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SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE HOSPITAL ASSOCIATION,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Appellant.

AMICUS CURIAE BRIEF OF WASHINGTON RURAL HEALTH
ASSOCIATION AND NORTHWEST ASSOCIATION OF NURSE
EXECUTIVES

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I. INTRODUCTION

The Washington Rural Health Association (“WRHA”) and the Northwest Organization of Nurse Executives (“NWONE”), appearing as *amicus curiae*, urge the Court to reject the Department of Health’s attempt to expand its certificate of need (“CON”) jurisdiction respecting existing hospitals. Specifically, the Court should reject the Department’s attempt to expand its statutory jurisdiction to review a “sale, purchase, or lease of part or all of existing hospital,” to include any circumstance it may deem to result in a change of control over all or part of a hospital.

Under this concept, the Department has said it will review arrangements that do not remotely resemble sales, purchases or leases, even to include some affiliations that demonstrably do not involve any change of control of a hospital. In addition to hospital affiliations, the Department’s expansive new reading of its CON jurisdiction implicates less prominent but equally important arrangements, such as where a hospital contracts with another hospital, a health system, or a physician group to operate a department within a hospital, such as emergency services, obstetrics, rehabilitation, and the like.

The Department’s attempted expansion of its CON jurisdiction to encompass these type of arrangements threatens the ability of hospitals and other health care providers, particularly those in rural or underserved

areas, to timely respond to changes in the health care environment resulting from the federal Patient Protection and Affordable Care Act¹ and related forces, and would further bureaucratize health care, all without regard to whether a “sale, purchase, or lease” of a “hospital” is involved.

The Department’s plea for deference is unwarranted because for over 20 years it treated the statutory language as unambiguously excluding hospital mergers and other changes of control. The Department’s interpretation was well-known and applied to a number of prominent transactions, which leads to an unrebutted presumption of legislative acquiescence. In these circumstances, only the Legislature may expand the agency’s jurisdiction.

The Department’s attempt to justify its new interpretation as an application of agency expertise to changed circumstances is refuted by the record, which shows that the agency’s change of position was not the product of its expertise. Rather, the change of position was directed by the Governor, who chose to bypass the statutorily prescribed method by which his office may recommend changes in CON administration² in order to respond to a complaint by the American Civil Liberties Union (“ACLU”). The ACLU’s complaint asserted that affiliations between religious health

¹ Affordable Care Act, P.L. 111-148, 124 Stat. 119-1025.

² RCW 43.370.030(3)(d).

care organizations and secular hospitals result in reduced access to certain hospital services. When that assertion was refuted by the Governor's Office of Financial Management ("OFM"), the Department stuck to its marching orders, and ignored the OFM report.

Deference in these circumstances would extend far beyond even the United States Supreme Court's *Chevron* doctrine,³ by permitting agencies to effectively amend statutes based on the chief executive's political directive. The Department's argument in this regard raises serious separation of powers issues, relative to both the division of authority between the legislative and executive branches and this Court's jurisdiction to declare the meaning of statutes.

II. IDENTITY & INTEREST OF AMICI

WRHA is a state-wide organization consisting of health care providers, administrators, and others whose focus is the special challenges of delivering health care in rural settings. WRHA's purpose is to advocate for enhanced access, quality, and stability for rural health services. NWONE is an organization representing nursing leadership throughout Washington and Oregon. NWONE serves as a voice for nursing leaders, including on matters of health care policy. Both organizations are

³ *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984).

intimately familiar with the demands of the current health care market and are devoted to meeting the challenge to provide access to quality, affordable health care throughout the state.

III. STATEMENT OF THE CASE

A. Agency Action

By statute enacted in 1984, and not amended since, CON review is triggered by the “sale, purchase, or lease of part or all of any existing hospital.”⁴ On multiple occasions between 1985 and 2013, the Department of Health ruled that transactions not involving the sale or transfer of a hospital’s title or assets were exempt from CON review, notwithstanding a resulting change of control.⁵ As detailed in the briefs of the parties, much of this state’s current healthcare landscape has been shaped by these rulings.

In June 2013, prompted by a complaint from the ACLU, which alleged that affiliations between secular and religious hospital groups would lead to restricted access to certain healthcare services, the Governor directed the Department to adopt rules expanding the scope of CON review to include change of control of all or part of a hospital.⁶

⁴ Laws of 1984, c. 228, § 221, codified as RCW 70.38.105(4)(b).

⁵ Clerk’s Papers (“CP”) 74-75, 80-81; Administrative Record (“AR”) 69, 159, 214, 1161-62.

⁶ CP 345-346; AR 1.

Specifically, the Governor directed that the CON process “should be applied” to “affiliations, corporate restructuring, mergers, and other arrangements among health care facilities” that “result[] in outcomes similar to the traditional methods of sales, purchasing, and leasing of hospitals, particularly when control of part or all of an existing hospital changes from one party to another.”⁷

In issuing this directive, the Governor bypassed the statutory mechanism created by the Legislature whereby the Governor’s Office of Financial Management (“OFM”)⁸ is directed, as part of the development of a statewide health resources strategy, to assess “emerging trends in health care delivery and technology as they relate to access to health care” and to “recommend any changes to the scope of health care facilities and services covered by the certificate of need program that may be warranted by these emerging trends.”⁹ The Legislature further directed OFM to submit the statewide strategy to the Department “to direct its activities related to the [CON] program.”¹⁰ The Department, in turn, is required to

⁷ AR 1.

⁸ OFM is a “division” of the Governor’s Office. RCW 43.41.030.

⁹ RCW 43.370.030(3)(d).

¹⁰ RCW 43.70.040.

make CON determinations “consistent with the statewide health resources strategy.”¹¹

As directed, the Department issued a notice of proposed rulemaking in August 2013, indicating it intended to amend WAC 246-310-010 to define, “sale, purchase, or lease” to mean “any transaction in which the control, either directly or indirectly, of part or all of any existing hospital changes to a different person including, but not limited to, by contract, affiliation, corporate membership restructuring, or any other transaction.”¹² In December, it adopted the proposed definition—unchanged despite numerous comments—as final.¹³

B. Potential Application of the New Rule

In this litigation, the Department requested a stay and accelerated review because it was concerned that several hospital affiliations, non-reviewable under its previous interpretation, were escaping review under its new rule because of the superior court’s decision.¹⁴ The Department’s statements in this regard are concerning because, not only do the mentioned transactions not involve a sale, purchase or lease of a hospital,

¹¹ RCW 70.38.018(2).

¹² AR 79, 87.

¹³ AR 1220, 1229.

¹⁴ Declaration of Janice R. Sigman in support of motion for stay (July 30, 2014); Declaration of Janice Sigman in support of motion for accelerated review (Dec. 18, 2014).

or part of a hospital, some of them do not involve any change of control. Specifically, the Department mentions the affiliations between the UW Medicine and PeaceHealth, as well as between UW Medicine and Capital Medical Center.¹⁵ These affiliations do not involve changes of control; rather, they are referral arrangements for complex specialty services.¹⁶

The Department also suggested that, but for the superior court's decision, it would review the affiliation between Yakima Valley Memorial Hospital and Virginia Mason Health System.¹⁷ The Yakima Valley Memorial/Virginia Mason arrangement is intended to provide access to specialty services in Yakima through Virginia Mason providers.¹⁸ Although not finalized, the parties have stated that the proposed agreement will give Virginia Mason representation, but not a majority, on Yakima Valley Memorial's board, while Yakima Valley will have representation on the Virginia Mason board.¹⁹

On its face, the Yakima/Virginia Mason arrangement is similar—except for the lack of a board majority—to that between UW Medicine

¹⁵ Declaration of Janice Sigman in support of motion for stay.

¹⁶ See <https://www.documentcloud.org/documents/1212647-uw-medicine-and-peacehealth-health-system.html> and <http://www.capitalmedical.com/2014/news/uwm-collaboration/>.

¹⁷ *Id.*

¹⁸ See <http://memorialnews.memfound.org/yakima-valley-memorial-hospital-affiliation>.

¹⁹ *Id.*

and Valley Medical Center in Renton, where in 2011 the parties entered into an interagency cooperation agreement whereby the public hospital commissioners turned over operational control of the hospital to a operating board dominated by UW Medicine representatives.²⁰

The UW Medicine/Valley arrangement seems to be the model for another affiliation that the Department has indicated would be subject to review under its new rule.²¹ It involves Valley General Hospital in Monroe and Evergreen Health System in Kirkland, both operated by public hospital districts. Valley General, which had been struggling, entered into an interlocal cooperation agreement with Evergreen, whereby the Monroe hospital will be governed by an operating board consisting of two commissioners from each district and the CEO of Evergreen Health.²²

None of these arrangements involves a sale, purchase, or lease of a hospital or part of a hospital. None of them has been shown to reduce access to the services previously provided by the involved institutions.

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²⁰ See *Pub. Hosp. Dist. No. 1 of King Cnty. v. Univ. of Wash.*, 182 Wn. App. 34, 36, 327 P.3d 128 (2014) (describing and upholding arrangement, which was not subjected to CON review).

²¹ Declaration of Janice R. Sigman in Support of Motion for Accelerated Review.

²² [http://www.valleygeneral.org/about us/](http://www.valleygeneral.org/about-us/).

IV. STATEMENT OF THE ISSUES

1. Did the Department exceed its statutory authority when it amended WAC 246-310-010 to expand the type of transactions subject to CON review?

2. Was the Department's action arbitrary and capricious?

V. ARGUMENT

A. **Expanded CON Jurisdiction Hinders the Ability of Hospitals to Adapt to Health Care Reform.**

The ACA is the largest driver behind the recent affiliations and other arrangements between health care organizations in Washington. Interjecting the cost, delay, and uncertainty attendant to CON review into this environment is not only unwarranted by the statutory language, but it also interferes with necessary market-based responses to the ACA. These concerns are heightened insofar as the CON process may be driven by politics.

Specifically, the method by which Medicare pays hospitals is shifting from payment based on volume and intensity to methodologies that reward quality of care and reduced cost.²³ Private insurers are

²³ See, Linking Quality to Payment, available at <http://www.medicare.gov/hospitalcompare/linking-quality-to-payment.html>; American Hospital Association, *Hospital Field Realignment*, (4/15/14) available at <http://www.aha.org/content/14/ip-hosprealign.pdf>.

following suit.²⁴ Under the new methodologies, the amount hospitals will be paid depends on meeting certain performance metrics, such as improved clinical outcomes, lower cost per case, information technology compliance, high patient satisfaction, and lower readmission rates.²⁵ As a part of this initiative, providers also may be penalized if they fail to implement an Electronic Health Record system,²⁶ which can be extremely costly, particularly for smaller facilities. Additionally, because reimbursement from Medicare and Medicaid is expected to decrease, it is imperative that these hospitals are able to negotiate favorable contracts with private insurers, which is difficult on a stand-alone basis.²⁷

These forces have led many hospitals, particularly those operated on a stand-alone basis or as part of small systems, to conclude that they must affiliate with other hospitals or health systems in order to meet the

²⁴ Rahkumar, Conway, and Tavenner, *CMS—Engaging Multiple Payers in Payment Reform*, Journal of the American Medical Ass’n, (May 21, 2014), available at

http://jama.jamanetwork.com/article.aspx?articleid=1864086&utm_campaign=social_042114&utm_medium=twitter&utm_source=@jama_current.

²⁵ See n. 23.

²⁶ See <http://www.cms.gov/Regulations-and-Guidance/Legislation/EHRIncentivePrograms/index.html>; Electronic health record systems can cost as much as \$50 million for mid-sized hospitals. American Hospital Association, *Hospital Field Realignment*, (4/15/14) available at <http://www.aha.org/content/14/ip-hosprealign.pdf>.

²⁷ American Hospital Association, *Hospital Field Realignment*, (4/15/14) available at <http://www.aha.org/content/14/ip-hosprealign.pdf>.

benchmarks required by the ACA and to remain economically viable. Whether these affiliations involve a sale, purchase or lease of a facility or its assets, a change of control, and simply sharing of resources, technology, or branding depends on the specifics of the transaction and the needs of the parties. If an affiliation involves a sale, purchase, or lease of a hospital, CON review is appropriate and consistent with the legislative scheme's focus on examining whether bricks and mortar expenditures are supportable and appropriate. Contrary to the Department's suggestion, limiting CON review to actual sales, purchase and leases, does not gut the CON review.²⁸

²⁸ According to the Department's website, from 2010 to 2014, a number of hospital transactions were subjected to CON review as sales, purchases, or leases. In 2014, the Department reviewed and approved an affiliation between Franciscan Health System and the Regional Hospital for Respiratory and Complex Care. In 2013, it issued a certificate to PeaceHealth to lease and operate United General Hospital in Sedro Wooley. In 2012, it issued certificates in connection with the purchase of the assets of Auburn Regional Medical Center as well as a leaseback arrangement for Snoqualmie Valley Hospital. In 2011, certificates were issued in connection with the sale of Fairfax Hospital in Kirkland and the lease of Valley General Hospital in Monroe. In 2010, it issued a certificate allowing Swedish Health Services to lease and operate the former Stevens Hospital in Edmonds. Documentation of these actions is available at:

<http://www.doh.wa.gov/Portals/1/Documents/2300/2014/14-28EvalCoverLetter.pdf>;

<http://www.doh.wa.gov/Portals/1/Documents/2300/12-40%20Evaluation%20&%20cover%20letter.pdf>;

<http://www.doh.wa.gov/Portals/1/Documents/2300/12-40%20Evaluation%20&%20cover%20letter.pdf>;

The ACA also encourages formation of Accountable Care Organizations, (“ACOs”), which are consortiums of health care providers, usually including hospitals, physician groups, imaging centers, nursing homes, and others, that are able to provide a broad swathe of services on a coordinated basis.²⁹ A number of ACOs have been formed in Washington, and more are likely.³⁰ These organizations agree to provide the full range of covered services to enrollees, and therefore, require risk sharing among members.³¹ In order to be effective, ACOs generally require larger networks and more alignment among providers.³² ACO arrangements do not necessitate a change of control, but an aggressive regulator conceivably could take that position based on shared risk/reward.

<http://www.doh.wa.gov/portals/1/Documents/2300/11-29eval.pdf>;
<http://www.doh.wa.gov/portals/1/Documents/2300/11-29eval.pdf>.
<http://www.doh.wa.gov/Portals/1/Documents/2300/CN1504andCoverLetter.pdf>;

<http://www.doh.wa.gov/portals/1/Documents/2300/10-32eval.pdf>.

²⁹ <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/ACO/index.html>.

³⁰ UW Medicine’s ACO is described at <http://www.uwmedicine.org/aco>.

³¹ See http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/Downloads/ACO_Providers_Factsheet_I_CN907406.pdf.

³² Jenny Gold, *Accountable Care Organizations Explained*, Healthcare Finance News (Aug. 26, 2013), available at <http://www.healthcarefinancenews.com/news/accountable-care-organizations-explained>.

Additionally, the ACA and resulting changes in the health care market have a particular impact on small and rural hospitals.³³ Typically, these facilities operate a small acute care hospital, a physician practice and outpatient clinic, and perhaps a nursing home.³⁴ They most often serve a higher than average percentage of poor and elderly patients. In order to provide a full range of services, and now to meet ACA benchmarks, these hospitals often contract with larger hospitals and systems to provide emergency, laboratory, physical therapy, speech therapy, medical records management, or other necessary services. If these types of arrangements are treated as resulting in a change in control of part of a hospital, the ability of small and rural facilities to adapt to changing market conditions, and to take advantage of incentives and avoid penalties under the ACA, will surely become more costly, and their ability to respond nimbly will be hindered unduly.

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³³ See e.g., the Kaiser Foundation's recent report on the subject. G. Gugliotta, *Rural Hospitals, One of the Cornerstones of Small Town Life, Face Increasing Pressure*, Kaiser Health News (March 17, 2015) available at <http://kaiserhealthnews.org/news/rural-hospitals-one-of-the-cornerstones-of-small-town-life-face-increasing-pressure/>.

³⁴ Dayton General Hospital, operated by Columbia County Health System, is a good example. See <http://cchd-wa.org/>.

B. The Court should not Defer to the Department's New Interpretation of its Jurisdiction.

The Court should reject the Department's argument that its new interpretation of its CON jurisdiction is entitled to *Chevron*-type deference. As respondent has demonstrated, and the Department itself stated in earlier years, the statute unambiguously does not extend to "changes in control," whether by merger, membership change, or stock transaction. In such circumstances, no deference is due. *Dot Foods, Inc. v. Wash. Dept. of Revenue*, 166 Wn.2d 912, 921, 215 P.3d 185 (2009) ("[D]eference is not afforded when the statute in question is unambiguous.") (internal quotation omitted). Further, courts afford agencies no deference when determining if a statute is ambiguous, even under *Chevron*. *Wells Fargo Bank, N.A. v. F.D.I.C.*, 310 F.3d 202, 205-06 (D.C. Cir. 2002).

If the statute is deemed ambiguous, *Chevron* deference—under which federal courts defer to any plausible agency interpretation of federal statute—is inconsistent with this Court's role as final adjudicator of statutory meaning and should be expressly rejected.³⁵ *See Port of Seattle*

³⁵ For similar reasons, other states have rejected *Chevron*. *See In re Complaint of Rovas Against SBC Michigan*, 482 Mich. 90, 111, 754 N.W.2d 259, 271-72 (2008) (*Chevron* conflicts with separation of powers by compelling delegation of court's authority to administrative agency); *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 383 (Del. 1999).

v. Pollution Control Hearing Bd., 151 Wn.2d 568, 593, 90 P.3d 659 (2004) (“This court interprets the meaning of statute de novo; we may substitute our interpretation of the law for that of the agency.”); *Skamania Cnty. v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 42, 26 P.3d 241 (2001) (“An agency's conclusions of law, including its interpretations of statutes, are reviewed de novo under an ‘error of law’ standard that permits us to substitute our judgment for that of the agency.”).

In accordance with these principles, Washington courts may give weight to agency interpretations in certain circumstances, but the agency’s interpretation is never controlling. *See, e.g., Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 221, 173 P.3d 885 (2007). Under this construct, the weight given to agency judgment “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors that give it power to persuade, if lacking power to control.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *also see Western Telepage, Inc. v. Tacoma*, 95 Wn. App. 140, 146, 974 P.2d1270 (1999) (citing *Skidmore*). No weight is afforded to agency judgments that are inconsistent with positions it has long advocated. *Young v. United Parcel Serv.*, --- U.S. ---, 2015 WL 1310745, Slip Op. at 16 (No. 12-1226, March 25, 2015); *also see Dot*

Foods, 166 Wn.2d at 921 (deference refused when agency's position was at odds with position taken shortly after statute enacted).

Washington courts also do not afford any deference to agencies' attempts to expand their own authority. *US W. Commc'ns, Inc. v. Wash. Utils. & Trasnp Comm'n*, 134 Wn.2d 48, 56, 949 P.2d 1321 (1997). ("we do not defer to an agency the power to determine the scope of its own authority."); *In re Elec. Lightwave, Inc.*, 123 Wn.2d 530, 540, 869 P.2d 1045 (1994) ("same."). Here, the Department's expanded definition of sale, purchase, or lease accomplishes exactly that: it confers agency jurisdiction over transactions it had previously deemed non-reviewable.

Deference to agency interpretations that do not involve the exercise of agency expertise is not warranted. *Cascade Court Ltd. P'ship v. Noble*, 105 Wash. App. 563, 567, 20 P.3d 997 (2001); *Russell v. Dep't of Human Rights*, 70 Wn. App. 408, 412, 854 P.2d 1087 (1993). Here, it is undisputed that: (a) the Governor bypassed the statutorily prescribed means of recommending changes in CON administration and issued a directive requiring the Department to change its position; and (b) in the course of doing so, the Department chose to ignore OFM's report,³⁶ which found no proof that hospital affiliations caused restricted access to health care services. No exercise of expertise or judgment was involved. In fact,

³⁶ CP 400, 448, 452.

the contrary appears to be the case; the Department ignored the Governor's own study in order to comply with its political marching orders. In these circumstances, deference also is inappropriate because willful disregard of relevant evidence amounts to arbitrary and capricious decision making. *See Childrens Hosp. & Med. Ctr. v. Wash. State Dep't of Health*, 95 Wn. App. 858, 871, 975 P.2d 567 (1999) (rejecting Department's interpretation of own rule, where agency ignored undisputed medical evidence).

Finally, the Department's attempts to justify its change of position by arguing that, even if recent affiliations have not resulted in restrictions on access, expansion of CON jurisdiction promotes "transparency, systematic review, and statewide data collection."³⁷ To the extent these are reasons for CON review,³⁸ they have been so since 1984. The Department does not explain how the need for transparency, review and data collection justify an interpretation of "sale, purchase, or lease" that is so much broader than the meaning it gave to those terms over the preceding 28 years; surely systematic review, statewide data collection

³⁷ Reply Brief at 1.

³⁸ As originally explained by this Court, the primary purpose of CON review is to control health care costs by limiting competition. *St. Joseph Hosp. & Health Care Ctr. v. Dep't of Health*, 125 Wn.2d 733, 741, 887 P.2d 891 (1995).

and transparency were equally important in 2011 when it declared the Swedish Health Services and Providence Health & Services affiliation exempt (CP 98-99), or in 2010 when PeaceHealth and Southwest Washington Health System affiliated (CP 128, 130), in 2006 when Good Samaritan Healthcare and MultiCare Health System affiliated (CP 160, 162), or in 2000 when the former Providence-Seattle hospital became a part of the Swedish Health Services (CP 83-84).

The Department did not assert jurisdiction over these transactions because it understood that the statutory terms “sale, purchase, or lease” did not apply to them. In light of the high profile nature of many of these exempt transactions, even the Department does not suggest the Legislature was unaware of its interpretation. Given that the Legislature amended RCW 70.30.105 nine times³⁹ since the Department first announced its interpretation in 1985 without ever changing the wording of subsection 4(b), legislative acquiescence should be presumed. *See Dot Foods*, 166 Wn.2d at 921 (“As a general rule, where a statute has been left unchanged by the legislature for a significant period of time, the more appropriate method to change the interpretation or application of a statute is by

³⁹ L. 2012 c 10 § 47; L. 2009 c 315 § 1; L. 2009 c 242 § 3; L. 2009 c 54 § 1; L. 2004 c 261 § 6; L. 1996 c 50 § 1; L. 1992 c 27 § 1; L. 1991 sp.s. c 8 § 4; L. 1989 1st ex.s. c 9 § 603.

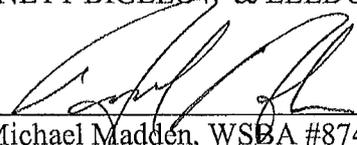
amendment or revision of the statute, rather than a new agency interpretation.”).

V. CONCLUSION

For these reasons, the Court should reject the Department’s attempt to administratively amend the CON law, and affirm the superior court.

RESPECTFULLY SUBMITTED this 30th day of April, 2015.

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CERTIFICATE OF SERVICE

I, certify under penalty under the laws of the State of Washington that on April 8, 2015, I caused the foregoing to be delivered as follows:

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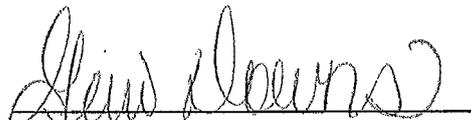
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Dear Clerk:

Attached for filing is a Motion for Permission to File Amicus Curiae Brief and the Amicus Curiae Brief of Washington Rural Health Association and Northwest Association of Nurse Executives in the above-referenced case.

Filer: Michael Madden
WSBA # 8747
Phone: 206-622-5511
Email: mmadden@bllaw.com

On behalf of Washington Rural Health Association and Northwest Association of Nurse Executives who are not parties to this action.

GERRI DOWNS
Legal Assistant to Michael Madden and Jenny M. Churas
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