

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
5/11/2020 3:15 PM  
BY SUSAN L. CARLSON  
CLERK

NO. 97557-4

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SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

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RESPONSE TO AMICUS CURIE

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## I. INTRODUCTION

The Legislature made a deliberate decision to limit the Business and Occupation (B&O) tax deduction at issue in this case to reimbursements covered under specified federal and Washington State subsidy programs. This intended scope is manifest in RCW 82.04.4311's plain language and structure, the statutory scheme, and the applicable legal presumptions requiring both a narrow construction of the deduction and deference to the Department's interpretation of it. Amici ignore the weight of this analysis and instead mischaracterize the statute's legislative findings to argue that the Legislature intended to cover Medicaid subsidies by all states. The legislative findings do not mean what Amici claim. Understood correctly, the primary support for Amici's argument actually weighs against them.

Moreover, RCW 82.04.4311 does not violate the dormant Commerce Clause. The statute does not textually discriminate against interstate commerce, or have an economically protectionist purpose or effect. And the statute falls squarely within the government function and market participant exceptions as set forth in *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 340, 128 S. Ct. 1801, 170 L. Ed. 2d 685 (2008). Amici's efforts to narrowly construe these exceptions conflict with both *Davis*'s express language and its underlying rationale. RCW 82.04.4311 is constitutional and the decision of the Court of Appeals should be affirmed.

## II. ARGUMENT

### A. **RCW 82.04.4311 Does Not Apply to Other States' Medicaid and CHIP Programs**

Amici, the Washington State Hospital Association, Seattle Children's Hospital, and Seattle Cancer Care Alliance (Hospital Amici), ignore most of the legal arguments supporting the Court of Appeals' and the Department's interpretation of RCW 82.04.4311. These arguments include the Court of Appeals' cogent application of the "series qualifier" rule, the applicable legal presumptions requiring both a narrow construction of the deduction and great weight afforded to the Department's interpretation of the deduction's scope, as well as the legislative history of the deduction. The Hospital Amici instead rely on a misinterpretation of RCW 82.04.4311's legislative findings, which conflicts with both the statute's operative terms and its legislative history.

#### 1. **The Hospital Amici misconstrue the legislative findings in RCW 82.04.4311**

The Hospital Amici cite generic references to "federal and state government" in RCW 82.04.4311's legislative findings to argue that the Legislature intended to cover health care subsidies from all states. Seattle Br. at 6; WSHA Br. at 3. Specifically, the Legislature found that providing healthcare to vulnerable populations is a "vital government function" and it would be inconsistent with this function to tax reimbursements under

programs “subsidized by federal or state government.” Laws of 2002, ch. 314, § 2. The language cited by the Hospital Amici, however, cannot bear the weight they claim.

The term “state government” appears ubiquitously throughout the Code to refer to Washington state government. *See, e.g.*, RCW 34.08.010 (finding need to facilitate participation in “*state government*” justifies publication of Washington State Register) (emphasis added); RCW 43.19.720 (directing Department of Enterprise Services to review mail processing equipment needs “throughout *state government*”) (emphasis added); RCW 9A.04.110(8) (defining “Government” for purposes of criminal code to include “any branch, subdivision, or agency of the government *of this state*”) (emphasis added). And over 1000 current and former statutes include an emergency clause deemed necessary for, among other things, “support of the *state government* and its existing public institutions.” *See, e.g.*, RCW 77.65.450 (emphasis added). In each instance, “state government” refers or relates to Washington state government.

The Legislature similarly uses terms like “essential” or “vital” “government functions” to refer to Washington’s government functions. *See, e.g.*, RCW 35.83.010 (remedying unsafe housing conditions constitutes “an *essential governmental function* for which public moneys may be spent”) (emphasis added). One reason the Legislature makes such findings

is to head off potential conflicts with Washington’s constitutional prohibition on gifts of public funds. *See, e.g., Wash. State Hous. Fin. Comm’n v. O’Brien*, 100 Wn.2d 491, 495, 671 P.2d 247 (1983) (Article VIII, section 5 not intended to hinder state’s “essential function to secure the health and welfare of the state’s citizens.”). This may have been the reason the Legislature included such language here, as H.B. 2732’s authorization of tax refunds potentially implicated the constitutional prohibition. H.B. 2732 (HB 2732), 57th Leg., Reg. Sess. (Wash. 2002) (Laws of 2002, ch. 314, § 4); *Seattle-King County Council of Camp Fire v. State Dep’t of Revenue*, 105 Wn.2d 55, 60, 711 P.2d 300 (1985) (refund of taxes validly collected can constitute gifts of public funds). Whatever its reason, the Legislature plainly intended to refer to Washington’s state government and government functions, not to signify a massive expansion of the deduction.<sup>1</sup>

WSHA argues that the reference in the legislative findings to subsidies by the federal government means that the B&O deduction applies to all states’ Medicaid programs because all states’ programs are subsidized

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<sup>1</sup> The Hospital Amici emphasize that the Legislature intended to support public and nonprofit hospitals with the B&O Deduction. As detailed herein and in the State’s Supplemental brief, the driving purpose of the B&O deduction was to support the State’s essential government function of providing care to vulnerable residents. Further, even if the Legislature also intended to benefit public and nonprofit hospitals, the scope of the benefit was limited to providing a deduction for amounts “covered under” the qualified programs identified in RCW 82.04.4311.

by the federal government. WSHA Br. at 3. This sweeping interpretation of the statute’s findings, however, cannot trump its operative terms. *State v. Reis*, 183 Wn.2d 197, 212, 351 P.3d 127 (2015). Here, RCW 82.04.4311 does not categorically exempt programs “subsidized by the federal government,” but instead limits the deduction to the programs “covered under” specified state and federal laws, including “chapter 74.09 RCW[.]” RCW 82.04.4311.<sup>2</sup> Such particularity would be rendered superfluous if the deduction applied to all federal healthcare subsidies. *Cockle v. Dep’t of Labor & Indus.*, 142 Wn.2d 801, 809, 16 P.3d 583 (2001) (courts avoid interpretations that render provisions or language superfluous). Construed in light of its operative terms, this language in the legislative findings plainly refers to the specific federal program identified in RCW 82.04.4311.<sup>3</sup>

When the legislative findings are properly understood, they actually support limiting the B&O deduction to Washington’s Medicaid and CHIP programs, and other identified state and federal programs. Washington’s

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<sup>2</sup> States cannot legally discriminate against the federal government as a purchaser of healthcare services. *Washington v. United States*, 460 U.S. 536, 103 S. Ct. 1344, 75 L. Ed. 2d 264 (1983).

<sup>3</sup> WSHA seems to suggest that the B&O deduction has always applied to other states’ Medicaid programs. WSHA Br. at 7. This argument conflicts with arguments by Petitioners that the 2002 amendment expanded the deduction to include other states’ subsidies. *See* Resp. Br. of Appellant PeaceHealth at 12-13, 16-18. This argument should not be considered here. *See State v. Gonzalez*, 110 Wn.2d 738, 752 n.2, 757 P.2d 925 (1988) (arguments raised by amici curiae alone need not be considered); RAP 9.12 (only evidence and issues raised to trial court on summary judgment should be considered).

Legislature does not purport to speak on behalf of other states' legislatures. This is particularly true in the Medicaid context, where states have broad discretion in designing, administering, and financing their own Medicaid programs. Consistent with this discretion, state tax policies relating to Medicaid vary widely, and states are free to decide that taxing (instead of exempting) Medicaid receipts is consistent with their vital governmental functions. The State of Oregon, for example, funds the bulk of its Medicaid program through a 4.3 percent hospital tax, applied to both subsidized and nonsubsidized healthcare. AR at 153-54. When Washington residents receive Medicaid services at Oregon hospitals, Washington must shoulder the burden of these related taxes. Likewise, when out-of-state residents receive Medicaid services in Washington, the responsible state must shoulder the economic burden of Washington's tax policies.

**2. An expansive interpretation of the B&O deduction conflicts with RCW 82.04.4311's legislative history and applicable legal presumptions**

Besides disregarding the plain language, the Hospital Amici's interpretation of RCW 82.04.4311 also disregards the statute's legislative history. This history demonstrates the Legislature's intent to maintain the same basic scope of the preexisting deduction, while accommodating on-the-ground changes in administering subsidized care, and a legislative fix proposed by the Department to ease an administrative burden, not to expand the deduction.

The B&O deduction was first codified in former RCW 82.04.4297 and applied to payments “from” Washington State or the federal government for health and social welfare services, but not “from” managed care organizations. State Supp. Br. at 2-3. To address the managed care revolution of the late 1990s, the Legislature amended the statute in 2001 to include payments from managed care organizations contracting with Washington and the federal government for specified subsidy programs. State Supp. Br. at 2-3. When it adopted the 2001 amendment, the Legislature explained that its purpose was to provide the State with “greater purchasing power” in financially supporting “health or social welfare services to benefited class of persons.” *See* HB 2732.

In 2002, the Department proposed the changes codified in RCW 82.04.4311, which the Hospital Amici now cite for an expansive interpretation of the deduction. Importantly, however, the operative terms identifying the qualifying programs are virtually identical in both the 2001 and 2002 Acts. *Compare* HB 2732, § 2, *with*, Substitute H.B. 1624 (SHB 1624), § 2, 57th Leg., 2d Sp. Sess. (Wash. 2001) (Laws of 2001, 2d Spec. Sess., ch. 23, § 2). Further, the Department’s express purpose in proposing the change was to address an unintended administrative burden created by the 2001 Act, requiring the Department and taxpayers to “trace” the source of specific dollars to differentiate between taxable and deductible receipts.

AR at 229-30. The Hospital Amici gloss over this fact, as well as the contemporaneous advice by the Department that its proposed legislative fix would have “minimal” fiscal impact. AR at 238-39. This history undermines the argument that the Legislature intended to expand the deduction in 2002.

This Court should also reject the characterization of the deduction as an “abuse” or as “increasing” expenses for Hospitals. Seattle Br. at 10. The Legislature must make hard choices for how to allocate limited state resources and expanding the deduction would reduce resources available for other vital public services, such as public education, food and housing support, and infrastructure. This is the reason tax deductions are strictly construed: to prevent unanticipated losses and to respect the Legislature’s prerogative in balancing competing public needs. *Lacey Nursing Center, Inc. v. Dep’t of Revenue*, 128 Wn.2d 40, 49-50, 905 P.2d 338 (1995).

The Court of Appeals correctly held that the deduction created by RCW 82.04.4311 unambiguously applies to health care services covered under Washington Medicaid and CHIP programs, not those of other states.

**B. RCW 82.04.4311 Does Not Violate the Dormant Commerce Clause**

RCW 82.04.4311 does not violate the dormant Commerce Clause. The statute has neither an economically protectionist purpose nor an

economically protectionist effect. And the statute falls within the governmental function and market participant exceptions to the dormant Commerce Clause under controlling U.S. Supreme Court authority.

**1. RCW 82.04.4311 does not discriminate against interstate commerce**

RCW 82.04.4311 does not discriminate against interstate commerce. Unlike the tax statute in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 568 ,n.2, 117 S. Ct. 1590, 137 L. Ed. 2d 852 (1997), RCW 82.04.4311 does not “textually identif[y] out-of-state persons or entities and grant[] them unfavorable treatment.” *Filo Foods LLC v. City of SeaTac*, 183 Wn.2d 770, 809, 357 P.3d 1040 (2015) (analyzing *Camps Newfound* to hold that “a facially discriminatory law *textually identifies* out-of-state persons or entities and grants them unfavorable treatment”) (emphasis added).<sup>4</sup> RCW 82.04.4311 does not even reference out-of-state companies or residents, but instead simply limits the B&O deduction to services covered under the Medicaid and CHIP

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<sup>4</sup> This Court held in *Filo Foods* that, in the absence of “textual” discrimination, the challenging party must show “‘the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits’” under the *Pike* balancing test. *Filo Foods*, 183 Wn.2d at 809 (alteration added by *United Haulers*) (quoting *United Haulers Assn’n Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346, 127 S. Ct. 1786, 167 L. Ed. 2d 655 (2007)) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174, (1970)). Whether the impact of RCW 82.04.4311 is analyzed for alleged excessive burdens under *Pike*, or as facial discrimination based on a discriminatory practical effect, the required showing has not been made here. The Hospital Amici have not even argued that the statute meets the *Pike* balancing test.

programs established under Washington law. RCW 82.04.4311. There is no textual discrimination.

Additionally, the Hospital Amici have not otherwise shown that the statute discriminates against interstate commerce for an economically protectionist purpose, or imposes a “clearly excessive” burden on interstate commerce in relation to local benefits under the *Pike* balancing test. *Davis*, 553 U.S. at 338 (“[a]bsent discrimination for the forbidden purpose, however, the law will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits”) (second alteration in original) (internal quotation marks omitted) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed .2d 174, (1970)). “Economic protectionism,” the Court in *Davis* explained, is defined as “regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” *Id.* at 337-38.

The Hospital Amici do not identify any out-of-state competitor that has been disadvantaged because of favoritism for *amici* in the interstate market. *Selevan v. New York Thruway Auth.*, 584 F.3d 82, 95 (2d Cir. 2009) (“Both an in-state interest and an out-of-state competitor are necessary because ‘laws that draw distinctions between entities that are not competitors do not “discriminate” for purposes of the dormant Commerce Clause.’”) (internal citations omitted);

*McBurney v. Young*, 569 U.S. 221, 235, 133 S. Ct. 1709, 185 L. Ed. 2d 758 (2013) (the “common thread” in cases finding a dormant Commerce Clause violation is that “the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation.”) (quoting *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806, 96 S. Ct. 2488, 49 L. Ed. 2d 220 (1976)).

The Hospital Amici similarly do not show that the B&O deduction benefits in-state residents “at the expense” of out-of-state residents. *Davis*, 553 U.S. 374. To the contrary, they claim the B&O deduction impacts Medicaid beneficiaries obtaining healthcare in Washington the same way regardless of residency. Seattle Br. at 11 (“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”).

The U.S. Supreme Court has specifically cautioned courts against intervening in cases where the primary impact of a regulation falls on in-state residents. *United Haulers Ass’n, Inc.* 550 U.S. at 345, (“Our dormant Commerce Clause cases often find discrimination when a State shifts the costs of a regulation to other States, because when the ‘burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests

within the state are affected.’”) (quoting *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767-68, n.2, 65 S. Ct. 1515, 89 L. Ed. 1915 (1945)). A contrary approach, the Court warned, “would lead to unprecedented and unbounded interference by the courts with state and local government.” *Id.* at 332; *see also Davis*, 553 U.S. at 340. The Hospital Amici’s ability to influence the political process here further shows that dormant Commerce Clause concerns are not implicated.<sup>5</sup>

## **2. The B&O deduction falls within the government function exception**

The dormant Commerce Clause challenge here also fails because the B&O deduction falls within the government function exception. The Hospital Amici’s efforts to limit this exception conflicts with the express holding and rationale of *Davis*. Seattle Br. at 13.

Seattle Children’s Hospital’s argument that the exception applies only to “state-run enterprises” directly conflicts with *Davis*. Seattle Br. at 13. *Davis* specifically characterized the exception as applying to “government functions,” not to “government-run enterprises.” *Davis*, 553 U.S. at 341-42. This moniker makes perfect sense because laws

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<sup>5</sup> Hospitals have successfully advocated for tax benefits in the past. In 2010, for example, Washington hospitals successfully petitioned for a hospital excise tax to leverage federal matching Medicaid funds during the economic downturn. *See Washington State Hosp. Ass’n v. State*, 175 Wn. App. 642, 309 P.3d 534 (2013); Laws of 2010, 1st Sp. Sess., ch. 30, § 1; *see* RCW 74.60.005. The Legislature later extended the hospital excise tax in 2019. *See* Laws of 2019, ch. 318, § 1.

favoring government-run enterprises would have already fallen within the previously-recognized “market participant” exception. *United Haulers* and *Davis* recognized a new exception, applying to regulatory measures supporting the State’s performance of its “civic responsibilities” of “protecting the health, safety, and welfare of citizens.” *Id.* at 342. Courts and legal scholars have since construed the government function exception consistently with its label. *See, e.g.*, 3 *Modern Constitutional Law* § 34:35 (3rd ed.) (*Davis* held “dormant Commerce Clause analysis did not apply to traditional government functions” because the “motive” in favoring such functions “cannot be described as simply protectionist.”).

Seattle Children’s Hospital also argues that applying the exception to government functions would swallow dormant Commerce Clause prohibitions by exempting all state regulations such as, for example, the State’s regulation of alcohol sales. *Seattle Br.* at 14. But this is a straw-man argument. The exception applies here not because Washington regulates the healthcare industry, but because it provides the subsidy that is privileged by the B&O deduction. The majority in *Davis* considered and rejected a similar argument by the dissent suggesting that any exercise of state police power would fall within the exception. *Davis*, 553 U.S. at 341, n.9.

The majority in *Davis* went on to explain that the point of the government function analysis was “not to draw fine distinctions among governmental functions,” but to determine whether the driving purpose of the challenged deduction was one of two possibilities: for the “benefit [of the] government fulfilling government obligations,” *or* “for the benefit of private interests, favored because they were local.” *Id.* Laws favoring the government’s performance of its traditional governmental functions are constitutionally different from those favoring in-state “commercial private” interests. *Id.* “State and local governments that provide public goods and services on their own, unlike private businesses, are ‘vested with the responsibility of protecting the health, safety, and welfare of [their] citizens’ and laws favoring such States and their subdivisions may ‘be directed towards any number of legitimate goals unrelated to protectionism.’” *Davis*, 553 U.S. at 340 (citing *United Haulers*, 550 U.S. at 343). This legitimate purpose takes regulations favoring governmental functions outside dormant Commerce Clause proscriptions. *Id.* at 341 (“a government function is not susceptible to standard dormant Commerce Clause scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause abhors”).

Here, no party has ever argued that the Legislature had an economically protectionist purpose in enacting the B&O deduction. To the contrary, the Hospital Amici argue that the Legislature intended to benefit nonprofit and public hospitals in their provision of subsidized care to vulnerable populations, which is itself an essential government function with an objective distinct from the economic protectionism. Seattle Br. at 7-8; WSHA Br. at 2-3. The Legislature’s limitations on the scope of the deduction does not transform its unquestionably civic objective into forbidden economic protectionism.

The Hospital Amici also argue that the exception should not apply here because the “benefit” of the deduction to the State is not sufficiently tangible or measurable. WSHA Br. at 5 (citing *Davis*, 553 U.S. at 344-45); Seattle Br. at 14. The Hospital Amici, however, conflate *Davis*’s discussions of the market participant and the government function exceptions. *Davis*’s government function analysis focused primarily on the “public character” of the enterprise to which the deduction applies (here the subsidy) and the purpose of that enterprise, not any specific financial gain to the State resulting from the deduction. *Davis*, 553 U.S. at 343.

The B&O deduction here, nevertheless, does benefit the State in performing its essential governmental functions. As the Ninth Circuit recently explained in *Asante v. California Dep’t of Health*

*Care Servs.*, 886 F.3d 795, 801-02 (9th Cir. 2018), the State functions much like a private insurer in providing Medicaid subsidies in the healthcare market. In this role, the State is subject to the same “market pressures and conditions” as private insurers in ensuring that remuneration provided to hospitals is set high enough to “enlist enough providers so that care and services are available” in relevant geographic areas. *Id.* The benefit provided by the State through the B&O deduction thus serves the same governmental interest as providing the healthcare subsidies in the first instance. The Hospital Amici’s argument that the deduction does not directly reduce the State’s Medicaid reimbursement rates puts too fine a distinction on *Davis*’s purpose-driven analysis. *Davis*, 553 U.S. at 341, n.9.

In contrast to benefiting the State’s performance of its government functions, the Hospital Amici do not identify any out-of-state competitor burdened by the deduction in *amici*’s favor, as discussed above. The deduction here thus parallels the deduction in *Davis* by favoring Washington State as a purchaser of healthcare services and treating all other purchasers of healthcare services the same.

*Davis*’s “government function” test is met here. The deduction supports Washington’s essential government functions and thus does not fall within the dormant Commerce Clause proscriptions.

### **3. The B&O deduction falls within the market participant exception**

The B&O deduction also falls within the market participant exception to the dormant Commerce Clause. The Hospital Amici admit that the State participates in the market when it provides subsidies to vulnerable residents. Seattle Br. at 15. They argue that the exception does not apply, however, because the deduction constitutes regulatory action and thus falls under *Camps Newfound* instead of *Davis*. Seattle Br. at 15. *Davis*, however, considered and rejected this same argument.

*Davis* explained that, where the State participates in the underlying market, reliance on *Camps Newfound* “both misses the point” and leaves language from the case “shorn of context” because the Court there had no occasion to consider a deduction that “facilitate[s]” the State’s participation in the market. *Davis*, 553 U.S. 348 n.17. *Davis*, in contrast, directly addressed the issue presented here and held that, when a tax deduction facilitates or preferences the States’ own participation in the market, the deduction falls within the market participant exception. Disaggregating the deduction from the State’s participation in the market was, in the words of the Court, a “denial of economic reality.” *Davis*, 553 U.S. 348 n.17.

This reasoning in *Davis* flows from the Supreme Court’s prior decisions involving local governments’ use of “tools of regulation” to

support their participation in the market. For example, *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204, 103 S. Ct. 1042, 75 L. Ed. 2d 1 (1983), addressed an executive order by the Mayor of Boston requiring its contractors' workforces to include certain thresholds of Boston residents, minorities, and women. Similarly, *Alexandria Scrap*, 426 U.S. 794, involved statutory documentation requirements applied preferentially to Maryland's residents. And *United Haulers* involved a regulation forbidding trash haulers from dealing with processors other than the municipally-run entity. All of the cases involved regulatory activity and in none of the cases did such activity preclude application of the market participant exception. As *Davis* explained:

In each of these cases the commercial activities by the governments and their regulatory efforts complemented each other in some way, and in each of them the fact of tying the regulation to the public object of the foray into the market was understood to give the regulation a civic objective different from the discrimination held to be unlawful . . .

*Davis*, 553 U.S. at 348.

So too here. As discussed above, the B&O deduction is a "tool of regulation" that "complements" and "facilitates" the State's direct participation in the healthcare market. *Davis*, 553 U.S. at 348; *see also Asante*, 886 F.3d at 802. In addition to facilitating the State's insurer-like role, the deduction also benefits the Legislature by eliminating the

“administrative make-work” of putting money in one pocket and taking it out of another. *See Merrion v. Jicarilla-Apache Tribe*, 455 U.S. 130, 158, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1992) (affirming tribe’s right to exempt its business transactions from generally applicable tax against dormant Commerce Clause challenge).

And unlike the paradigmatic discrimination case, the deduction here does not “chill interstate activity by creating a commercial advantage for goods or services marketed by local private actors.” *Davis*, 553 U.S. at 348. Nor does the deduction apply to parties other than recipients of the State’s subsidies—a key concern in distinguishing between a state’s role as regulator versus market participant. *Asante*, 886 F.3d at 801. The market participant exception applies here, exempting the B&O deduction from dormant Commerce Clause concerns.

**4. Federal Medicaid residency regulations underscore lack of facial discrimination**

WSHA also cites to federal Medicaid residency regulations, which are largely irrelevant to the statutory or constitutional analysis. If Washington assumes financial liability by virtue of federal law or interstate agreement, those services will be “covered under” Washington’s Medicaid program and the B&O deduction will apply. The fact that Washington’s Medicaid programs can apply to nonresidents in certain circumstances only underscores that the deduction is not facially discriminatory.

WSHA also points to language in 42 C.F.R. § 431.52(c) requiring each state to provide “procedures” for “facilitating” access to care for nonresident Medicaid patients.<sup>6</sup> The same regulation, however, generally requires the beneficiary’s state of residence to pay for such services, absent some contrary agreement between the states. 42 C.F.R. § 431.52 (b). The State’s duty to ensure medical services are available to nonresident beneficiaries thus does not mean services provided to nonresidents are “covered under” Washington’s Medicaid program for reimbursement or deduction purposes. And federal law does not require hospitals to participate in states’ Medicaid programs. *Asante*, 886 F.3d at 801. WSHA’s argument that the B&O deduction cannot support the State’s insurer-like role in the healthcare market is inaccurate.

### III. CONCLUSION

The decision below should be affirmed.

RESPECTFULLY SUBMITTED this 11th day of May 2020.

ROBERT W. FERGUSON  
*Attorney General*

*s/ Tera M. Heintz*  
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*Deputy Solicitor General*

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*Assistant Attorney General*

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<sup>6</sup>See Washington State Health Care Authority, *Residency* <https://www.hca.wa.gov/health-care-services-supports/program-administration/residency> (Last visited May 11, 2020).

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 11th day of May 2020, at Olympia, WA.

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