Courts' Secure Portal, which will automatically cause such filing to be served on counsel for all other parties in this matter via the Court's e-filing platform.

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DATED: April 10, 2020, at Seattle, Washington.

s/ Jessica Flesner

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