

78652-6

Nos. 78652-6 and 78931-2

SUPREME COURT OF THE STATE OF WASHINGTON

DAVID J. JENKINS,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL
AND HEALTH SERVICES,

Appellant;

and

VENNETTA GASPER and TOMMYE MYERS,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL
AND HEALTH SERVICES,

Petitioner.

**APPELLANT/PETITIONER'S ANSWER TO BRIEF OF AMICUS
CURIAE SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 775, AND RENEWED MOTION TO STRIKE
PORTIONS THEREOF**

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I. INTRODUCTION

Appellant/Petitioner, the Washington State Department of Social and Health Services (Department or DSHS), respectfully submits its answer to the Amicus Curiae Brief of Service Employees International Union, Local 775 (SEIU), and renews its motion to strike those portions of SEIU's brief and declaration in support thereof that rely on evidence not properly before this Court.

SEIU has filed an amicus curiae brief in support of Respondents in which it argues that the shared living rule should be invalidated (1) because it has an adverse financial impact on some DSHS-contracted Individual Providers (IPs), who are represented by SEIU, Br. of SEIU at 2-8; and (2) because it allegedly violates constitutional due process requirements by creating an irrebuttable presumption. Br. of SEIU at 8-14. As discussed in the Department's Objection to Motion of Service Employees International Union, Local 775, For Leave to File Amicus Curiae Brief, at 5, the first of these arguments relies on evidence not properly before this Court and is not addressed to proper grounds upon which a court may invalidate an agency rule under the Administrative Procedure Act (APA).

Furthermore, as discussed in the Department's briefs to the Court of Appeals and this Court in the *Jenkins v. Dep't of Soc. & Health Servs.*

case,¹ due process does not necessitate a precise, individualized determination of the amount of assistance available to an individual through public assistance programs. Therefore, the shared living rule does not violate constitutional due process requirements.

II. RENEWED MOTION TO STRIKE

For the reasons discussed in part III-A below, the Department renews its request that this Court strike those portions of SEIU's amicus curiae brief and the supporting declaration in support thereof that contain new evidence that is not properly before this Court. In particular, the Department asks the Court to strike those portions of the Declaration of Counsel that contain new substantive evidence that was not part of the agency record below (specifically, paragraphs 4-6), all exhibits attached to the Declaration of Counsel (numbered 1-2), and those portions of SEIU's brief that rely on such improper evidence (specifically, pages 2-8 of SEIU's amicus curiae brief) (collectively referred to hereinafter as "challenged materials").²

¹ See *Jenkins*, Br. of App. at 51-56; *Jenkins*, Rep. Br. of App. at 19-26; see also *Gasper*, Rep. Brief at 14 n.14.

² This is not the first time SEIU has attempted to improperly interject new evidence into this case on appeal. Before the Court of Appeals in the *Gasper* case, SEIU attempted to put new evidence, which was not part of the agency record below in that case, before the court. The Court of Appeals granted the Department's motion and struck those portions of SEIU's amicus curiae brief that included, or relied on, evidence that was not part of the agency record below. See *Gasper v. Dep't of Soc. & Health Servs.*, No. 33088-1-II, Order Striking Portions of Amicus Curiae Brief (Wash. Ct. App. Oct. 18,

III. ARGUMENT

A. SEIU's Brief Relies On Evidence Not Properly Before This Court

Appellate review of a superior court decision on review of an agency order is governed both by the APA, chapter 34.05 RCW, and the Rules of Appellate Procedure (RAP). *See* RCW 34.05.510; RCW 74.08.080(2); RAP 1.1(a). Both the APA and the RAP limit review by an appellate court to the agency record, as considered below, and allow for supplementation of that record only in limited circumstances. *See* RCW 34.05.558, .562; RAP 9.1, 9.10, 9.11. In its amicus curiae brief and supporting declaration, SEIU seeks to put before this Court evidence not included in the agency record, not considered by the administrative law judge, not considered by the superior court, and not part of the record on review. However, SEIU has not sought to properly supplement the record with this new evidence as required by the APA and RAP. The challenged materials should, therefore, be stricken.

1. The APA Limits Judicial Review To The "Agency Record"

Under the APA, "[j]udicial review of disputed issues of fact . . . *must be confined to the agency record for judicial review as defined by [the APA], supplemented by additional evidence taken pursuant to this*

2005) (copy attached hereto as Appendix A). The Department asks this Court to follow suit.

chapter.” RCW 34.05.558 (emphasis added). “Agency record” is defined by RCW 34.05.476, which provides that “[e]xcept to the extent that this chapter or another statute provides otherwise, the agency record constitutes the *exclusive basis* for agency action in adjudicative proceedings under this chapter and for judicial review of adjudicative proceedings.” RCW 34.05.476(3) (emphasis added).

A court reviewing an agency’s decision may consider evidence not contained in the agency record only in the limited circumstances, which are enumerated in the APA. *See* RCW 34.05.562. The challenged materials were not part of the agency record considered by the Department at the time it took the action at issue in this case. SEIU has not demonstrated, nor has it attempted to demonstrate, that consideration of new evidence, not included in the agency record, is proper in this case.

2. The RAP Limits An Appellate Court’s Review To The Record Below

In performing its review function, an appellate court is limited to considering the “record on review.” RAP 9.1; *see also* RAP 9.10, 9.11; *City of Sumner v. Walsh*, 148 Wn.2d 490, 495, 61 P.3d 1111 (2003) (“Generally, [an appellate court] consider[s] only those documents that have properly become part of the record on review.”). When an appellate court (i.e., the Court of Appeals or Supreme Court) is reviewing a superior

court that, acting in its appellate capacity, was itself reviewing an agency action, the record on review consists solely of the agency record, with certain limited exceptions. *See* RAP 9.1, 9.10, 9.11; *Den Beste v. Pollution Control Hrgs. Bd.*, 81 Wn. App. 330, 332-33, 914 P.2d 144 (1996) (“With limited exceptions, facts pertinent to the review of administrative proceedings are established at the administrative hearing.”).

RAP 9.10 allows an appellate court to permit or require the supplementation or correction of the record on review when necessary. RAP 9.11 allows an appellate court to “direct that additional evidence on the merits of the case be taken” if certain enumerated conditions are met. However, even if SEIU had demonstrated that taking additional evidence was warranted under RAP 9.11, it would still be required to comply with those provisions of the APA limiting judicial review to the agency record and providing for supplementation of the agency record. *See* RCW 34.05.558, .562.³

As discussed above, the challenged materials submitted by SEIU were not part of the agency record. They are, therefore, not part of the record on review. SEIU has not sought leave of this Court to supplement the record pursuant to RAP 9.10. Furthermore, SEIU has not

³ Moreover, the proper course for admitting new evidence would be a remand by this Court to the superior court, which, in turn, would likely be required to remand to the Department for further fact finding.

demonstrated, nor has it attempted to demonstrate, that the taking of additional evidence is warranted pursuant to RAP 9.11.

Because the challenged materials are not part of the record on review, they cannot properly be considered by this Court and should be stricken.

3. The Purpose Of An Amicus Curiae Brief Is To Argue Points Of Law, Not To Introduce New Evidence

A party is granted permission by an appellate court to file a brief as an amicus curiae only for a limited purpose—to illuminate for the court points of law that are not otherwise adequately addressed in the briefs of the principal parties—not to introduce or argue new facts. *See Pleas v. City of Seattle*, 49 Wn. App. 825, 827 n.1, 746 P.2d 823 (1987), *rev'd on other grounds*, 112 Wn.2d 794 (1989) (stating that “[t]he purpose of an amicus brief is to help the court with points of law and not to reargue the facts,” and noting that RAP 10.3 “limit[s] the content of an amicus brief to the issues of concern to amicus” (emphasis in original)). *See also Ochoa Ag Unlimited, L.L.C. v. Delanoy*, 128 Wn. App. 165, 172, ¶¶ 23-24, 114 P.3d 692, 695 (2005) (striking appendices to an amicus brief that the court otherwise found “helpful to us in interpreting the law” and noting that appellate courts “routinely ignore material appended to briefs other than convenience copies of excerpts from the appellate record”).

The challenged materials submitted by SEIU do not address issues of law, nor do such materials aid this Court in understanding points of law. They simply contain or refer to new evidence, which had not previously been part of the record. Because they do not “help the [C]ourt with points of law,” *Pleas*, 49 Wn. App. at 827 n.1, the challenged materials are not properly before this Court as part of an amicus curiae brief and should, therefore, be disregarded and/or stricken.

For the foregoing reasons, the Department asks this Court to strike and/or disregard those portions of the Declaration of Counsel that contain new substantive evidence that was not part of the agency record below (specifically, paragraphs 4-6), all exhibits attached to the Declaration of Counsel (numbered 1-2), and those portions of SEIU’s amicus curiae brief that rely on such improper evidence (specifically, pages 2-8 of SEIU’s amicus curiae brief).

B. This Court Must Disregard SEIU’s “Adverse Impact” Argument Because It Is Not Germane Or Relevant To The Validity Of The Shared Living Rule

The APA strictly limits the grounds on which a reviewing court may declare an agency rule invalid. See RCW 34.05. In reviewing an agency rule under the APA,

a court shall declare the rule invalid *only* if it finds that:
The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted

without compliance with statutory rule-making procedures;
or the rule is arbitrary and capricious.

RCW 34.05.570(2)(c) (emphasis added); *see also Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 437, ¶ 9, 120 P.3d 46 (2005). A court reviewing an agency rule under the APA has no authority to invalidate such rule on grounds other than these enumerated in RCW 34.05.570(2)(c). *Ass'n of Wash. Bus. v. Dep't of Revenue*, 121 Wn. App. 766, 776, 90 P.3d 1128 (2004) (affirmed by *Ass'n of Wash. Bus.*, 155 Wn.2d 430).

In reviewing the validity of an agency rule, “a court will not substitute its judgment for that of the agency,” *American Network, Inc. v. Utilities & Transp. Comm'n*, 113 Wn.2d 59, 69, 776 P.2d 950 (1989) (discussing former RCW 34.04.070(2), which was recodified as RCW 34.05.570(2)(c)), and will not venture into the policy-making domain of the legislature. *Id.*; *see also* RCW 34.05.574(1) (“In reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency.”).

A significant portion of SEIU’s amicus curiae brief consists of an argument that this Court should invalidate the shared living rule for

reasons *other* than those enumerated in the APA. SEIU asks this Court to invalidate the shared living rule in part because, according to SEIU,⁴ the rule has an adverse affect on the individuals it represents.⁵ *See, e.g.*, Br. of SEIU at 2-8. Essentially, SEIU asks this Court to invalidate the shared living rule based on SEIU's disagreement with the "social policy," *id.* at 3, embodied in the shared living rule, and because the rule potentially reduces the earnings of some of its members. *Id.* at 6. In arguing that the shared living rule has an adverse impact on its membership, SEIU does not argue that the rule is unconstitutional (although it makes a discrete argument to this effect later in its brief), does not argue that the rule exceeds the Department's statutory authority, and does not argue that the rule is arbitrary and capricious.

SEIU's "adverse impact" argument must be disregarded by this Court because the impact the shared living rule might have on SEIU's membership is not relevant to any ground on which this Court may invalidate an agency rule under the APA. Under the APA, this Court must leave to the Department and to the legislature public policy considerations about the potential fiscal impacts of the shared living rule. *See American Network, Inc.*, 113 Wn.2d at 69.

⁴ As discussed above, SEIU's assertions are based on new evidence not properly before this Court under the APA and the RAP. This evidence should, therefore, be disregarded in its entirety.

⁵ This argument is referred to herein as the "adverse impact" argument.

RCW 74.39 and 74.39A, the statutes that authorize DSHS to administer home and community long-term care programs, demonstrate that SEIU's "adverse impact" argument is irrelevant. By law, DSHS does not, and may not, consider the effects on care providers described by SEIU when adopting a rule that makes a need-based allocation of limited in-home care resources to eligible recipients.⁶ The Department is charged with the responsibility to husband the state's finite public assistance resources in order to provide benefits to eligible persons on a consistent and cost-effective basis statewide. *See* RCW 74.39.005(5) (articulating a legislative purpose to "[e]nsure that long-term care services are coordinated in a way that [*inter alia*] maximizes the use of financial resources in directly meeting the needs of persons with functional limitations"); RCW 74.39A.007(2) ("Home and community-based services [should] be developed, expanded, or maintained in order to meet the needs of consumers and to maximize effective use of limited resources."). The Department fulfills this responsibility by making need-

⁶ At the time the rule at issue in this case was adopted and applied to Mr. Jenkins and Ms. Gasper and Myers, the state's relationship with the SEIU was limited to collective bargaining over wages, hours, and working conditions. RCW 74.39A.270, as amended by Initiative 775. By enacting Laws of 2006, ch. 206, the legislature expanded the scope of collective bargaining to include "how the department's core responsibility affects hours of work for individual providers." RCW 74.39A.270(6)(a). Collective bargaining for the 2007-09 biennium has recently concluded, and any agreed changes in the shared living rule will be implemented if funded by the legislature. SEIU is apparently hoping that this Court will give it additional benefits for its members beyond any that may have been obtained through the statutorily mandated collective bargaining process.

based resource allocation decisions, allocating medical assistance benefits to individuals based on their need for publicly paid personal care services as identified in an individualized assessment. *See generally* WAC 388-106 (formerly WAC 388-72A).

The Department has the “authority to establish a plan of care for each consumer [and the] responsibility to manage long-term in-home care services under [RCW 74.39A], including determination of the level of care that each consumer is eligible to receive.” RCW 74.39A.270(6)(a). In so doing, the Department is obligated to consider only the needs of the client in making its determination of the number of long-term care hours that a client will receive. *See* RCW 74.39.005(2); RCW 74.39A.007(3). The Department’s client assessment system, including the shared living rule, is rationally designed to identify the number of personal care hours each client may receive, based on his or her otherwise unmet need for personal care services. The effect on care providers described by SEIU is simply not a factor that the Department was required to consider in making its resource allocation decisions based on client need at the time the CARE assessment system was developed and used in making the determinations that are at issue in this case. Thus, the asserted effect the shared living rule has on care providers does not determine whether the rule is valid.

C. The Shared Living Rule Does Not Violate Due Process Requirements

In its amicus curiae brief, SEIU argues that the shared living rule violates due process requirements by creating an irrebuttable presumption.⁷ This argument reflects a misunderstanding of both the shared living rule and the case law on the permissibility of irrebuttable presumptions in the public assistance benefit context. As the Department has argued in briefing previously submitted to the Court of Appeals and to this Court, *see Jenkins*, Br. of App. at 51-56; *Jenkins*, Rep. Br. of App. at 19-26, due process requirements do not necessitate a precise, individualized determination of the amount of assistance an individual may receive through a public assistance program. Accordingly, the shared living rule does not violate due process requirements.

As an initial matter, the cases cited by SEIU do not support its contention. In none of the cases cited by SEIU was a due process violation found as a result of a state's Medicaid agency creating an "irrebuttable presumption." In *Mothers and Childrens Rights Org., Inc. v. Stanton*, 371 F. Supp. 298 (N.D. Ind. 1973), and *Hausman v. Dep't of Institutions and Agencies, Division of Public Welfare*, 64 N.J. 202, 314 A.2d 362, *cert. denied*, 417 U.S. 955, 94 S. Ct. 3083, 41 L. Ed. 2d 674

⁷ This argument is identical to arguments that have already been made by Respondent Jenkins. SEIU's replication of those arguments adds nothing that "would assist the appellate court" in resolving this case. RAP 10.6(a).

(1974), the courts held that a Medicaid agency's irrebuttable presumption violated federal AFDC regulations; constitutional issues were not addressed in any of those decisions.⁸ Further, in *Anderson v. Morris*, 87 Wn.2d 706, 712, 558 P.2d 155 (1976), this Court upheld a DSHS regulation, noting in dicta that that "[t]he presumption used by DSHS would be improper and inconsistent with federal regulations only if it were conclusive." (Emphasis added.) Again, the constitutionality of the rule was not an issue.

Only two cases cited by SEIU address constitutional issues. In the first, *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972), the Supreme Court held that Illinois' irrebuttable presumption that unwed fathers were unfit to be awarded custody of their children was unconstitutional because it violated Stanley's due process and equal protection rights. *Stanley*, 405 U.S. at 648-59. The Court's holding in that case was premised on its conclusion that the presumption in question "seriously curtailed important liberties cognizable under the Constitution," *Weinberger v. Salfi*, 422 U.S. 749, 785, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975), namely the right of a father to be involved in the rearing of his child.

⁸ SEIU has pointed to no federal regulation in the long-term care context comparable to the AFDC regulations at issue in those three cases that the shared living rule, assuming *arguendo* it is an "irrebuttable presumption," violates.

The Supreme Court later declined to apply the holding in *Stanley* in the context of public assistance benefits because a noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status.” *Salfi*, 422 U.S. at 771-72.

Salfi involved a challenge to the provision of the Social Security Act that withheld benefits to a surviving spouse of a covered worker unless the marriage had been in place for at least nine months prior to the worker’s death. While acknowledging that the rule had a reasonable goal—to prevent the use of sham marriages to obtain Social Security benefits—the lower court relied on *Stanley* and invalidated the nine-month requirement “because it presumed a fact which was not necessarily or universally true.” *Salfi*, 422 U.S. at 768.

The Supreme Court reversed and upheld the challenged provision of the Social Security Act. It began its analysis with the observation that “[p]articularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as (Social Security), we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly

lacking in rational justification.”⁹ *Id.* (quoting *Flemming v. Nestor*, 363 U.S. 603, 611, 80 S. Ct. 1367, 1373, 4 L. Ed. 2d 1435 (1960)).

The *Salfi* Court also noted that in *Richardson v. Belcher*, 404 U.S. 78, 92 S. Ct. 254, 30 L. Ed. 2d 231 (1971), it had upheld a provision of the Social Security Act that required an offset against disability benefits of state-paid workers’ compensation payments but did not require a similar offset of payments under private disability insurance, stating the governing principle as follows:

If the goals sought are legitimate, and the classification adopted is rationally related to the achievement of those goals, then the action of Congress is not so arbitrary as to violate the Due Process Clause of the Fifth Amendment.

Salfi, 422 U.S. at 769 (quotation marks omitted). Further, the *Salfi* Court reiterated with approval the following statement from *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970), where the Supreme Court rejected a claim that Maryland welfare legislation violated the Equal Protection Clause:

⁹ SEIU’s characterization of the Supreme Court’s decision in *Salfi* confuses the facts of the case with the constitutional principle on which it was decided, and is thus significantly inaccurate. Contrary to SEIU’s contention, *see* Br. of SEIU at 13-14, the Supreme Court’s holding in *Salfi* was not limited to the validity of “duration of marriage” requirements. Instead, the *Salfi* Court held generally that where receipt of non-contractual public assistance benefits is concerned, eligibility rules based on “presumed [] fact[s,] which [are] not necessarily or universally true,” *Salfi*, 422 U.S. at 768, do not violate due process requirements unless they bear no rational relationship to a legitimate legislative goal. Also contrary to SEIU’s contention, the Court’s decision was *not* made on the “basis that ‘fixed period of time’ rules are traditionally relied on by commercial insurance policies.” Br. of SEIU at 13-14. This was merely a secondary observation that the Court made in upholding the duration of marriage rule.

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality.

Salfi, 422 U.S. at 769 (quotation marks omitted).

Finally, the *Salfi* Court rejected the suggestion that the Constitution required an individualized determination as to the validity of marriages, rather than the bright-line nine-month rule in the Social Security Act. The Court observed that it was not clear that individual determinations would achieve their purpose of “filter[ing] out sham arrangements,” *id.* at 782, and that Congress could legitimately weigh “the administrative difficulties of individual eligibility determinations,” *id.* at 784, determine as a policy matter that “limited resources would not be well spent in making individual determinations [of eligibility],” *id.*, and, therefore, elect to “rely on rules which sweep more broadly than the evils with which they seek to deal.” *Id.* The *Salfi* Court concluded that “[t]he Constitution does not preclude such policy choices as a price for conducting programs for the distribution of social insurance benefits.” *Id.* at 785.

Like the appellees in *Salfi*, both Respondents and the SEIU argue that the shared living rule “sweep[s] more broadly than the evils with which [it] seek[s] to deal” (*id.* at 784), i.e., avoiding the use of Medicaid

funds to pay for services that benefit non-Medicaid eligible persons. Just as Congress's choice of a bright-line rule regarding marriages was determined by the *Salfi* Court to be constitutionally acceptable, the Department's shared living rule comports with both due process and equal protection requirements. The Department may, consistent with due process requirements, determine that its limited resources are not well spent in making individual determinations of need in shared living situations and, therefore, elect to rely on a rule that arguably sweeps more broadly in some individual situations than the evils with which it was created to deal.

In the second case cited by amicus, *Dillingham v. I.N.S.*, 267 F.3d 996 (9th Cir. 2001), the 9th Circuit held that an I.N.S. policy that created an irrebuttable presumption that foreign expungement orders were invalid violated equal protection guarantees. *Dillingham*, 267 F.3d at 1010. The only rationale offered by the federal government for the differential treatment of aliens convicted in U.S. Court and those convicted abroad was the "added administrative difficulty in verifying that an alien's [non-U.S.] conviction has indeed been validly expunged, and that he or she in fact complied with the requirements of the foreign expungement statute." 267 F.3d at 1008. The 9th Circuit held that this "unquantifiable or de minimis" interest when compared to the alien's "substantial" liberty

interest in avoiding deportation did not satisfy even rational basis review. *Id.* at 1009.

As between these two cases, the instant case is much more like *Salfi* than *Dillingham*. Like *Salfi*, this case involves a “noncontractual claim to receive [benefits that are paid] from the public treasury,” 422 U.S. at 772, where individualized determinations would consume resources that otherwise can be used to provide services, be inefficient, and contravene the legislative directive to develop a uniform system.

Unlike *Dillingham* (or *Stanley*), this case does *not* involve a substantial deprivation of liberty (deportation “visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom,” 267 F.3d at 1010 (quotation marks omitted)). The Respondents here will lose no services because of the shared living rule—the services will be performed either by the live-in caregiver or others in the living unit on behalf of the entire household, or be performed at the Department’s expense by a caregiver who comes into the home. Finally, immigration and deportation decisions are by their nature susceptible to individual determinations, whereas standard eligibility guidelines for public assistance benefits—such as the shared living rule at issue here—are by far the norm in the social welfare context. Because of these significant differences, the *Dillingham* case is inapposite here.

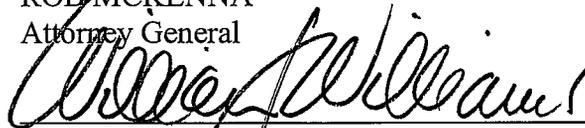
As discussed in the Department's briefing to the Court of Appeals and to this Court (*see Jenkins*, Br. of App. at 51-56; Rep. Br. of App. at 19-26; *Gasper*, Rep. Br. of App. at 14 n.4), the shared living rule is one component of a complex system used to determine long-term care recipients' different levels of need for paid assistance, a mechanism that—to the extent it can be said to “classify” recipients—does so in a manner that is rationally related to the state's legitimate interest in making a need-based allocation of its finite resources. SEIU's contention that the shared living rule violates due process should be rejected.

IV. CONCLUSION

The Department asks this Court to strike the challenged materials designated in Part II above as they are not properly before this Court nor relevant to the issues in this appeal. The Department further asks the Court to reject the arguments proffered by SEIU in its amicus curiae brief and to reverse the decisions below.

RESPECTFULLY SUBMITTED this 27th day of October, 2006.

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PROOF OF SERVICE

I certify that a copy of this document was served on all parties or their counsel of record on the date below as follows:

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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 27th day of October, 2006, at Lacey, WA.



Sharon Paakkonen, Legal Assistant

Counsel. These materials either contain or rely on evidence that is not properly before this court.

IT IS SO ORDERED.

DATED this 18th day of October, 2005.

Van Deren, A.C.J.
Van Deren, A.C.J.

Bridgewater, J.
Bridgewater, J.

Penoyar, J.
Penoyar, J.