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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.

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

The State's brief is remarkable for its mischaracterization of the Hospital Safety Net Act, RCW 74.60 ("the Act")¹ and the actual effect of HB 2069 and the 2011 budget amendments, its mistaken analysis of the test described in *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995) to determine whether a legislative impost is a tax or a fee, and for its exceedingly narrow interpretation of article VII, § 5, which has already been rejected by this Court.

The undisputed facts are that the Legislature diverted funds generated by the Hospital Safety Net assessment ("Safety Net tax") from their sole stated purpose of capturing additional federal matching funds to be used to pay hospitals serving needy Medicaid patients. Instead, it used those funds as a substitute for reduced General Fund Medicaid appropriations, thereby freeing up General Fund money for other uses. Because the assessment is a "tax," which is subject to the requirements of article VI, § 5 of our state's Constitution, this diversion was unconstitutional. Alternatively, the Legislature's action triggered the "poison pill" provision of the Act, terminating the Act all together.

B. STATEMENT OF THE CASE

¹ The 2010 legislation creating the Act described it as an act relating to "a hospital safety net assessment for increased hospital payments to improve health care access for the citizens of Washington." CP 157.

The State's recitation of the facts in this case largely follows the facts articulated in the opening brief of the Washington State Hospital Association ("WSHA"), with some exceptions discussed below. In other portions of its brief, however, the State makes factual statements that are simply wrong, or unsupported on this record. Those factual misstatements require correction.

First, the State contends in its Introduction that the only entities that pay the Safety Net tax "are hospitals that choose to participate in the Medicaid program." Br. of Resp'ts at 1. That is simply wrong. *All* hospitals in Washington, except those exempted by statute, *must* pay the Safety Net tax. RCW 74.60.040.³ For example, public hospitals that serve large Medicaid populations pay no tax but receive the benefit of increased reimbursement whereas some private hospitals serve many elderly covered by Medicare, but relatively few Medicaid patients. The latter are heavily taxed but receive little by way of increased reimbursement from the Fund.⁴

³ When the hospitals receive Safety Net tax revenue, there is no correlation between the taxes paid and Medicaid reimbursement received, as Secretary Dreyfus admitted in her letters to the federal Centers for Medicare and Medicaid Services ("CMS"). CP 225-26. Federal law *prohibits* such a correlation. 42 U.S.C. § 1903(w)(3). In practice, the hospitals that pay *more* Safety Net taxes actually may benefit the least because they serve *fewer* poor, Medicaid-qualified patients.

⁴ For example, according to data compiled and published by the State in 2011, 53% of inpatient admissions (measured by days in the hospital) at Seattle's Virginia Mason Medical Center were covered by Medicare. Consequently, Virginia Mason is

Second, the State asserts that in order to qualify for Medicaid reimbursement, it had to obtain federal approval *and* a waiver of the requirement that the State's contribution comes from a broad-based and uniform health care-related tax. Br. of Resp'ts at 7. For Medicaid, only federal *approval* is mandatory; the decision to seek a waiver of the federal requirement of the broad base and uniformity requirements is entirely discretionary with the State. 42 U.S.C. § 1902(w)(3). More to the point, the limited waiver of these requirements does not speak to the characterization of the assessment as a tax.

Third, the State asserts that HB 2069 satisfies the Ninth Circuit standard for adequacy of Medicaid reimbursement rates articulated in cases like *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491 (9th Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998). Br. of Resp'ts at 9-10. The State has *no basis* in fact for making this claim.⁵ In fact, the State litigated *and lost* cases in which it had reduced rates in violation of the federal requirement

heavily taxed. But, because it treats relatively few Medicaid patients (less than 5% of inpatient days), it receives little by way of increased reimbursement under the Act. See <http://www.doh.wa.gov/DataandStatisticalReports/HealthcareinWashington/HospitalandPatientData/HospitalDischargeDataCHARS/CHARSStandardReports.aspx>. In contrast, Seattle Children's Hospital pays little in taxes because only about 1% of its admissions are covered by Medicare, but its Medicaid percentage exceeds 45%. Similarly, 27% of Harborview Medical Center's inpatient admissions are covered by Medicaid, yet it and all other public hospitals are tax exempt. *Id.*

⁵ The State cites CP 207-09 for this proposition, the Senate Bill Report for HB 2069. That bill report characterizes testimony offered in opposition to the bill by WSHA. CP 209.

in 42 U.S.C. § 1396(a)(30)(A) that rates must be consistent with efficiency, economy, and quality of care, and sufficient to attract providers to provide care comparable to that received by more wealthy patients. *See, e.g., Wash. State Pharmacy Ass'n v. Gregoire*, 2009 WL 1259632 (W.D. Wash. 2009) (pharmacy rates); *Wash. Health Care Ass'n v. Dreyfus*, 2009 WL 2432005 (W.D. Wash. 2009) (nursing home rates). *See also*, CP 79-90 (deficiencies in 2011-13 operating budget).

Fourth, the State claims that the Safety Net tax "is directly correlated with each hospital's level of care for Medicaid clients." Br. of Resp'ts at 22. This reckless assertion, which could jeopardize the State's ability to obtain federal matching funds, is flatly *untrue*. Under the Act, the measure of the tax is "nonmedicare hospital inpatient days," RCW 74.60.030, which simply has *nothing* to do with a hospital's participation in Medicaid.

Finally, perhaps the most glaring factual error in the State's brief is its studied misunderstanding of how HB 2069 benefits the General Fund, rather than the needy Medicaid patients the Act was intended to serve. The State admits, as it must, that the Legislature in HB 2069 increased the amount of Fund revenues that can be used in lieu of the General Fund

moneys from \$66.8 million in the Act⁶ to \$199.8 million. Br. of Resp'ts at 9. The State argues "as under the 2010 bill, all expenditures from the assessment fund must still be made 'to hospitals.'" *Id.* Its statement is ultimately *misleading*.

In fact, the State budget writers played games with the Fund to balance the gaping shortfall in the General Fund operating budget for 2011-13. The budget writers wanted to *reduce* General Fund revenues committed to Medicaid by \$110.5 million (losing the equivalent federal match). Because federal Medicaid funds were not captured, overall Medicaid budget for 2011-13 was *reduced by \$221 million*. CP 57, 66. To make up the difference, those budget writers reduced Medicaid reimbursement rates for hospitals serving the needy. In fact, they seized \$110.5 million from the Fund to replace the General Fund appropriation (but losing the federal match). They also grabbed the \$40 million Fund surplus that will exist at the end of the 2011-13 biennium, notwithstanding the direction in RCW 74.60.020(1)(a) that any balance carry over to the next biennium to "be applied to reduce the amount of the assessment" upon hospitals.

⁶ The \$66.8 million consisted of \$49.3 million in Safety Net Fund revenues, expended to restore the proposed 4% reduction in the hospital rates applicable on July 1, 2009, plus \$17.5 million in Safety Net Fund dollars to capture the enhanced federal Medicaid match authorized in the American Recovery and Reinvestment Act. It is noteworthy that both of these expenditures captured added federal Medicaid funds.

The undisputed net effect of these maneuvers is to substitute Safety Net tax revenues for General Fund moneys, thus freeing up the General Fund monies to be used, not to pay for care rendered to Medicaid patients, but to balance the shortfall in the 2011-13 operating budget. The \$150.5 million taken from the Fund to *supplant* the State's obligation to Medicaid does not capture matching federal Medicaid funds and *reduces* the rates for hospitals serving Medicaid purposes; those funds merely serve the budget writers' political need to balance the General Fund operating budget without new taxes.⁷

C. SUMMARY OF ARGUMENT

HB 2069 violates the anti-diversionary policy of article VII, § 5 of the Washington Constitution by utilizing the Safety Net tax revenues to benefit the General Fund rather than meeting the Act's clearly articulated purposes set forth in RCW 74.60.005. Under *Covell*, the Safety Net tax is a tax and not a fee, as the State itself represented to federal Medicaid authorities. Further, article VII, § 5's reach is not limited to property taxes; this Court has already ruled to the contrary.

In the event the Court does not invalidate HB 2069 on constitutional grounds, the Act is invalid under the poison pill provisions

⁷ Such efforts in the Legislature to seize moneys accumulated in special funds and transferring them to the General Fund to balance the operating budget are commonly referred to as "light bulb snatching."

of RCW 74.60.150/RCW 74.60.900. The Act included this provision in order to ensure that Safety Net tax revenues be used *only* for the capture of additional federal Medicaid funds to ensure that Washington hospitals could sustainably serve poor people. The poison pill remains fully in effect, even after HB 2069.

D. ARGUMENT

(1) The Diversion of Safety Net Revenues Violates Article VII, Section 5 of the Washington Constitution

The State commences its argument by knocking down a series of straw men. First, it asserts that WSHA is seeking a holding that "the Legislature was precluded from amending the 2010 legislation unless the industry agreed." Br. of Resp'ts at 12 (citing CP 259-61 and WSHA's opening brief at 1-2). The State's argument is a complete misrepresentation of what WSHA actually said. *Nowhere* do the references cited by the State even approach claiming a WSHA "veto" on legislative actions. Rather, those references note that WSHA took the highly unusual step of proposing a heavy tax on its members "to be used for the sole purpose of generated additional [revenue] sufficient to restore some of the 2009 payment reductions and to provide for enhanced hospital

rates in the future" for hospitals serving needy persons qualifying for Medicaid. CP 260-61.⁹

Next, the State asserts that WSHA is seeking ruling that would limit the Legislature's ability to amend previously enacted statutes. Br. of Resp'ts at 13-15. WSHA has *never* argued that the Legislature lacks the authority to amend the Act. The very authority cited by the State on the legislative power to amend the Act sets forth the core of WSHA's argument; *i.e.*, the Legislature may amend the the Act unless "it is prohibited by the state and federal constitutions." *Wash. State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 300-01, 174 P.3d 1142 (2007). Of course, that is precisely WSHA's argument here as to article VII, § 5.¹⁰

The State also discusses what it claims are the applicable construction principles for article VII, § 5. Br. of Resp'ts at 15-17. As expected, the State contends that this Court should presume HB 2069's constitutionality and that the burden is on the WSHA to demonstrate its unconstitutionality "beyond a reasonable doubt." As noted in WSHA's opening brief at 16, this expression of deference is not a true evidentiary

⁹ The State's shoddy misrepresentation of WSHA's position is emblematic of its lack of a *real* argument on the merits.

¹⁰ The Legislature's ability to amend the Act in the fashion that it did is also constrained by the Act's limitation on use of Fund revenues in RCW 74.60.020, and the poison pill provisions of RCW 74.60.150. *See infra*.

burden of proof, and this Court retains its plenary power to declare what our Constitution means and to find a statute unconstitutional.¹²

The State argues that in the analysis of the Act for purposes of article VII, § 5 and otherwise, this Court should effectuate the Legislature's intent. Br. of Resp'ts at 16. WSHA agrees. But the State hopes that this Court will overlook the *entirety* of RCW 74.60 in determining that intent. This Court must give meaning to *all* of the provisions of that statute. *Dot Foods, Inc. v. Wash. Dep't of Revenue*, 166 Wn.2d 912, 919, 215 P.3d 185 (2009) (Courts look to the statute as a whole, giving effect to all of its language). Thus, the Court must also give meaning to the intent section of the Act, RCW 74.60.005,¹³ and RCW 74.60.020(1)(a) that directs the Legislature to *reduce* assessments if the Fund generates a surplus, *and* the poison pill provisions of RCW 74.60.150/RCW 74.60.900.

¹² The State also asserts that this "burden" on WSHA is higher because this is a facial, rather than "as applied" challenge. This argument is the epitome of sophistry. Having withdrawn its already insupportable contention, adopted by the trial court, that WSHA's challenge to HB 2069 was not "ripe" because CMS had not formally approved the decreased Medicaid rates (even though the other changes in HB 2069 were *mandatory*), the State now wants to assert that HB 2069 has not been "applied!" Obviously, HB 2069 is now being implemented.

¹³ The State makes the strange argument that this Court should ignore RCW 74.60.005, in effect, because it is merely "a statement of purpose and intent." Br. of Resp'ts at 36-37. Obviously, a statement of purpose and intent is highly *relevant* when discerning the Legislature's intent, RCW 74.60.005 is codified, and was voted upon the 2010 Legislature. It was not amended in 2011. It is a *detailed* recitation of the Legislature's intent. Contrary to the authority recited by the State in its brief at 37, WSHA has never argued that RCW 74.60.005 created an independently enforceable duty. Rather, it offers controlling guidance on the operative provisions of the Act.

(a) The Assessments Constitute a Tax

The State argues in its brief at 17-27 that the Safety Net tax is merely an assessment and not a tax, in defiance of its own representations to federal authorities, and at odds with this Court's *Covell* test. The State's arguments are disingenuous.

First, the State contends that this Court should ignore the letters to federal Medicaid authorities of DSHS Secretary Susan Dreyfus in which she repeatedly referred to the Safety net tax *as a tax*. CP 225-26; Br. of Resp'ts at 18-19. Federal law mandates that the state matching revenue for Medicaid be derived from a "health care related *tax*." 42 U.S.C. § 1903(w)(3) (emphasis added). Federal regulations require that the tax be "broad-based" and "uniformly applied." 42 C.F.R. § 433.68. The State, through Dreyfus, was fully aware of these requirements when it contended to the federal authorities that the Safety Net tax met the requirements of federal law to enable it to qualify as the State match to obtain federal Medicaid funds. Dreyfus specifically noted that "the tax is generally redistributive" and that its revenues bore "no direct correlation to Medicaid payments." CP 225-26. CMS only approved DSHS' waiver request because the tax was generally redistributive in nature and because *the tax bore no relationship to Medicaid funds received*. CP 129-30.

The only authority cited by the State for its changing characterization of the Safety Net tax is *Storedahl Props., LLC v. Clark County*, 143 Wn. App. 489, 178 P.3d 377, *review denied*, 164 Wn.2d 1018 (2008), a case dealing with a federal agency's characterization of a local fee as a tax. That case bears no relationship to what occurred here. Here, the DSHS Secretary, presumably on advice of counsel, *affirmatively represented* to CMS that the Safety Net tax *was a tax*. Just as parties to litigation are estopped to take conflicting positions to courts under principles of judicial estoppel,¹⁴ the State cannot be allowed to take inconsistent positions with a federal agency and this Court, when, as articulated in WSHA's opening brief at 24 n.17, the State's cynical position offered for momentary advantage could jeopardize Washington's federal Medicaid funds.

The State next argues that the Safety Net tax is not a tax under this Court's *Covell* analysis.¹⁵ Br. of Resp'ts at 19-26. The principal reason

¹⁴ Judicial estoppel applies if (1) a party's position is clearly inconsistent with its position in another proceeding, (2) judicial acceptance of the inconsistent position would create the perception that the court was misled, and (3) the party asserting the inconsistent position derives an unfair advantage or imposes an unfair detriment on the opposing party if not stopped. *Mavis v. King County Pub. Hosp. Dist. No. 2*, 159 Wn. App. 639, 650, 248 P.3d 558 (2011).

¹⁵ The *Covell* test for determining whether a particular charge is truly a "fee" rather than a tax is as follows:

the State is wrong in its analysis is that it cannot establish the first and third aspects of the *Covell* 3-part test. The Safety Net tax has *no regulatory purpose*; its sole purpose, as articulated in RCW 74.60.005 is *to raise revenue*.

The State twists the first facet of the *Covell* test -- whether the primary purpose of the impost is to regulate -- into a new test focusing on who benefits from the assessment, citing *Dean v. Lehman*, 143 Wn.2d 12, 18 P.3d 523 (2001). It does this precisely because it has *no answer* to the cases finding a tax, as opposed to a fee, cited in WSHA's opening brief at 22. The State cannot demonstrate how the Safety Net tax is associated with the regulation of anything.¹⁶ That is precisely why this case differs from *Franks & Sons, Inc. v. State*, 136 Wn.2d 737, 966 P.2d 1232 (1998), *cert. denied*, 566 U.S. 1066 (1999), cited by the State in its brief at 21. There, the issue was whether a gross weight charge on trucks was a tax or a fee for purposes of the Commerce Clause. That charge was based on

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- Whether the primary purpose of the legislation in question is to regulate the fee payers or to generate revenue to finance broad-based public improvements that cost money.
 - Whether the money collected from the fees is segregated and allocated exclusively to the regulating entity or activity being assessed.
 - Whether there is a direct relationship between the rate charged and either a service received by the fee payers or a burden to which they contribute.

Samis Land Co. v. City of Soap Lake, 143 Wn.2d 798, 806, 23 P.3d 477 (2001).

¹⁶ The Department of Health, not the Health Care Authority or DSHS, is responsible for regulation of Washington hospitals.

vehicle weight and the revenue was used to pay for State *regulation* of the trucking industry, unlike the situation here where no regulation of the hospitals was undertaken by the Act.

The first *Covell* criterion initially appeared in *Hillis Homes, Inc. v. Snohomish County*, 97 Wn.2d 804, 650 P.2d 193 (1982) and was further illustrated in *San Telmo Assocs. v. City of Seattle*, 108 Wn.2d 20, 735 P.2d 673 (1983) where this Court struck down Seattle's requirement that the owners of apartment buildings with low-income tenants must replace the low-income units or pay substantial amounts into a housing fund upon the conversion of the structures to condominiums or other uses. The *San Telmo* court held that low-income housing was a general responsibility of the community at large shifted by the City to a limited segment of the population, thus effectively imposing an unauthorized tax on the apartment owners. *Id.* at 24. Thus, when legislative bodies impose so-called "fees" to shift general governmental obligations to a select few, such "fees" will be held to be what they really are: *taxes*.

The *Dean* case did not purport to alter the first facet of the *Covell* test in all future cases. That case addressed a highly unusual program operated by the Department of Corrections in which the spouses of inmates who sent funds to their husbands while in prison were subject to a 35% deduction, of which 10% went to the inmate's personal savings

account, 20% defrayed incarceration costs, and 5% went to the crime victims compensation fund. This Court held this deduction was not a tax because the purpose of the deduction was not to raise revenue. *Id.* at 27.¹⁷

The Safety Net tax is designed to raise revenue to address a broad-based need.¹⁸ The underlying purpose and effect of the assessments is to subsidize hospitalization for low-income Medicaid patients, which is a proper, *general* responsibility of the entire community rather than a charge that can be lawfully characterized as a "fee" and imposed on a limited segment of the population. (*San Telmo*, 108 Wn.2d at 24). The fact that these are "safety net assessments," underscores the larger community's responsibility to provide a safety net for its impoverished members, although the assessments are imposed on a specific group of institutions and their patients rather than on the community as a whole.

The State similarly distorts the third *Covell* facet, arguing that there is a direct relationship between the impost and the benefit received

¹⁷ Moreover, the public benefit was only incidental. *Id.* The Court also noted the deductions bore a direct relationship to the actual benefit received or burden imposed by the inmates. *Id.* at 28. As noted previously, neither of these salient aspects of *Covell's* three-part test is met with respect to the safety net assessments here.

¹⁸ The fact that governmental provides are exempt is an indication that the assessment is a tax. Governmental entities are rarely exempt from user fees and burden offset charges, while they are routinely exempted from taxes. *See King County Fire Protection Dist. No. 16 v. King County Housing Auth.*, 123 Wn.2d 819, 872 P.2d 516 (1994) (upholding non-tax fire "benefit charges" against a housing authority). *See also*, Wash. Const. art. VII, § 1, grants a blanket property tax exemption for Washington governments.

by the person paying it or the detriment created by that person. Br. of Resp'ts at 24-26. That is simply untrue. Under *Covell's* third facet, fees are "akin to charges for services rendered," and must be individually determined (based on services received or impacts created). Most critically, they must be *avoidable*. The inability of the payer to avoid a charge (by not purchasing a service or not creating impacts) suggests that the charge is actually a tax. *Covell*, 127 Wn.2d at 884-85.

Here, the Legislature imposed a mandatory assessment upon hospitals in a flat amount per day per non-Medicare patient. RCW 74.60.030. The assessment is imposed on *all hospitals*, except public hospitals. RCW 79.60.040. Monies are distributed without regard to how much an individual hospital paid in taxes. Applying *Covell*, it is clear that the test for a tax is met here. The assessments are mandatory, and unavoidable. The amounts paid by various hospitals bears no relationship whatsoever to services they receive or burdens to which they contribute. In fact, facilities that represent the "problem" and "burden" on the community (*i.e.*, those with more low-income Medicaid patients) pay a much lower assessment; facilities that do not burden the system pay into a fund without receiving the proportionate benefits or services that are the hallmark of a legal "fee" mechanism in Washington. Secretary Dreyfus

admitted the amount of the tax had no direct correlation to Medicaid payments received by the participating hospitals. CP 225-26.

The assessments are a tax because their fundamental thrust is to raise revenue -- to qualify for federal Medicaid funds.¹⁹ Moreover, the so-called "fees" are not a *quid pro quo* for a service like utilities, septic system upkeep, or storm water abatement. Further, there is no relation between the "fee" paid by a hospital and any service it might receive.

Finally, without even a slight effort to address the contrary authority cited in WSHA's opening brief at 19-21, the State nevertheless asserts that the Legislature's characterization of an impost should control. Br. of Resp'ts at 26-27. This Court, not the Legislature, decides if the Safety Net tax is indeed a tax.²⁰

This Safety net tax is a tax under *Covell*.

¹⁹ The fact that a large portion of the Fund revenue has been diverted to the General Fund after HB 2069 only reinforces the status of the assessments as a tax. If they were "fees," no revenue could be used for the General Fund, which supports all state government services from the Department of Agriculture to the Supreme Court.

²⁰ The corollary argument to its assertion that the Legislature's characterization of the Safety Net tax controls is that statements made by WSHA in the legislative process should bind it on the characterization of the Safety Net tax. This argument is truly ironic in light of the State's disingenuous argument that its characterization of the Safety Net tax to federal Medicaid authorities should be disregarded by this Court. Statements made in the Legislature for or against bills neither establish legislative intent (*In re F.D. Processing, Inc.*, 119 Wn.2d 452, 461, 832 P.2d 1303 (1992) (one legislator's remarks do not constitute legislative intent); *W. Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 611, 998 P.2d 884 (2000) (lobbyist's understanding of legislative intent was not admissible)), nor do they intrude upon this Court's duty to characterize an impost as a tax or a fee.

(b) HB 2069 Violates Article VII, § 5²¹

The State contends in its brief at 29-34 that article VII, § 5 applies *only* to property taxes. As it must, it half-heartedly acknowledges this Court's decisions in *Sheehan v. Central Puget Sound Regional Transit Auth.*, 155 Wn.2d 790, 804, 123 P.3d 88 (2005) and *Okeson v. City of Seattle*, 150 Wn.2d 540, 558, 78 P.3d 1279 (2003) that *rejected* its interpretation of article VII, § 5 and applied the constitutional provision to *excise taxes*. Neither case confined the Court's analyses to local excise taxes only.

First, in interpreting our Constitution, a cardinal principle of such interpretation is that textual analysis is the starting point. *Wash. Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 477, 90 P.3d 42 (2004) ("When interpreting constitutional provisions, we look first to the plain language of the text. . ."). *Nothing* in the text of article VII, § 5 limits it to property taxes. Indeed, article VII itself pertains generally to taxation and revenues, not just property taxation or local excise taxation.²²

²¹ Akin to its strawman argument regarding the Legislature's power to amend a statute discussed *supra*, the State raises yet another strawman argument regarding the Legislature's power to enact taxes. Br. of Resp'ts at 27-29. As it acknowledges, the Legislature's power to tax is inhibited by constitutional restraints. That is the whole point of this case -- whether HB 2069 violated article VII, § 5.

²² For example, article VII, § 3 addresses *all* taxation on the United States and its agencies or their property. Article VII, § 6 provides that all tax revenue must be paid into the state treasury. Article VII, § 7 requires an annual statement of receipts and

Second, even if the authorities cited by the State relating to article VII, § 5 being confined to property taxes correctly stood for that proposition, they no longer retain any vitality. Even the State concedes that *Okeson* and *Sheehan* both addressed excise taxes, undercutting the State's argument for a narrow reading of article VII, § 5. This point is reinforced by the fact that the State made the very same argument it now makes regarding article VII, § 5 in a brief in *Sheehan*,²³ and this Court did not adopt it. Cases like *State v. Sheppard*, 79 Wash. 328, 140 Pac. 332 (1914), cited by the State in its brief at 31 for the proposition that article VII, § 5 applies only to property taxes, were effectively *overruled* by *Okeson* and *Sheehan*.²⁴

expenditures of all public moneys. Article VII, § 8 requires the Legislature to impose taxes to remedy any shortfall in the prior fiscal year.

²³ The State also supplied a brief in *Larson v. Seattle Popular Monorail Auth.*, 156 Wn.2d 752, 131 P.3d 892 (2006), making this same argument yet again. 2005 WL 2492329. Again, the Court declined to adopt it.

²⁴ The State is superficial in its constitutional analysis of article VII, § 5 in any event. It fails to advise this Court that the original article VII, the basis for many of the decisions cited by it, br. of resp'ts at 29-31, was *fundamentally amended* by the people in the 14th Amendment in 1930. See Robert F. Utter, Hugh D. Spitzer, *The Washington Constitution, a Reference Guide* (Greenwood Press: 2002) at 126-28. This Court described the change effected by the 14th Amendment as having "entirely swept away" the former provisions of article VII. *State ex rel. Atwood v. Wooster*, 163 Wash. 659, 662, 2 P.2d 653 (1931). See also, *State ex rel. Mason County Logging Co. v. Wiley*, 177 Wash. 65, 69-71, 31 P.2d 539 (1934).

Thus, the authorities cited by the State in its brief at 29-31 do not help it. Those cases relate to the pre-14th Amendment article VII, §§ 1, 2, which do specifically relate *only* to property taxes, as stated in *their texts*. In fact, *Sheppard* cites to *State v. Clark*, 30 Wash. 439, 71 Pac. 20 (1902) in support of its analysis. A careful reading of *Clark*, however, reveals that *nowhere* in the text of the opinion is a violation of § 5 specifically

Third, the foreign authorities cited by the State in its brief at 32-34 miss the point. WSHA cited those cases in connection with its argument on the *anti-diversionary* aspect of article VII, § 5. Br. of Appellants at 27-28. The State's citation to these foreign authorities is, in any event, selective. Numerous courts apply the anti-diversionary policy of their constitutional provisions analogous to article VII, § 5 to taxes besides property taxes. *See, e.g., Goer v. Taylor*, 200 N.W. 894 (N.D. 1924) (license fee of \$15 on attorneys was tax to which constitutional limit applies); *In re Opinion of the Judges*, 240 N.W. 600 (S.D. 1932) (tax on motor vehicle fuels subject to anti-diversionary policy of state constitution); *Associated General Contractors of S. Dakota, Inc. v. Schreiner*, 492 N.W.2d 916 (S.D. 1992) (anti-diversionary policy applied to motor vehicle taxes); *State ex rel. Sathre v. Hopton*, 265 N.W. 395 (N.D. 1936) (flat tax on acreage);²⁵ *State ex rel. Edwards v. Osborne*, 11

found. A decision based on the former versions of §§ 1, 2, and 9 is referenced in the text of the opinion, but all of those sections, by their terms, relate only to property taxes.

What did survive the adoption of the 14th Amendment was the direction in former article VII, §§ 1, 2, and 9, and in the present article VII, §§ 1 and 9 that taxation of property be *uniform*. *Fleetwood v. Read*, 21 Wash. 547, 554, 58 Pac. 665 (1899). Article VII, § 2 now provides for limitations on property taxes. In each instance, these provisions apply only to property taxes because their texts so command.

²⁵ The cases from Iowa and New York cited by the State pertain to constitutional provisions with language dissimilar to that of article VII, § 5. Br. of Resp'ts at 33 n.9. In *Solberg v. Davenport County Sheriff*, 232 N.W. 477 (1930), the Iowa Supreme Court held that truck license fees were not a tax. In the New York cases, the court similarly rejected argument that imposts were taxes. For example, a transfer of \$190 million in worker compensation surpluses to the general fund was not a de facto "tax" on other worker

S.E.2d 260 (S.C. 1940) (gasoline taxes and motor vehicle license fees); *Oldner v. Villines*, 943 S.W.2d 574 (Ark. 1997) (sales tax).

Finally, the State's argument is unsound on public policy grounds. Washington's Constitution has expressed a strong anti-diversionary policy both in article VII, § 5 and in article II, § 40 (gasoline tax revenues). These provisions are designed to prevent bait and switch tactics by the Legislature. The Legislature cannot enact a tax for one purpose, only to subsequently divert its revenues to another purpose. Washington taxpayers deserve consistency and candor from elected officials when exacting revenue from them. The anti-diversionary policy of article VII, § 5 is properly applied to the Safety Net tax revenues here.

(2) The Act's Poison Pill Provisions Apply

The poison pill provisions in RCW 74.60.150/RCW 74.60.900 are critical components of the Act because they give teeth to the conditions under which it was enacted. These provisions are designed to make sure the assessment is used exclusively to generate additional federal Medicaid match and to prevent raids on the Fund to make up for reduced General Fund appropriations; *i.e.*, RCW 74.60.005(3) conditions the assessment "on continuation of other funding sufficient to maintain hospital inpatient and outpatient reimbursement rates and small rural disproportionate share compensation payors. *Methodist Hosp. of Brooklyn v. State Ins. Fund*, 476 N.E.2d 304, 310 (N.Y. 1985).

payments at least at the levels in effect on July 1, 2009," and RCW 74.60.150(2)(e) provides that the Act becomes invalid and ineffective at the point when Safety Net tax monies are used as a "substitute" for, or to "supplant," other funding necessary to maintain those levels. WSHA's opening brief demonstrates why HB 2069 and accompanying 2011 budget bill violated these stipulations.

In response, the State offers up a hodgepodge of contradictory and ultimately unsupportable contentions. It initially suggests that the Legislature could not possibly have intended to create a "poison pill," and, if it did, such a condition was "ineffective." Br. of Resp'ts at 14-15. This contention is absurd: the Act clearly contemplates that it will be invalidated if certain conditions occur and, just as it has the power to enact laws, the Legislature has authority to place conditions on the continuing vitality of its enactments. In fact, it does so routinely. *See, e.g.*, budgetary provisos (*Wash. State Legislature v. Lowry*, 131 Wn.2d 309, 931 P.2d 885 (1997); *Wash. State Legislature v. State*, 139 Wn.2d 129, 985 P.2d 353 (1999)); sunset provisions (RCW 43.131); null and void clauses (*e.g.*, Laws of 2012, ch. 36, § 7; Laws of 2012, ch. 51, § 3).

RCW 74.60.150(1) makes the Act "conditional." RCW 74.60.150(2) provides that the Act "does not take effect or ceases to be imposed" if certain situations occur. For example, evidencing the critical

relationship between the Safety Net tax and matching federal Medicaid dollars, RCW 74.60.150(2)(c) provides that the Act is invalidated if the payments from the Fund are ineligible for the federal match. Further, RCW 74.60.150(2)(e) invalidates the Act if Safety Net tax revenues are used as "a substitute for or to supplant other funds. . . ." RCW 74.60.900 crystallizes the Legislature's intent. It provides, "If the conditions set forth in RCW 74.60.150(1) are not satisfied or if any of the circumstances set forth in RCW 74.60.150(2) should occur, *this entire chapter shall have no effect from that point forward. . .*" (emphasis added).

Unable to make this language disappear from the Act, the State offers a series of avoidances. First, it contends that the poison pill is triggered only if hospital rates are reduced to the level in effect on July 1, 2009. Br. of Resp'ts at 38-40. Under its theory, the State can use Safety Net tax revenues for non-Medicaid purposes freely, so long as it leaves behind enough to maintain rates one penny higher than they were on July 1, 2009. While certainly bold, this proposition cannot be squared with the Act's fundamental purpose of ensuring that every dollar of Safety Net tax revenues is utilized to generate additional federal matching funds for hospital care. See RCW 74.60.005(1) and (3)(a-b). Further, the State's exclusive focus on rate levels cannot be squared with the statement in RCW 74.60.005(3)(d) that the assessment is conditioned "on

continuation of other funding sufficient to maintain hospital inpatient and outpatient reimbursement rates and small rural disproportionate share payments at least at the levels in effect on July 1, 2009.” The critical element is the *level of funding*, not rates; otherwise, the purpose of the Act, to “obtain additional funds” for Medicaid services, is violated.

Recognizing as much, the State’s next contention is that the poison pill is not triggered because RCW 74.60.150(2)(e) provides an exception, permitting use of Safety Net revenues to substitute for or supplant other funds when “authorized by RCW 74.60.020(3)(e).” It argues that, because HB 2069 amended RCW 74.60.020(3)(e) to authorize the expenditure of \$199.8 million per biennium in lieu of General Fund appropriations, the poison pill was not triggered. Br. of Resp'ts at 40-41. The fatal problem with this argument is that, like its “rates” theory, it would defeat the entire purpose and objective of the Act, by allowing expenditure of Safety Net tax funds without generation of additional federal Medicaid matching funds.

This situation is entirely different from what the poison pill exception contemplates; *i.e.*, the Act as originally passed contained authorization in RCW 74.60.020(3)(e) for expenditure of up to \$66.8 million in Safety Net tax revenues in lieu of General Fund appropriations. However, all of those funds generated federal match additional to what

was produced by the then-existing 2009-11 General Fund Medicaid appropriation. But, when the Legislature reduced that General Fund appropriation and back-filled with Safety Net tax money, no additional federal Medicaid matching funds are generated.

This use of funds is fundamentally different from what was contemplated under the exception to the prohibition on substitution or supplantation under RCW 74.60.150(3)(e). To hold that the use of Safety Net tax revenues in this manner does not violate the Act's substitution or supplantation prohibitions would negate the fundamental purpose of the Act and render the poison pill provisions meaningless. When the statute is read sensibly and as a whole,²⁶ however, the use of Safety Net tax revenues in lieu of General Fund revenues pursuant to RCW 74.60.020(3)(e) is authorized only so long as that use generates additional federal dollars.

The use of \$40 million in Fund "surplus" revenues to substitute for General Fund appropriations is additionally problematic. Not only does it violate the requirement that any surplus in the Fund be used to reduce subsequent assessments or returned to hospitals (RCW 74.60.020(1)(a)-

²⁶ "A statute must be read as a whole giving effect to all of the language used," and each provision must be harmonized with other provisions to "insure proper construction of every provision." *State v. Young*, 125 Wn.2d 688, 696, 888 P.2d 142 (1995) (quoting *Addleman v. Bd. of Prison Terms & Paroles*, 107 Wn.2d 503, 509, 730 P.2d 1327 (1986)).

(b)),²⁷ but taking the Fund surplus at the end of the biennium, when the Act is scheduled to expire, necessarily means that those revenues cannot generate additional federal Medicaid match and will not be used to support the higher rates mandated by the Act.

Because it is wrong on its interpretation of the statute, the State's last argument is that WSHA did not produce evidence sufficient to support a finding that the 2011 operating budget reduced hospital funding below the July 1, 2009 level. Br. of Resp'ts at 42. But, the record shows that WSHA did produce that evidence, CP 56-60; 65-66, and that the State neither objected nor responded to that evidence below. Because the State did not produce any evidence to show that the level of other funding provided by the 2011-13 operating budget was sufficient to support the July 1, 2009 Medicaid hospital rates, it was error for the trial court to grant its motion for summary judgment.

Further, the trial court should have granted summary judgment in favor of WSHA because the record—in the form of an explanation from the Legislature itself—shows without dispute that the General Fund appropriations for Medicaid in 2011-13 were reduced to a level that is “\$975 million (8 percent) less than the amount needed to maintain current service coverage and payment policies through 2013.” The reduction in

²⁷ The State's argument (Br. of Resp'ts at 42) that there will be no surplus if the revenues are illegally taken before the expiration of the Act defies credulity.

state funds was \$552 million—“a 10 percent reduction from the program maintenance baseline.” CP 65. That “baseline” was the level established by the 2009-11 operating budget, which became effective on July 1, 2009.

Id.

The State notes that these statements describe overall reductions in Medicaid funding, and are insufficient to show that General Fund appropriations for Medicaid hospital services were insufficient to maintain the July 1, 2009 rates. Br. of Resp'ts at 43. This suggestion is extremely disingenuous. First of all, although it had the capacity to do so, the State did not offer a scintilla of evidence to support its claim. Second, the legislative documents in the record demonstrate that the 2011-13 General Fund appropriation was inadequate to support the July 1, 2009 baseline hospital rates; that is exactly why the Legislature found it necessary to (a) substitute \$150.2 million in Safety Net tax revenues; and (b) reduce hospital rates by eight percent for inpatient and seven percent for outpatient services. CP 66. As the Legislature itself has stated, this combination of back-filling and rate-cutting was necessary to make up for the reductions in General Fund appropriations “below the program maintenance baseline.” CP 65, 66. Finally, if the legislative record is not sufficiently specific, WSHA’s unchallenged analysis of the 2011-13 budget specifically demonstrates that the level of General Fund

appropriations necessary to maintain Medicaid hospital rates at the July 1, 2009 baseline was \$1.66 billion but that only \$1.55 billion was appropriated. CP 57-58.

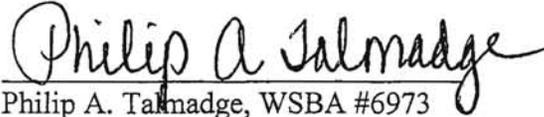
E. CONCLUSION

The State wants this Court to ignore significant portions of the Act and the real budgetary effect of HB 2069. That legislation, at its core, diverted revenues from the purpose of the Safety Net tax expressed in the Act in 2010, the capture additional federal Medicaid dollars to provide healthy reimbursement rates to allow Washington's hospitals to serve needy, Medicaid-qualified persons, to just another revenue source to balance the shortfall in the 2011-13 operating budget. This is precisely what the anti-diversionary policy of article VII, § 5 of our Constitution and the poison pill provisions of RCW 74.60.150/RCW 74.60.900 were designed to prevent.

This Court should reverse the trial court's summary judgment orders with directions to the trial court to enter an injunction in favor of WSHA under article VII, § 5, barring the enforcement of HB 2069. Alternatively, the Court should direct the trial court to enter an order mandating the application of the poison pill provision of RCW 74.60.150/RCW 74.60.900. Costs on appeal should be awarded to WSHA.

DATED this ~~27th~~ day of August, 2012.

Respectfully submitted,



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APPENDIX

RCW 74.60.005:

(1) The purpose of this chapter is to provide for a safety net assessment on certain Washington hospitals, which will be used solely to augment funding from all other sources and thereby obtain additional funds to restore recent reductions and to support additional payments to hospitals for medicaid services.

(2) The legislature finds that:

(a) Washington hospitals, working with the department of social and health services, 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 inpatient and outpatient reductions in hospital reimbursement rates and provide for an increase in hospital payments; and

(b) The hospital safety net assessment and hospital safety net assessment fund created in this chapter allows the state to generate additional federal financial participation for the medicaid program and provides for increased reimbursement to hospitals.

(3) In adopting this chapter, it is the intent of the legislature:

(a) To impose a hospital safety net assessment to be used solely for the purposes specified in this chapter;

(b) That funds generated by the assessment shall be used solely to augment all other funding sources and not as a substitute for any other funds;

(c) That the total amount assessed not exceed the amount needed, in combination with all other available funds, to support the reimbursement rates and other payments authorized by this chapter; and

(d) To condition the assessment on receiving federal approval for receipt of additional federal financial participation and on continuation of other funding sufficient to maintain hospital inpatient and outpatient reimbursement rates and small rural disproportionate share payments at least at the levels in effect on July 1, 2009.

RCW 74.60.150:

(1) The assessment, collection, and disbursement of funds under this chapter shall be conditional upon:

(a) Withdrawal of those aspects of any pending state plan amendments previously submitted to the centers for medicare and medicaid services that are inconsistent with this chapter, specifically any pending state plan amendment related to the four percent rate reductions for inpatient and outpatient hospital rates and elimination of the small rural disproportionate share hospital payment program as implemented July 1, 2009;

(b) Approval by the centers for medicare and medicaid services of any state plan amendment or waiver requests that are necessary in order to implement the applicable sections of this chapter;

(c) To the extent necessary, amendment of contracts between the department and managed care organizations in order to implement this chapter; and

(d) Certification by the office of financial management that appropriations have been adopted that fully support the rates established in this chapter for the upcoming fiscal year.

(2) This chapter does not take effect or ceases to be imposed, and any moneys remaining in the fund shall be refunded to hospitals in proportion to the amounts paid by such hospitals, if and to the extent that:

(a) An appellate court or the centers for medicare and medicaid services makes a final determination that any element of this chapter, other than RCW 74.60.100, cannot be validly implemented;

(b) Medicaid inpatient or outpatient reimbursement rates for hospitals are reduced below the combined rates established by RCW 74.60.080 and 74.60.090;

(c) Except for payments to the University of Washington medical center and harborview medical center, payments to hospitals required under RCW 74.60.080, 74.60.090, 74.60.110, and 74.60.120 are not eligible for federal matching funds;

(d) Other funding available for the medicaid program is not sufficient to maintain medicaid inpatient and outpatient reimbursement rates at the levels set in RCW 74.60.080, 74.60.090, and 74.60.110; or

(e) The fund is used as a substitute for or to supplant other funds, except as authorized by RCW 74.60.020(3)(e).

RCW 74.60.900:

(1) The provisions of this chapter are not severable: If the condition set forth in RCW 74.60.150(1) are not satisfied or if any of the circumstances set forth in RCW 74.60.150(2) should occur, this entire chapter shall have no effect from that point forward, except that if the payment under RCW 74.60.100, or the application thereof to any hospital or circumstances does not receive approval by the centers for medicare and medicaid services as described in RCW 74.60.150(1)(b) or is determined to be unconstitutional or otherwise invalid, the other provisions of this chapter or its application to hospitals or circumstances other than those to which it is held invalid shall not be affected thereby.

(2) In the event that any portion of this chapter shall have been validly implemented and the entire chapter is later rendered ineffective under this section, prior assessments and payments under the validly implemented portions shall not be affected.

(3) In the event that the payment under RCW 74.60.100, or the application thereof to any hospital or circumstances does not receive approval by the centers for medicare and medicaid services as described in RCW 74.60.150(1)(b) or is determined to be unconstitutional or otherwise invalid, the amount of the assessment shall be adjusted under RCW 74.60.050(1)(c).

DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited with the U.S. Mail for service a true and accurate copy of the Motion for Leave to File Over-Length Reply Brief and Reply Brief of Appellant in Supreme Court Cause No. 87084-5 to the following parties:

William T. Stephens
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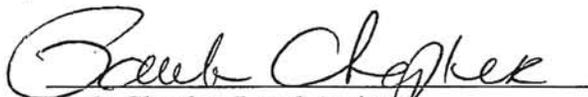
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Original filed with:

Washington Supreme Court
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415 12th Street W
Olympia, WA 98504-0929

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: August 27, 2012, at Tukwila, Washington.


Paula Chapler, Legal Assistant
Talmadge/Fitzpatrick

OFFICE RECEPTIONIST, CLERK

To: Paula Chapler
Subject: RE: Washington State Hospital Association v. State of Washington, et al. ---Motion for Leave to File Over-Length Reply Brief and Reply Brief of Appellant

Rec'd 8/27/2012

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Paula Chapler [<mailto:paula@tal-fitzlaw.com>]
Sent: Monday, August 27, 2012 3:33 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Washington State Hospital Association v. State of Washington, et al. ---Motion for Leave to File Over-Length Reply Brief and Reply Brief of Appellant

Per Mr. Talmadge's request, attached please find a Motion for Leave to File Over-Length Reply Brief and Reply Brief of Appellant for filing in the following case:

Case Name: Washington State Hospital Association v. State of Washington, et al.
Cause Number: 87084-5
Attorney: Philip A. Talmadge, WSBA #6973
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Sincerely,

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