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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.

MEMORANDUM OF AMICI CURIAE
SEATTLE CHILDREN'S HOSPITAL AND
SEATTLE CANCER CARE ALLIANCE
IN SUPPORT OF PETITION FOR REVIEW

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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 non-profit 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 2018 fiscal year, Seattle Children's Hospital served over 170,000 patients, approximately 42% 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 court of appeals' decision is affirmed, amici's annual tax burden would increase substantially—including by around \$2.5 million for Seattle Children's Hospital—thus preventing those resources from being used to treat patients who are unable to pay for the costs of their care.

II. ARGUMENT

This Court should accept review because the court of appeals' decision involves a significant constitutional question and raises issues of substantial public importance that should be determined by the Supreme Court. *See* RAP 13.4(b)(3)-(4).

A. The court of appeals' decision raises issues of substantial public importance to specialized non-profit hospitals and their thousands of patients who receive government assistance.

Washington is fortunate to have within its borders nationally-recognized non-profit 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* Seattle Children's Hospital, T-Cell Immunotherapy for Cancer, <https://www.seattlechildrens.org/clinics/cancer/research-and-clinical-trials/t-cell-therapy> (last visited Oct. 28, 2019). Seattle Cancer Care Alliance similarly is internationally recognized for its leadership in the development of T-cell immunotherapy for cancer patients. *See* Seattle Cancer Care Alliance, FAQs for FDA-Approved CAR T-Cell Therapies, <https://www.seattlecca.org/immunotherapy/car-tcell-therapy-faq> (last visited Oct. 28, 2019).

Not every hospital can develop deep expertise on every condition, however, particularly rare conditions or conditions 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.*, Nat'l Center for Advancing Translational Sciences, Help with Travel Costs, <https://rarediseases.info.nih.gov/guides/pages/118/help-with-travel-costs> (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 court of appeals' decision abuses Washington's privileged position as home to critical regional health care resources and creates a risk that deep expertise and new research will become less available to patients who cannot afford to pay for the deeply 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 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. The court of appeals’ decision has particularly substantial implications for providers of highly specialized care, such as amici, that serve a regional or national patient base.

B. The court of appeals’ decision frustrates the intent of the Washington Legislature by burdening non-profit 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 decreasing the costs that Washington public and non-profit hospitals incur in providing medical care to patients who receive government assistance.

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.” 2002 Laws, 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 non-profit 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. St. 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 health care programs subsidized by “government” writ large, not just Washington.

The legislative history of RCW 82.04.4311 confirms the Legislature’s intent to decrease the unreimbursed costs incurred by non-profit 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”). Before 2001, non-profit hospitals were permitted to deduct only “amounts received from the United States . . . or from the state of Washington or any municipal corporation or political subdivision thereof as compensation for . . . health or social welfare services.” RCW 82.04.4297. Because Medicaid services increasingly were delivered through managed care organizations rather than direct government payments, the 2001 Legislature sought to expand the meaning of the phrase “amounts received from” to include “amounts received . . .

from a managed care organization or other entity that is under contract to manage health care benefits” if they comprised “compensation for health care service within the scope of benefits covered by the pertinent government health care program.” 2001 Laws, 2nd Sp. Sess., ch. 23 § 2. The Department opposed the amendment because it would be “forced to look beyond the immediate payer to the underlying source of the funds.” AR 230-31. Nonetheless, the Governor signed the bill, save for vetoing an unrelated section on retroactive effects.

After the 2001 bill passed, the Governor directed the Department to draft legislation to fix the problems it perceived in the bill “while preserving the underlying policy of exempting monies received by hospitals for providing health and welfare services.” AR 240; *see also* AR 242-43. To that end, the Department drafted a standalone provision to allow non-profit hospitals to deduct “all amounts received . . . for treatment of eligible patients for covered benefits, *not dependent on the identity of the payor.*” AR 242-43 (emphasis added). The resulting bill became RCW 82.04.4311. 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.

The court of appeals' interpretation would require Washington non-profit 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 additional tax burden is particularly significant for institutions like amici that provide highly specialized treatment to patients on a regional basis. 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." 2002 Laws, ch. 314 § 1.

C. The court of appeals' interpretation of RCW 82.04.4311 discriminates against out-of-state patients without benefitting Washington's purchase of medical services.

The court of appeals' interpretation of RCW 82.04.4311 not only frustrates the Legislature's stated purpose but also discriminates against interstate commerce by taxing non-profit hospitals based solely on the residency of their patients. Washington is host to significant regional medical institutions. 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 non-resident. This is precisely the type of discrimination that the Supreme Court held unconstitutional in *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564,

572-95 (1997) (property tax exemption restricted to institutions that principally benefited Maine residents violated the U.S. Constitution).

With virtually no analysis, the court of appeals' decision concludes 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 1069, 2019 WL 3287077, at *4 (Ct. App. July 22, 2019) (unpublished). 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. The constitutional question is whether Washington's deduction relates to its participation in the market as a buyer of medical services. *See New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 277 (1988). It does not.

The Department erroneously asserts that the deduction "finance[s]" or "support[s] the State's Medicaid/CHIP program" and "ensur[es] Washington Medicaid program operates in an efficient and cost effective manner." *See, e.g.,* Ans. 1, 9, 15. But public and non-profit 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 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.

Because statutes should be construed "to avoid constitutional doubt," *Utter v. Bldg. Indus. Ass'n of Wash.*, 182 Wn.2d 398, 434, 341 P.3d 953 (2015), the dormant Commerce Clause is an additional reason to reject the court of appeals' discriminatory interpretation of RCW 82.04.4311.

V. CONCLUSION

For the foregoing reasons, amici respectfully request that the Court grant the Petition for Review.

Respectfully submitted.

DATED: October 28, 2019.

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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.

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

DATED: October 28, 2019, at Seattle, Washington.

s/ Jessica Flesner

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