

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Nov 25, 2014, 4:48 pm
BY RONALD R. CARPENTER
CLERK

E

NO. 90486-3

RECEIVED BY E-MAIL

hph

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON STATE HOSPITAL ASSOCIATION,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Appellant.

**CORRECTED ANSWERING BRIEF OF RESPONDENT
WASHINGTON STATE HOSPITAL ASSOCIATION**

Douglas C. Ross, WSBA #12811
Brad Fisher, WSBA #19895
Rebecca Francis, WSBA # 41196
Davis Wright Tremaine LLP
Suite 2200 1201 Third Avenue
Seattle, WA 98101-3045
(206) 622-3150 Phone
(206) 757-7700 Fax

Barbara A. Shickich, WSBA #8733
Riddell Williams PS
1001 Fourth Avenue, Suite 4500
Seattle, WA 98154-1065
Phone: 206-389-1680
Fax: 206-389-1708

*Attorneys for Respondent
Washington State Hospital Association*



ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. STATEMENT OF THE ISSUES.....	3
III. STATEMENT OF THE CASE.....	3
A. Washington State Hospital Association.....	3
B. The Certificate of Need Law.....	4
C. The Cost of CN Applications and the Department’s Formal and Binding Non-Reviewability Process	5
D. For 30 Years the Department Interpreted the Sale, Purchase, or Lease of a Hospital to <i>Exclude</i> Other Change-in-Control Transactions	7
E. The Governor’s Directive	9
F. The Department’s Rulemaking and Adoption of the New Control Rule.....	10
G. The OFM Report.....	13
H. Procedural History	15
IV. STANDARDS OF REVIEW	16
V. ARGUMENT.....	17
A. The Department Exceeded Its Statutory Authority.....	17
1. The New Control Rule Is Inconsistent with the Plain Language of RCW 70.38.105(4)(b).....	17
a. The Legislature Regulated Only Sales, Purchases, or Leases of Hospitals	19

b.	The Legislature Explicitly Regulates Changes in Control in Title 70	23
c.	For 30 Years the Department Interpreted RCW 70.38.105(4)(b) as Written.....	28
2.	The Department’s Other Arguments Lack Merit.....	31
a.	The Department’s Perception of Changes in Hospital Transactions Cannot Render an Unambiguous Statute Ambiguous	32
b.	Hospital Change-in-Control Transactions Are Not New and “Transparency” Does Not Justify Amending the Statute by Rule	37
c.	The Department Lacks Authority to Expand the CN Law by Rule	40
d.	The Department’s Interpretation Is Not Reasonable.....	44
B.	The Court Also May Affirm on the Alternative Ground the Department Acted Arbitrarily and Capriciously	47
VI.	CONCLUSION	50

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>AllianceOne Receivables Mgmt, Inc. v. Lewis</i> , 180 Wn.2d 389 (2014)	19
<i>Beers v. Ross</i> , 137 Wn. App. 566 (2007)	49
<i>Bostain v. Food Express, Inc.</i> , 159 Wn.2d 700 (2007)	16, 17, 47
<i>Bour v. Johnson</i> , 122 Wn.2d 829 (1993)	44
<i>Buecking v. Buecking</i> , 179 Wn.2d 438 (2013)	18
<i>Byers v. Comm'r</i> , 740 F.3d 668 (D.C. Cir. 2014)	34
<i>Cajun Elec. Power Coop., Inc. v. F.E.R.C.</i> , 924 F.2d 1132 (D.C. Cir. 1991)	18
<i>Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984)	34
<i>Chi. Title Ins. Co. v. Wash. State Office of Ins. Comm'r</i> , 178 Wn.2d 120 (2013)	44
<i>Children's Hosp. & Med. Ctr. v. Wash. State Dep't of Health</i> , 95 Wn. App. 858 (1999)	43
<i>Church of Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520 (1993)	32
<i>Dot Foods, Inc. v. Wash. Dep't of Revenue</i> , 166 Wn.2d 912 (2009)	<i>passim</i>

<i>Edelman v. State ex rel. Pub. Disclosure Comm'n</i> , 152 Wn.2d 584 (2004)	<i>passim</i>
<i>Friends of Earth, Inc. v. EPA</i> , 446 F.3d 140 (D.C. Cir. 2006)	2, 21, 44
<i>Greater Yellowstone Coalition, Inc. v. Servheen</i> , 665 F.3d 1015 (9th Cir. 2011)	48
<i>Green River Cmty. Coll. v. Higher Ed. Pers. Bd.</i> , 95 Wn.2d 108 (1980), <i>as modified on other grounds</i> , 95 Wn.2d 962 (1981)	17, 34
<i>In re Impoundment of Chevrolet Truck</i> , 148 Wn.2d 145 (2002)	35, 41, 47
<i>Kennecott Utah Copper Corp. v. U.S. Dep't of Interior</i> , 88 F.3d 1191 (D.C. Cir. 1996)	46
<i>Kern County Land Co. v. Occidental Petroleum Corp.</i> , 411 U.S. 582 (1973)	27
<i>King Cnty. Pub. Hosp. Dist. No. 2 v. Wash. State Dep't of Health</i> , 178 Wn.2d 363 (2013)	4
<i>LaMon v. Butler</i> , 112 Wn.2d 193 (1989)	47
<i>Overlake Hosp. Ass'n v. Dep't of Health of State of Wash.</i> , 170 Wn.2d 43 (2010)	43
<i>Puget Sound Harvesters Ass'n v. Wash. State Dep't of Fish & Wildlife</i> , 157 Wn. App. 935 (2010)	47, 48
<i>Resident Councils of Washington v. Leavitt</i> , 500 F.3d 1025 (9th Cir. 2007)	35, 36, 37
<i>Rios v. Wash. Dep't of Labor & Indus.</i> , 145 Wn.2d 483 (2002)	48

<i>Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit Cnty.</i> , 135 Wn.2d 542 (1998)	22
<i>St. Joseph Hosp. & Health Care Ctr. v. Dep't of Health</i> , 125 Wn.2d 733 (1995)	4, 43
<i>State v. Dodd</i> , 56 Wn. App. 257 (1989)	18, 22
<i>State v. Johnson</i> , 179 Wn.2d 534 (2014)	24, 25
<i>State v. Munson</i> , 23 Wn. App. 522 (1979)	35, 41, 42, 47
<i>Swinomish Indian Tribal Cmty. v. Wash. State Dep't of Ecology</i> , 178 Wn.2d 571 (2013)	<i>passim</i>
<i>Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n</i> , 149 Wn.2d 17 (2003)	16
Statutes	
RCW 7.48.050(11)	25
RCW 7.48A.010(11)	25
RCW 23B.01 <i>et seq.</i>	39
RCW 23B.19.020(15)	25
RCW 34.05.325(6)(a)(i)	48
RCW 34.05.530	3
RCW 34.05.562(1)(b)	49
RCW 34.05.562(1)(c)	49
RCW 34.05.570(4)(c)	3
RCW 70.38.025	1, 5, 9

RCW 70.38.025(15).....	5, 20, 23
RCW 70.38.105(1).....	40
RCW 70.38.105(4).....	<i>passim</i>
RCW 70.38.105(4)(b)	<i>passim</i>
RCW 70.38.111(5)(c)	24
RCW 70.38.115(9).....	39
RCW 70.38.135(3)(c)	40, 41, 42, 43
RCW 70.41.020(4).....	5, 20, 23
RCW 70.44	25
RCW 70.44.315(1)(g)	39
RCW 70.44.315(4)(a)	25
RCW 70.45	24
RCW 70.45.020(3).....	25
RCW 70.45.050	39
RCW 82.45.010	25
Rules and Regulations	
RAP 2.4(a).	50
WAC 246-310-010(54).....	2, 10, 45
WAC 246-310-050.....	7
WAC 246-310-050(1).....	6
WAC 246-310-050(1), (5)	36
WAC 246-310-050(5).....	7

WAC 246-310-110(2)(b). Dept.	39
WAC 246-310-150(1)(a)	40
WAC 246-310-210.....	4
WAC 246-310-490(3).....	35
Legislative Materials	
Laws 1933 ch. 1985	39
Laws 1965 ch. 53	39
Laws 1967 ch. 235	39
Laws 1989 ch. 1965	39
Other Authorities	
<i>Black's Law Dictionary</i> 1454 (9th ed. 2009).....	19, 20
“Licenses, Permits, and Certificates,” Washington State Department of Health, <i>available at</i> www.doh.wa.gov/LicensesPermitsandCertificates/ FacilitiesNew ReneworUpdate/CertificateofNeed/ReviewProcess	40
<i>Webster's Third New Int'l Dictionary</i> 2003 (2002).....	19, 20

I. INTRODUCTION

For almost 30 years, the Department of Health interpreted RCW 70.38.105(4)(b) according to its plain language, subjecting the “sale, purchase, or lease of part or all of any existing hospital as defined in RCW 70.38.025” to review under the Certificate of Need (“CN”) law. In a series of binding, formal determinations dating back to 1985, the Department consistently ruled that stock transactions between non-hospital entities, mergers, affiliations, and member substitutions are “*not*” hospital sales “subject to review under the state’s CON law.” CP 88 (emphasis added). Rather, it applied the statute only to the sale of hospital facilities, admitting that was the statute’s intended limit. CP 87.

Last summer, the Department asserted that changed circumstances somehow rendered the statute “ambiguous,” justifying promulgating a new rule. This new rule would expand the Department’s regulatory authority to include not just the review of sales or leases of hospitals, but also of any event that indirectly results in any change in control of any part of a hospital. This abrupt change in “interpretation” stemmed from a directive Governor Inslee issued in response to lobbying efforts by interest groups critical of religiously-affiliated health care providers. Within months of the Governor’s request, the Department promulgated the “New Control Rule” (or “Rule”). This Rule purports to “define” the “sale,

purchase, or lease of part or all of any existing hospital” to include “any transaction in which the control, either directly or indirectly, of part or all of an existing hospital changes.” WAC 246-310-010(54).

In its opening brief, the Department contends the New Control Rule is good policy. According to it, since 2009, hospitals affiliating with Catholic health systems have structured transactions to avoid CN review under RCW 70.38.105(4)(b), and as a result, have reduced or may reduce certain services. Dept. Br. at 1. No data or evidence supports the Department’s accusations. In fact, the only evidence that does exist—a report the Washington State Office of Financial Management (“OFM”) sent the Department in draft form during the rulemaking period (“OFM Report”)—confirms that communities with religiously-affiliated hospitals do *not* have diminished access to services. See CP 372-73, 449-50, 400.

But the Department’s policy arguments are for the legislature to consider. See *Swinomish Indian Tribal Cmty. v. Wash. State Dep’t of Ecology*, 178 Wn.2d 571, 601 (2013). The Department “may not avoid the [legislative] intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.” *Friends of Earth, Inc. v. EPA*, 446 F.3d 140, 145 (D.C. Cir. 2006).

The New Control Rule is transparent legislation-by-rulemaking. The Superior Court correctly concluded the Department’s actions

exceeded the Department's statutory authority, and this Court should affirm. This Court may also affirm on the alternative ground that the Department acted arbitrarily and capriciously when it discarded 30 years of decisions without even considering the OFM Report.

II. STATEMENT OF THE ISSUES

1. Did the Department exceed its statutory authority when it promulgated the New Control Rule to expand the reach of the CN laws beyond the matters the legislature enumerated in RCW 70.38.105(4)?

2. Did the Department act arbitrarily and capriciously when it changed its long-standing interpretation of RCW 70.38.105(4) at the request of the Governor, for reasons contrary to the available evidence?

III. STATEMENT OF THE CASE

A. Washington State Hospital Association

Respondent, the Washington State Hospital Association (“WSHA”), is a Washington not-for-profit corporation, whose members include 99 Washington hospitals. CP 5 ¶ 3. WSHA advocates for and serves its members on issues that affect the delivery, quality, accessibility, affordability, and continuity of health care. *Id.* The Department does not dispute that WSHA has standing to challenge the New Control Rule under RCW 34.05.530 and RCW 34.05.570(4)(c).

B. The Certificate of Need Law

The legislature enacted the State's CN law in 1979 in response to congressional encouragement to use health care planning to "control health care costs." *St. Joseph Hosp. & Health Care Ctr. v. Dep't of Health*, 125 Wn.2d 733, 735 (1995) (citing Pub. L. No. 93-641, 88 Stat. 2225 (repealed in 1986)); *Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kan. City*, 452 U.S. 378, 386 (1981)). The legislature "intended the [CN] requirement to provide accessible health services and assure the health of all citizens in the state while controlling costs." *King Cnty. Pub. Hosp. Dist. No. 2 v. Wash. State Dep't of Health*, 178 Wn.2d 363, 366 (2013).

The CN laws seek to achieve these goals by requiring some providers or projects to obtain a CN before the provider may offer a service or the project may occur, thereby restricting entry into the market. RCW 70.38.105(4); *King Cnty.*, 178 Wn.2d at 366.¹ Many projects and providers are *not* subject to CN review; the statute does not itself reveal the reasons why some are subject to CN review and others are not.²

¹ The CN law identifies four criteria the Department must consider in reviewing whether to grant CN applications: the "need for the proposed project, financial feasibility of the project, structure and process of care, and containment of the costs of health care." *King Cnty.*, 178 Wn.2d at 367; *see also* WAC 246-310-210 through -240.

² New nursing homes, kidney dialysis centers, and ambulatory surgery centers require CN review, but CN review is not required for the sale or purchase of existing nursing homes, dialysis centers, or ambulatory surgery centers. All dialysis center expansions require a CN, but only some nursing home expansions do. Transfers of existing dialysis

In 1984, the legislature added the “sale, purchase, or lease of part or all of any existing hospital as defined in RCW 70.38.025” to RCW 70.38.105(4) as subsection (b). RCW 70.38.025(15) defines a “hospital” as “any health care institution which is required to qualify for a license.” The licensure laws apply to the actual facilities that provide the health care services. RCW 70.41.020(4).³ The legislature has not amended RCW 70.38.105(4)(b) since its adoption in 1984.

C. The Cost of CN Applications and the Department’s Formal and Binding Non-Reviewability Process

Although, to WSHA’s knowledge, the Department has never blocked a hospital sale under the CN laws, the CN application process still imposes substantial cost burdens and delays on health care providers. In October 2013, as part of its Small Business Economic Impact Analysis and Significant Legislative Rule Analysis for the Rule, the Department asked hospitals to estimate CN application costs. AR 92-96, 108-11. Those survey results showed a CN application costs, on average, well over

facilities, nursing homes, and surgery centers are not subject to review; nor are mergers of physician groups. Adult residential treatment facilities are not subject to review, though they provide some services offered by psychiatric hospitals, which are. Freestanding radiation oncology treatment facilities, proton beam centers, and mammography centers are not subject to CN review. RCW 70.38.105(4).

³ RCW 70.41.020(4) defines a “Hospital” as “any institution, place, building, or agency which provides accommodations, facilities and services over a continuous period of twenty-four hours or more, for observation, diagnosis, or care, of two or more individuals not related to the operator who are suffering from illness, injury, deformity, or abnormality, or from any other condition for which obstetrical, medical, or surgical services would be appropriate for care or diagnosis.”

\$100,000, and often over \$500,000. AR 92-96, 108-11, 181. This represents money and provider time *not* spent on providing or improving health care services. *See* AR 1162.

In addition to the direct financial costs of an application, the CN review process takes months to complete—not including the years that administrative proceedings and judicial appeals add to the process. *See* AR 159-60, 181, 189, 215, 1165 & n.v. An audit the Joint Legislative Audit and Review Committee (“JLARC”) conducted in 2006 found 64% of CN application decisions are not made within the statutory time frames, even with 30-day extensions. AR 189 (citing JLARC study).⁴ The JLARC found 20% of CN decisions took seven months or more. *Id.* During the comment period on the New Control Rule, one WSHA member, Evergreen Health, commented it waited over one year for approval of a single CN application. *Id.*

Because the CN process imposes substantial economic burdens and can delay providing critical services, the Department has a process by which providers may learn whether a contemplated action is subject to CN review. Providers “may submit a written request to the certificate of need program requesting a formal determination of applicability of the certificate of need requirements to the action.” WAC 246-310-050(1).

⁴ Available at www.leg.wa.gov/JLARC/AuditAndStudyReports/2006/Pages/06-6.aspx.

The Department’s response is “binding upon the department.” WAC 246-310-050(5). Once the Department decides an action is not reviewable under the statute, the provider may proceed immediately, without submitting an expensive and time-consuming CN application.

D. For 30 Years the Department Interpreted the Sale, Purchase, or Lease of a Hospital to *Exclude Other Change-in-Control Transactions*

For 30 years the Department issued formal, binding applicability determinations under WAC 246-310-050, in which it consistently applied RCW 70.38.105(4)(b) as written, using the common understanding of the words “sale” and “hospital.” In interpreting the statute’s plain language, the Department repeatedly found stock transactions between entities that are not hospital facilities, affiliations, corporate reorganizations, mergers, and member substitutions—all of which may have involved an indirect change in ownership or control—were *not* “sales” or “purchases” of “hospitals” and therefore not subject to CN review. *See* CP 74-75, 80-81; AR 69, 159, 214, 1161-62.⁵

For example, in 2000, the Department found a corporate reorganization and merger involving Swedish Health Services and

⁵ Hospital affiliations often enable hospitals to improve, expand, and streamline health care services. *See* CP 72-73; AR 188-89, 214-15, 1156-57, 1162. In some instances, a hospital must affiliate to maintain services, recruit top-quality doctors and nurses, provide specialty care, or afford necessary renovations. *See* CP 72-73; AR 214-15.

Providence Health and Services not subject to CN review because “the CON law was *not intended* to apply to merger transactions.” CP 87 (emphasis added). Providence, which owned and operated Providence Seattle Medical Center hospital, formed a new holding company to hold the assets of that hospital. CP 83-84. When Providence merged the holding company into Swedish, Swedish gained control of the Providence Seattle Medical Center. *Id.* The Department determined this was *not* a “sale, purchase, or lease of part or all of any existing hospital” under RCW 70.38.105(4) because “*a merger of hospitals is not subject to review under the state’s CON law.*” CP 88 (emphasis added).

The Department reached the same conclusion in many other non-profit member substitutions, mergers, and reorganizations in which a change of control occurred, but which were not the “sale, purchase, or lease” of a “hospital.” *See, e.g.*, CP 80-81, 90-91, 95, 105, 108-10, 114, 117-19, 121, 128-30, 136, 142-45, 149, 154-58, 162-69, 323-24, 327-28; AR 1165. In a 2007 decision, the Department described its conclusion as “*consistent with past practice determinations for this type of affiliation.*” CP 158 (emphasis added). As recently as August 2013, during the rulemaking period, it again declared a non-profit member substitution was *not* a sale, purchase, or lease of a hospital, and again described its decision as “consistent with previous similar determinations” it issued. CP 114.

The Department also has recognized RCW 70.38.105(4)(b) does not apply to stock transactions between companies whose downstream assets include hospitals because the statute applies only to the “sale, purchase, or lease of part or all of any existing hospital as defined in RCW 70.38.025,” not to the entities that own or control the hospital. *See, e.g.*, CP 7-8 ¶ 13, 171, 184, 186-87, 190-91, 196, 198-99, 202; AR 1166.

Whatever the form of the transaction, the Department has recognized that in RCW 70.38.105(4)(b), the legislature decided to limit CN review to the *sale, purchase, or lease of a hospital*.⁶ Not once in these 30 years of binding determinations did the Department identify any perceived “ambiguity” in the statutory language or legislative intent.

E. The Governor’s Directive

Despite the plain statutory language, the long history of binding decisions interpreting it, and the lack of legislative action, Governor Inslee issued a directive to the Department on June 28, 2013, to begin rulemaking to “consider how the structure of affiliations, corporate restructuring, mergers, and other arrangements among health care facilities results in outcomes similar to the traditional methods of sales, purchasing,

⁶ In 2010, the Department issued a single anomalous decision, in which it concluded a stock purchase agreement under which the subsidiary of a for-profit company acquired a for-profit hospital’s parent company was subject to review. After this decision, the Department issued at least three decisions consistent with its long-standing interpretation of the plain language of RCW 70.38.105(4)(b), finding member substitution transactions are *not* sales, purchase, or lease of hospitals under RCW 70.38.105(4)(b). CP 97-126.

and leasing of hospitals.” AR 1. The directive resulted from lobbying efforts by interest groups that distrust Catholic health care providers. *See* AR 2; *see also* AR 1163.

F. The Department’s Rulemaking and Adoption of the New Control Rule

The Department initiated rulemaking on July 3, 2013. AR 71. In its Notice of Proposed Rulemaking, it stated it was “amending the [CN] rules to address health care facility affiliations, corporate restructuring, mergers and other arrangements” in response to the Governor’s directive. AR 79. Under the new rule, “[t]hese types of transactions would require prior CoN review by the department.” *Id.* The Department thus added a ninth category to the legislature’s list in RCW 70.38.105(4) of matters subject to CN review: Any “health care facility” transaction the Department believes will “indirectly” result in a change in “control” of any “part” of a hospital. WAC 246-310-010(54).

During the comment period, the Department received comments from WSHA, WSHA members, and the general public. *See* CP 72-81; AR 69, 158, 181, 188, 213, 270, 1156, 1161. WSHA and various hospitals pointed out the purpose of the CN law is to evaluate whether a need for a service exists, not to compel services—a concept antithetical to the purpose of the CN laws. *See* CP 76; AR 159, 214. They explained the

New Control Rule would invalidly expand the scope of the CN law and reverse over 30 years of binding Department decisions under RCW 70.38.105(4)(b), without any legislative amendment. *See* CP 74-76; AR 69-70, 158-60, 181-82, 188-90, 213-16, 270, 1156-57, 1161-62.

Responding to concerns over protecting access to certain services, WSHA noted that hospitals (regardless of religious affiliation) generally do not provide death-with-dignity services, and very few abortions occur in an inpatient hospital setting, as these services are typically offered by other types of providers. CP 76; *see also* AR 182; CP 411 (in 2011, 1.1% of abortions statewide occurred in an inpatient hospital setting). WSHA also questioned how expanding the CN law to require review for every “direct or indirect” change-of-control transaction would improve or ensure access to these services in hospitals, and how the Department would determine the need for and access to these services in hospitals. AR 1163.

In addition, WSHA and its members explained the New Control Rule would *decrease* access to health care services because the CN review process takes months (and sometimes years) and is expensive. *See* AR 159-60, 181, 189, 215, 1165 & n.v, 92-96, 108-11, 181. The expanded scope of the Rule would not only lengthen existing delays, but it would also force hospitals either to spend more money on costly CN applications in many more transactions, contrary to the CN law’s goal of containing

health care costs, or to forego affiliations that would benefit patients and their communities. *See, e.g.*, AR 189, 214. Discouraging hospitals from entering beneficial partnerships, in turn, would risk reduced services. *See* CP 72-73; AR 214-15, 159-60, 181.

In responding to comments, the Department rationalized its decision to expand the CN law as consistent with the “[c]urrent [CN] review process” because that process “evaluates the reduction or loss of services in a community and alternatives for access to those services.” AR 1190; *see also* AR 1188. The Department cited nothing to show that requiring prior CN approval for every transaction involving the “direct or indirect” change in “control” of “any part” of a hospital would improve access to services hospitals provide. The Department even admitted it cannot compel hospitals to provide “a full range of legal reproductive and end-of-life services.” AR 1190-91; *see also* AR 1193.

In the Concise Explanatory Statement, the Department identified the Governor’s directive as the “agency’s reason[.]” for adopting the New Control Rule. AR 1211. The Department explained the Rule now makes CN review necessary for any “change in control of a hospital, whether by sale, purchase, lease, affiliations, corporate restructuring, mergers, and other arrangements,” if the transaction “results in the change of control, direct or indirect, of any part of an existing hospital to a different person (or entity).”

Id. It provided no reason for the Rule other than the Governor’s directive, though it acknowledged that directive “does not carry any statutory weight.” AR 1211-12, 1213-18 (Div. Reviewer Cmt., 12/09/13). The Department adopted the Rule on December 23, 2013. AR 1220, 1229.

G. The OFM Report

On the same day he issued his directive to the Department, Governor Inslee responded to a “letter concerning the rise in mergers and affiliations among hospital systems.” CP 372. The Governor advised he had asked his “staff to fully investigate the issues,” and had met with “legislators, regulators, hospitals, the Attorney General’s Office and concerned citizens.” *Id.* He acknowledged, however: “Thus far, we have not identified any situations in which Washingtonians have been denied access as a result of these mergers and affiliations.” *Id.* He stated the OFM “will initiate a review for specific access to care concerns,” and observed that “[o]nce that review is completed in the fall, *it may provide further information to help inform policymaking.*” CP 373 (emphasis added).

Consistent with the Governor’s expectation, in November 2013, during the rulemaking period, the OFM issued a report in draft form. CP 452. (It issued the Report in final form in early 2014; apart from a change in the cover page, the two reports appear the same.) The Report concluded no evidence exists that communities with religiously- owned or

affiliated hospitals have less access to tubal ligation, abortion, or death-with-dignity services in hospitals. *See* CP 452, 400.⁷

On November 27, 2013, almost one month *before* the Department adopted the New Control Rule, Joe Campo of the OFM emailed the draft report to Janis Sigman, the Program Manager for the CN Program. CP 452. Mr. Campo used the subject line “Catholic hospitals,” and told Ms. Sigman: “from what we could measure, there was *no* readily apparent access concerns,” noting hospitals typically are not the providers who perform abortions and death-with-dignity services. *Id.* (emphasis added). Ms. Sigman testified in the Superior Court that she never read Mr. Campo’s email or the attached report. CP 448 ¶ 3.

Instead, on December 2, 2013, she forwarded Mr. Campo’s email and the Report to Bart Eggen, the Executive Director for the Facilities Programs of the Office of Community Health Systems at the Department, and Steven Saxe, the Director of the Office of Community Health Systems, Health Systems Quality Assurance Division, at the Department. *Id.* In her email, Ms. Sigman stated: “I just got this draft from Joe Campo. I haven’t had time to read it yet but wanted you both to be aware of it.” CP 455. In the Superior Court, Mr. Eggen testified he “read the draft report attached to Joe Campo’s email,” but could not remember when

⁷ The Report also found no instances of “potential discriminatory practices against LGBT patients or their families.” CP 400.

exactly he read it. CP 454 ¶ 3. Mr. Saxe testified he “quickly reviewed the draft report attached to Joe Campo’s email, while the rulemaking process was underway for the rule at issue in this case.” CP 458 ¶ 3. He further stated: “My review led me to conclude that the report had nothing to do with the transparency and public process issues..., so I did not consider the draft report, nor did I discuss it with the other Department of Health employees involved in the rulemaking process.” *Id.*

Ms. Sigman, Mr. Eggen, and Mr. Saxe all participated in the rulemaking process for the New Control Rule. CP 448 ¶ 4, 454 ¶ 4, 458 ¶ 1. Even though the OFM Report addressed the precise policy justification for the Rule and was intended to “inform policymaking,” CP 373, the OFM Report “was not [] considered in the rulemaking process and decision to amend the rule.” CP 448 ¶ 4; *see also* CP 454 ¶ 4, 458 ¶ 3.

H. Procedural History

WSHA filed a timely petition for review in Thurston County Superior Court. CP 4. It asked the Court to invalidate the New Control Rule on three grounds: (1) the Rule exceeds the Department’s statutory authority because the Department’s enabling act does not permit it to amend the CN law, and because the Rule is inconsistent with RCW 70.38.105(4)(b); (2) the Department adopted the Rule arbitrarily and capriciously; and (3) the Department failed to follow proper procedure for

adopting significant legislative rules. CP 4-12, 55-68.

Following a June 6 hearing on WSHA's motion to invalidate the Rule, the Superior Court held the Rule "exceeds the statutory authority that was granted to [the Department]." It reasoned "the plain meaning of the statute [RCW 70.38.105(4)(b)] does not allow the regulation at issue." RP 41:4-6.⁸ The Court did not reach the other two grounds WSHA presented. RP 40:7-9. The Department sought direct review.

IV. STANDARDS OF REVIEW

The Department's challenge to the Superior Court's order arises under Washington's Administrative Procedure Act. "A court must declare an administrative rule invalid if it finds that the rule exceeds the statutory authority of the agency." *Swinomish*, 178 Wn.2d at 580.

Appellate courts review statutory interpretation questions de novo.⁹ *Dot Foods, Inc. v. Wash. Dep't of Revenue*, 166 Wn.2d 912, 919 (2009). "If the statute's meaning is plain, [the Court] give[s] effect to that plain meaning as the expression of the legislature's intent," *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708 (2007), and "the statute is not open to

⁸ The Court also granted the Department's motion to strike the OFM Report. RP 8:22-9:8. Although the Court erred in granting this motion, the Court's evidentiary ruling was not germane to its dispositive ruling that the Department lacked authority to adopt the Rule, as discussed in Section V(B) below.

⁹ This Court also applies the de novo standard of review to the question whether to affirm the Superior Court's ruling on the alternative ground the Department acted arbitrarily and capriciously in adopting the New Control Rule. *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 149 Wn.2d 17, 24 (2003).

construction or interpretation.” *Green River Cmty. Coll. v. Higher Ed. Pers. Bd.*, 95 Wn.2d 108, 113 (1980), *as modified on other grounds*, 95 Wn.2d 962 (1981). The Court determines plain meaning “from the ordinary meaning of the language used in the context of the entire statute in which the particular provision is found, related statutory provisions, and the statutory scheme as a whole.” *Bostain*, 159 Wn.2d at 708.

V. ARGUMENT

A. The Department Exceeded Its Statutory Authority

1. The New Control Rule Is Inconsistent with the Plain Language of RCW 70.38.105(4)(b)

“Administrative rules or regulations cannot amend or change legislative enactments.” *Swinomish*, 178 Wn.2d at 580 (alteration and internal quotation marks omitted). “Rules that are not consistent with the statutes they implement are invalid.” *Id.* at 581; *see also Bostain*, 159 Wn.2d at 715. The New Control Rule is inconsistent with RCW 70.38.105(4)(b) because it *adds* to the legislature’s list of “sale, purchase or lease” of a hospital facility any direct or indirect change of “control” of any “part” of a hospital. The Rule does not define “sale, purchase or lease”; it expands the scope of the statute by rule, rather than by legislative amendment.

The Department argues the Court must defer to its interpretation of RCW 70.38.105(4)(b) because changes in the health care industry since

2009 render its new interpretation of the statute reasonable. *See* Dept. Br. at 1, 13-21, 25. But courts defer to administrative interpretations only of *ambiguous* statutes. The “agency is given *no deference at all* on the question whether a statute is ambiguous.” *Cajun Elec. Power Coop., Inc. v. F.E.R.C.*, 924 F.2d 1132, 1136 (D.C. Cir. 1991) (emphasis added). “Courts retain the ultimate authority to interpret a statute,” not agencies. *Edelman v. State ex rel. Pub. Disclosure Comm’n*, 152 Wn.2d 584, 590 (2004); *see also State v. Dodd*, 56 Wn. App. 257, 261 (1989) (same) (citing *Hearst Corp. v. Hoppe*, 90 Wn.2d 123 (1978)).

The starting point, as always, is the language of the statute—not whether industry changes might call for different statutory approaches. *Buecking v. Buecking*, 179 Wn.2d 438, 444 (2013). The plain language of RCW 70.38.105(4)(b) is unambiguous, as demonstrated by: (1) the ordinary dictionary definitions of the terms “sale” and “purchase”; (2) the fact the legislature explicitly regulates other change-in-control transactions in Title 70 when it wants to, but chose not to do so here; and (3) the Department’s unbroken history of interpreting the statute as applying only to “sales” and “purchases” of hospitals, not to other changes in control. Because the statute here is unambiguous, this Court “accord[s] no deference to [the] agency’s rule.” *Edelman*, 152 Wn.2d at 590.

a. **The Legislature Regulated Only Sales, Purchases, or Leases of Hospitals**

“In the absence of a specific statutory definition, words in a statute are given their common law or ordinary meaning.” *AllianceOne Receivables Mgmt, Inc. v. Lewis*, 180 Wn.2d 389, 395 (2014) (citation and internal quotation marks omitted). “To determine the plain meaning of a term undefined by statute, the court first looks at the dictionary definition,” including “*Black’s Law Dictionary*.” *Id.* The Department’s suggestion this Court should not consider the ordinary dictionary definitions in *Black’s* contradicts Washington law. *See* Dept. Br. at 15.

Here, the ordinary definitions of the terms “sale” and “purchase” in RCW 70.38.105(4)(b) do not include every change in control, and the statute does not regulate things other than actual hospitals. For these reasons, for nearly 30 years, neither the Department nor the industry discerned any ambiguity or confusion as to what the statute covers.

As the Department recognizes, the dictionary defines “sale” as “the act of selling: a contract transferring the absolute or general ownership of property *from one person or corporate body to another* for a price (as a sum of money or any other consideration).” *Webster’s Third New Int’l Dictionary* 2003 (2002) (emphasis added); Dept. Br. at 15. *Black’s Law Dictionary* defines “purchase” as “the act or instance of buying.” *Black’s*

Law Dictionary 1454 (9th ed. 2009). “Buy,” in turn, means “to get possession or ownership of by giving or agreeing to give money in exchange.” *Webster’s, supra*, 306. Importantly, the statute defines “hospital” as the facility providing the health care services. *See* RCW 70.38.105(4)(b); RCW 70.38.025(15); RCW 70.41.020(4).

Reading these definitions together confirms that in RCW 70.38.105(4)(b), the legislature intended to require CN review for the transfer from (in *Webster’s* words) “one person or corporate body to another” of ownership of a hospital facility (i.e., the property) for consideration—*not* for every “indirect” change in “control” of any “part” of a hospital, or for every sale of a controlling interest in stock of a corporate body that happens to own a hospital.

Dictionary definitions for the other types of transactions the Department would now call a “sale” of a “hospital” highlight the differences between what the legislature included in the statute and what it did not. For instance, *Black’s* defines “merger” as “[t]he act or an instance of combining or uniting”; “consolidation” as “[t]he act or process of uniting”; and “reorganization” as “[a] financial restructuring of a corporation.” *Black’s, supra*, at 1078, 351, 1412. These transactions do not necessarily involve a transfer of title to property, or the “buying” of anything, unlike “sale” and “purchase.” Yet by its plain terms, RCW

70.38.105(4)(b) refers only to the “sale, purchase, or lease” of a “hospital,” *not* to other change-in-control transactions.

This Court will not defer to agency rules that add language to unambiguous statutes, and “will not strain to find ambiguity where the language of the statute is clear.” *Edelman*, 152 Wn.2d at 591. In *Edelman*, for example, the Court held the Public Disclosure Commission exceeded its statutory authority when it promulgated a rule that created “a broad exemption to the single contribution limit where no such exemption exist[ed] in the statute.” *Id.* The Court held the statute was unambiguous because, among other things, if the legislature had wanted to create the exemption the agency desired, “it would have done so in the language of the statute. It didn’t.” *Id.* at 590. By creating the exemption, the agency “impermissibly add[ed] to the statute” and “therefore exceed[ed] [the Department’s] rule making authority.” *Id.* at 592. *See also Dot Foods*, 166 Wn.2d at 920-21 (invalidating rule adding language to statute); *Friends of Earth*, 446 F.3d at 144-45 (same).

As in *Edelman*, the New Control Rule adds language to RCW 70.38.105(4)(b). An indirect change of control would include things like changes in the stock ownership of a publicly-held corporation, or a simple change in the composition of a board of directors managing the affairs of an entity. Under the Rule, these common transactions would require

submitting a CN application, at an average cost exceeding \$100,000, and at a delay of months to years, without regard to whether the transaction would impact access to services in any way. AR 92-96, 108-11, 181.

In fact, in the Superior Court, the Department *admitted* that “for the [New Control Rule] to be valid this Court would have to interpret the statutory language as including a transaction *other* than a sale, purchase, or lease.” RP 24:23-26:6 (emphasis added). By the Department’s own admission, applying the statute to change-in-control transactions other than sales or purchases of hospitals would require the Court “to import additional language into the statute that the legislature did not use.” *Dot Foods*, 166 Wn.2d at 920. But under traditional separation of powers principles, only the legislature can do that. *See id.*; *see also Edelman*, 152 Wn.2d at 592; *Skagit Surveyors & Eng’rs, LLC v. Friends of Skagit Cnty.*, 135 Wn.2d 542, 567 (1998) (invalidating agency action that exceeded agency’s authority; Court “will not rewrite the statute”). “It is a cardinal rule of administrative law that an agency by its rulemaking authority may not amend or nullify a statute under the guise of interpretation.” *Dodd*, 56 Wn. App. at 260 (citing *Green River*, 95 Wn.2d at 112).

The Department cannot circumvent these basic principles by relying on a secondary definition of the verb “purchase,” or by providing its own gloss on the actual dictionary definitions of the transactions it

would now sweep into the terms “sale” and “purchase.” Dept. Br. at 15, 20. The Department’s focus on whether “sale” or “purchase” requires “monetary consideration” misses the point. Dept. Br. at 2, 14-15. The Department agrees a “sale” requires “transferring the absolute or general ownership of property from one person or corporate body to another,” and that RCW 70.38.105(4)(b) applies only to hospital facilities. *Id.* at 15 (quoting *Webster’s*); RCW 70.38.105(4)(b); RCW 70.38.025(15); RCW 70.41.020(4). An “indirect” “change in control” of “part” of a hospital, and a “change in control” of something other than a “hospital” (such as a health care system that operates hospitals or the board governing a hospital), are not “sales” of “hospitals” under RCW 70.38.105(4)(b), regardless of consideration.

b. The Legislature Explicitly Regulates Changes in Control in Title 70

Even if the Court were to look beyond the plain words of the statute, the Department offers no legislative history showing the legislature intended “sale” or “purchase” in RCW 70.38.105(4)(b) to encompass all conceivable change-in-control transactions—because, in fact, no such history exists. Instead, the Department argues “sale” or “purchase” of a “hospital” could be interpreted to include other direct or indirect changes in “control” of “part” of a hospital because some

Washington statutes regulating completely different industries have defined “sale” or “purchase” more broadly. Dept. Br. at 15-16. The Department’s argument ignores that the legislature in Title 70 of the RCW—the title containing the CN law—explicitly regulates changes in control beyond sales, purchases, and leases when the legislature desires that result. The Court must give meaning to the legislative decision not to regulate changes in control in RCW 70.38.105(4)(b).

For example, in RCW 70.38.111(5)(c), the legislature made “[t]he sale, lease, **acquisition, or use** of part or all of a continuing care retirement community nursing home” subject to CN review under certain circumstances. (Emphasis added.) If the legislature had believed the terms “sale” and “lease” already included “acquisition” or “use,” it would not have needed to list them separately. “The legislature’s choice of different words in another subsection of the same statute” in which RCW 70.38.105(4)(b) appears, “shows that a different meaning is intended” by “sale” and “purchase” than by “acquisition.” *Swinomish*, 178 Wn.2d at 587. *See also State v. Johnson*, 179 Wn.2d 534, 546-47 (2014) (court will not interpret statutes so as to render any portion “superfluous”).

Similarly, the legislature defined “[a]cquisition” in the statute that governs the acquisition of nonprofit hospitals, RCW 70.45, as “an **acquisition** by a person of an interest in a nonprofit hospital, **whether by**

purchase, merger, lease, gift, joint venture, or otherwise, that results in a change of ownership or control of twenty percent or more of the assets of the hospital, or that results in the acquiring person holding or controlling fifty percent or more of the assets of the hospital.” RCW 70.45.020(3) (emphasis added). The legislature applied this same definition to the term “acquisition” in the public hospital district statute, RCW 70.44. See RCW 70.44.315(4)(a). If the legislature believed the definition of “purchase” included “merger,” “joint venture,” “acquisition,” or other “change of ownership or control” transactions, it would not have needed to explicitly identify these terms, as it did. See *Johnson*, 179 Wn.2d at 546-47.

These provisions in Title 70 demonstrate the legislature understands the meaning of “sale” and “purchase,” and knows how to regulate change-of-control transactions *other* than sales and purchases when it wants to—up to and including the specific percentage of ownership that would trigger regulation.¹⁰ But the legislature has never

¹⁰ Many examples outside Title 70 show the legislature knows how to differentiate among different types of transactions. See, e.g., RCW 23B.19.020(15) (distinguishing between “merger, share exchange, or consolidation of a target corporation or a subsidiary of a target corporation,” on the one hand, and “sale, lease, exchange, mortgage, pledge, transfer, or other disposition or encumbrance,” on the other); RCW 7.48.050(11) & RCW 7.48A.010(11) (defining “sale” as “a passing of title or right of possession from a seller to a buyer for valuable consideration”); RCW 82.45.010 (defining “sale” as “[having] its ordinary meaning and includ[ing] any conveyance, grant, assignment, quitclaim, or transfer of the ownership of or title to real property ... for a valuable consideration,” and “the transfer or acquisition within any twelve-month period of a controlling interest in any entity with an interest in real property located in this state for a valuable consideration”).

amended RCW 70.38.105(4)(b) to encompass “acquisitions” or “change of ownership or control” transactions. These other statutes within Title 70 show the legislature “plainly is aware of the importance and meaning” of the terms it used in RCW 70.38.105(4)(b). *Swinomish*, 178 Wn.2d at 586. Under time-tested statutory construction principles, the Department has no right to add words to the statute that the legislature chose to omit.

The Department has long recognized as much. In its 2000 decision finding the Swedish-Providence statutory merger not subject to CN review, the Department observed RCW 70.38.105(4)(b) does not define “sale” or “purchase,” but another statute in Title 70 defined “acquisition” “to include acquiring by ‘purchase, merger, lease, joint venture, or otherwise.’” CP 87. The Department, rightly, concluded, “[t]herefore, its [sic] reasonable to assume that *had the CON law been intended to apply to mergers it would have specifically so stated*. The department concludes that the CON law was not intended to apply to merger transactions.” *Id.* (emphasis added).

Consistent with that plain language interpretation, the Department *explicitly distinguished* hospital change-in-control transactions from hospital sales or purchases in many other binding non-reviewability decisions. For instance, when it found the recent Franciscan/Highline non-profit member substitution transaction not subject to CN review under RCW 70.38.105(4)(b), the Department explained CN review *would* be required

“should either Franciscan Health System or Highline Medical Center be sold or leased to another entity,” *i.e.*, if an actual transfer of the hospital facility occurred. CP 122; *see also* CP 129, 137, 150, 202 (same).

The Department introduces out-of-jurisdiction cases involving other transactions under other statutes regulating other industries under other statutory definitions of “sale” or “purchase” to advance its argument. Dept. Br. at 17. But these cases undercut its position. In *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582 (1973), for instance, the U.S. Supreme Court addressed whether a merger and option agreement was a sale or purchase under the Securities Exchange Act. That Act, *unlike* RCW 70.38.105(4)(b), broadly defined “[t]he terms ‘buy’ and ‘purchase’ each [to] include any contract to buy, purchase, or otherwise acquire,” and “[t]he terms ‘sale’ and ‘sell’ each [to] include any contract to sell or otherwise dispose of.” *Id.* at 594 n.25. Despite those broad definitions, the Court held the merger and option agreement was *not* a sale or purchase under the Act. *Id.* at 596, 599, 604.¹¹

¹¹ *See also* Dept. Br. at 17 (citing *In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 49 F.3d 541, 541 (9th Cir. 1995) (holding the particular stock transaction before it “constituted a purchase and sale for the purposes of the securities laws and the class definition,” but “emphasiz[ing] ... the narrowness of our holding”); *In re First T.D. & Inv., Inc.*, 253 F.3d 520, 527 (9th Cir. 2001) (interpreting statute that explicitly defined “sale” to “include every disposition of any interest in a real property sales contract or promissory note secured directly or collaterally by a lien on real property”)).

c. For 30 Years the Department Interpreted RCW 70.38.105(4)(b) as Written

From 1984 to December 2013, the Department issued many formal and binding decisions interpreting RCW 70.38.105(4)(b) as applying *only* to the “sale” or “purchase” of a “hospital.” Many of the hospital affiliations the Department excluded from CN review involved a change in control, but no transfer of the title to or assets of a hospital, or no transfer of a hospital facility for consideration, including:

- The 2013 member substitution transaction between Franciscan Health System and Harrison Medical Center, in which a new non-profit corporation, consisting of Franciscan and Harrison board members, was formed and became the sole member of Harrison. CP 108-09.
- The 2012 affiliation between Franciscan Health System and Highline Medical Center, in which Franciscan became the sole member of, and parent entity to, Highline, but each would continue existing as separate, not-for-profit corporations. CP 117-18.
- The 2011 member substitution transaction between Swedish Health Services and Providence Health & Services, in which a new non-profit entity, with a mix of Swedish and Providence board members, was formed and became the sole member of Swedish. CP 98-99.
- The 2010 member substitution transaction between PeaceHealth and Southwest Washington Health System, under which PeaceHealth became the sole member of Southwest Washington. CP 128, 130.
- The 2009 member substitution transaction between Northwest Hospital & Medical Center and UW Medicine, under which UW became the sole member of Northwest Hospital. CP 142.
- The 2007 member substitution transaction between Enumclaw Regional Hospital and Franciscan Health System, under which Franciscan became the sole member and parent entity of Enumclaw Regional Hospital. CP 154-55.

- The 2006 member substitution transaction between Good Samaritan Community Healthcare and MultiCare Health System, under which MultiCare became the sole member and parent of Good Samaritan Community Healthcare. CP 160, 162.
- The 2000 statutory merger between Swedish Health Services and Providence Health System-Washington, under which the parties merged Swedish Health Services and certain Providence Health System-Washington operations, with Swedish Health Services as the surviving corporation. CP 83-84.
- The 1992 statutory merger between Swedish Hospital Medical Center and Ballard Community Hospital, under which Ballard Community Hospital merged into Swedish Hospital Medical Center, with Swedish as the surviving corporation. CP 90-91.
- The 1985 reorganization of St. Luke’s Memorial Hospital and Deaconess Medical Center into Empire Health Services. CP 323.

Had the legislature disagreed with the Department’s consistent interpretation of the plain language of the statute as written—starting with the 1985 decision that a “reorganization” transferring control of a hospital was *not* subject to review—the legislature could have revised the statute. Over the course of 30 years, the legislature has had ample opportunity to do so: it has amended the CN law 12 times, including as recently as 2012, and has debated countless other potential amendments that never became law, but has never amended RCW 70.38.105(4)(b) to include change-in-control transactions other than sales or purchases. “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 amendment or revision of the statute, rather than a new agency interpretation.” *Dot Foods*, 166 Wn.2d at 921.

So, for instance, in *Dot Foods*, the Court held the Department of Revenue exceeded its authority when, after interpreting, for 15 years, a B&O tax exemption as written, the Department changed its statutory interpretation by narrowing the exemption. 166 Wn.2d at 920-21. The Court explained, “[t]he Department’s argument for deference is a difficult one to accept, considering the Department’s history interpreting the exemption” in a manner contrary to its new interpretation, and the lack of legislative action. *Id.* at 921.

Like the Department of Revenue in *Dot Foods*, the Department here seeks to change the scope of RCW 70.38.105(4)(b) by rule, even though (1) the Department has interpreted the statute as written for 30 years; (2) the New Control Rule “appl[ies] the law differently than [the Department] previously did”; and (3) the legislature has not amended the statute. “The wording of the statute has not changed since its enactment; only the Department’s interpretation and application of the statute have changed.” *Dot Foods*, 166 Wn.2d at 921. Because RCW 70.38.105(4)(b) is unambiguous and nothing has changed except the Department’s interpretation, the Court should give the Department no deference. *Id.*; Dept. Br. at 28.

The Department argues the New Control Rule is necessary because the focus should be on the “substance of the transaction rather than its form.” Dept. Br. at 17; *see also id.* at 20. But WSHA does not argue the CN law applies only to transactions that use the magic terms “sale” or “purchase.” This argument is the Department’s straw man. The Department’s own analyses in its determinations of non-reviewability did not turn on the presence or absence of magic words. To the contrary, the Department repeatedly stated it considered all materials submitted and the *actual structure* of the proposed transactions. CP 87, 95, 105, 113, 121, 136, 149, 158, 169, 184, 323. This case is not about magic terms but about a statute that does not subject to CN review transactions that substantively are not sales or purchases of hospitals.

2. The Department’s Other Arguments Lack Merit

In its opening brief, the Department primarily argues the Court should reverse because, according to a declaration from Ms. Sigman, since “around 2009” hospitals or health systems have started using other labels in their transactional documents and in *that* alleged context, the Department’s broad interpretation of “sale, purchase or lease” is “reasonable.” *See* Dept. Br. at 1, 14-20, 25-26. The Department’s argument has principles of statutory construction backwards, turns a blind eye to a long history of hospital change-in-control transactions other than

“sales” or “purchases,” ignores the scope of the CN law’s enabling statute, and results in an unreasonable “interpretation” of RCW 70.38.105(4)(b).

a. The Department’s Perception of Changes in Hospital Transactions Cannot Render an Unambiguous Statute Ambiguous

The Department argues RCW 70.38.105(4)(b) is ambiguous because according to it, “[i]n recent years” hospitals have started using terms like “affiliation” instead of “sale” or “purchase” to circumvent CN review. *See* Dept. Br. at 1, 14-20, 25-26. Indeed, in the Superior Court the Department argued the statute is “ambiguous because of the changes that have occurred, the fact that the types of transactions that are not traditionally named sales and purchase have accelerated in recent history.” RP 29:24-30:9.

To support this argument, the Department makes numerous unsupported and inflammatory accusations, revealing at best, distrust of Catholic health systems, and at worst, outright animosity towards the sincere beliefs of those providers.¹² Dept. Br. at 7-11; 21-22. The Department cites no evidence supporting its claims that Catholic or religious health systems are making an end run around the CN laws, or

¹² WSHA is not challenging the constitutionality of the Department’s actions, though some of its members may have the right to do so if the New Control Rule is reinstated and applied to specific transactions, particularly in light of the Department’s stated reasons for promulgating the Rule. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 536 (1993) (facially neutral government regulation unconstitutionally targeted certain religious conduct).

that these providers deprive the community of services in hospitals. *Id.* Instead, it relies solely on the opinions of some interest groups and members of the public, on unadmitted and unauthenticated internet sources, and on misstatements.¹³ The only actual evidence that exists on the availability of these services contradicts the Department’s claims—but the Department deliberately chose to ignore it. CP 400; CP 458 ¶ 3.¹⁴

Even if it were true that, starting in 2009, hospitals changed how they structure transactions to evade CN review, the Department nowhere argues the plain language of RCW 70.38.105(4)(b) was ambiguous during the 30 years between 1984, when the statute was enacted, and December 2013, when the Department adopted the New Control Rule. Nor does it argue the plain language of the statute was ambiguous between 1984 and 2009, when other change-in-control transactions supposedly accelerated. In the Superior Court, the Department argued “[t]hese particular changes [in the law] were being brought about by a change in the industry, in the

¹³ One particularly egregious example suffices: the Department claims that “Based on” the supposed “public outcry” after the Providence/Swedish affiliation was announced in 2011, “it was agreed that Planned Parenthood would cover services that Swedish would no longer provide.” Dept. Br. at 6, n.2. In fact, the newspaper article the Department cites in support says this: “Swedish’s plan to refer patients to the [new Planned Parenthood] center, which will provide a full range of reproductive-health services, including elective abortion, has been in the works for several months and was expected to be announced next week.” *Id.*

¹⁴ The Department cites the loss of “pediatric services or a psychiatric wing” or “loss of emergency services and a mammography machine” as supporting the New Control Rule. The administrative record makes clear the Rule was motivated by concerns over secular-religious hospital transactions. Dept. Br. at 22; *see* CP 76, AR 1186-95; *see also* CP 451-52. In any event, hospitals that are not involved in change-of-control transactions are constantly adding and eliminating services, and this is not subject to review by anyone.

healthcare climate,” *not* because the language of the statute, as the legislature wrote it, had changed or had been ambiguous from its inception. RP 27:11-13.

The Department’s statutory construction arguments have it backwards. They “rest[] on reasoning divorced from the statutory text,’ which surely cannot carry the day.” *Byers v. Comm’r*, 740 F.3d 668, 677 (D.C. Cir. 2014) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007)). The statute is not a Rorschach blot, in which the Department can see what it wants (and change what it sees over time) and so, subject to CN review any transaction it thinks might affect access. And the Department cites no authority for the proposition that industry changes render an unambiguous statute ambiguous. Nor could it, for when, as here, the plain language of the statute is unambiguous, the Court must enforce the statute as written: “the statute is *not* open to construction or interpretation.” *Green River*, 95 Wn.2d at 113 (emphasis added).

The cases the Department cites recognize as much. “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). If industry changes do justify or require a change in the law or policy, the legislature—not the Department—must

address the issues. *See Swinomish*, 178 Wn.2d at 601. “Insofar as this case implicates policy determinations about [health care resources and access] ... the policy determinations are for the legislature.” *Id.* at 601.¹⁵ Agencies may not legislate. *Munson*, 23 Wn. App. at 525.

The cases on which the Department relies all involved ambiguous statutes, which agencies re-interpreted in the context of changed circumstances. Because RCW 70.38.105(4)(b) is unambiguous, those cases do not apply here.¹⁶ The Department does not have authority to change the law whenever *it* perceives a change in circumstances.

Resident Councils of Washington v. Leavitt, 500 F.3d 1025 (9th Cir. 2007), on which the Department also relies, provides it no support. Dept. Br. at 27. That case involved the federal Reform Law, which prohibited the “full-time paid use of any individual as a nurse aide in the facility” unless the individual had undergone certain training. 500 F.3d at 1028. The statute defined “nurse aide” to mean “any individual providing

¹⁵ The Department cites WAC 246-310-490(3) as authority for being able to require hospitals to provide services and, by extension, as authority for adopting the New Control Rule. Dept. Br. at 22. But the Department cannot define the scope of its own power and so, WAC 246-310-490(3) lacks relevance. *In re Impoundment of Chevrolet Truck*, 148 Wn.2d 145, 157 (2002). Even if that were otherwise, in the administrative record the Department admitted “[t]here is no statutorily required minimum set of services that a hospital must provide.” AR 1191; *see also* AR 1193.

¹⁶ *See* Dept. Br. at 26-27 (citing *Rust v. Sullivan*, 500 U.S. 173, 184 (1991) (“every court to have addressed the issue [agreed] that the [statutory] language” that simply referred to “programs where abortion is a method of family planning” “is ambiguous”); *Chevron*, 467 U.S. at 859-60 (ambiguous reference to “stationary source” in Clean Air Act); *Nat'l Cable & Telecommc 'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 977, 989 (2005) (reference in Communications Act to “the offering of telecommunications” ambiguous)).

nursing or nursing-related services to residents.” *Id.* For eleven years, the Department of Health and Human Services interpreted “nursing or nursing-related services” “in informal letters to include assisting a resident with feeding.” *Id.* at 1029. In response to a “growing shortage of nurse aides,” an “increasing aged population, and increasing demands on nurse aides,” the Department proposed a new rule that would allow nursing homes to use “paid feeding assistants,” instead of nurse aides, “for residents without complicated feeding programs,” and the Court found this a “permissible construction of the statute.” *Id.* at 1029, 1037. But unlike RCW 70.38.105(4)(b), the meaning of “nursing-related services” in the Reform Law had always been ambiguous, thereby permitting statutory construction. Changes in the nursing industry did not render the statute ambiguous. *See id.* at 1031-32.

In addition, *Leavitt* involved “informal letters,” which did not bind the agency; by contrast, the Department’s prior non-reviewability determinations are, by the Department’s own regulation, “*formal*” and “*binding*.” WAC 246-310-050(1), (5) (emphasis added). Further unlike the informal letters in *Leavitt*, the binding determinations the Department issued under RCW 70.38.105(4)(b) contained analysis and addressed the precise issue raised here—whether change-in-control transactions that were not sales or purchases of hospital facilities were subject to CN

review under RCW 70.38.105(4)(b). *See, e.g.*, CP 86-88, 90-202, 323-31. Even if all those critical distinctions did not exist, *Leavitt* still would not support the Department’s position, for the Court in *Leavitt* recognized that “market conditions should *not* control an agency’s statutory interpretation.” 500 F.3d at 1033 n.7 (emphasis added).

In *Dot Foods*, the Court rejected an argument similar to the one the Department advances here. The Court of Appeals had found an unamended statute ambiguous by deciding the agency’s interpretation was reasonable and, working backwards, concluding the statute therefore must have been ambiguous. 166 Wn.2d at 919-20. The Washington Supreme Court disagreed, recognizing the starting point is the language of the statute, not the agency’s perception of extraneous circumstances. *Id.* at 920. The Court should reject the Department’s similar backwards reasoning here, too.

b. Hospital Change-in-Control Transactions Are Not New and “Transparency” Does Not Justify Amending the Statute by Rule

The Department’s position the statute is ambiguous also rests on the notion that hospital change-in-control transactions are of recent vintage, starting “around 2009.” Dept. Br. at 1, 25. But the Department’s own determinations of non-reviewability make clear that so-called affiliations, reorganizations, and strategic alliances are not a creation of

“recent years.” These transactions date back to 1985, just one year after the legislature enacted RCW 70.38.105(4)(b):

- In a 1985 St. Luke’s Memorial/Deaconess Medical Center non-reviewability decision, the Department “concluded that this **reorganization** does not constitute the sale, purchase or lease of an existing hospital (RCW 70.38.105(4)(b)).” CP 323 (emphasis added).
- 1989, the Department found the **reorganization** of a hospital’s parent corporation did not constitute the sale or purchase of a hospital under RCW 70.38.105(4)(b). CP 191.
- In its 1997 OrNda/Tenet non-reviewability decision, the Department concluded “the proposed **restructure** is not the sale, purchase, or lease of all or part of an existing hospital.” CP 202.
- In its 2000 Swedish/Providence non-reviewability decision, the Department reviewed “Article 10, **Strategic Alliance Agreement**” in deciding the merger did not constitute a sale or purchase under RCW 70.38.105(4)(b). CP 86. The Department knew in 2000 the parties viewed the transaction as a “strategic alliance.”
- In its 2005 HCA/Capella non-reviewability decision, the Department “review[ed]” the materials for that transaction, which included the term “**corporate reorganization**,” concluding the transaction was not subject to CN review. CP 171 (emphasis added), 184.
- In its 2006 MultiCare/Good Samaritan non-reviewability decision, the Department again described the transaction as an “affiliation” and, “[b]ased on [the review of the materials submitted], the department ... concluded **the affiliation** as described is not subject to prior [CN] review and approval.” CP 169 (emphasis added).
- In its 2007 Franciscan/Enumclaw non-reviewability decision, the Department described the transaction as an “affiliation” and, “[b]ased on [its review of the materials] and **consistent with past practice for this type of affiliation**, the Program conclude[d] that the **affiliation** as described is not subject to prior [CN] review and approval.” CP 158 (emphasis added).

As the Department’s history shows, “affiliations,” “restructurings,”

“reorganizations,” and “strategic alliances” have existed since the 1980s.¹⁷

The Department also seeks to justify amending RCW 70.38.105(4)(b) through the New Control Rule so it can subject more transactions to the public CN review process. Dept. Br. at 23. The Department asserts that without CN review “the public usually has no idea that their community health care facilities are negotiating deals.” *Id.* But the legislature requires a public review process for all transactions involving the transfer of control of a nonprofit hospital to a for-profit entity, or the transfer of control of a hospital owned by a public hospital district. *See* RCW 70.45.050; RCW 70.44.315(1)(g).

Further, the Department has asserted it would review change-in-control transactions under the New Control Rule on an expedited basis, under WAC 246-310-110(2)(b). Dept. Mot. to Stay at 13. The expedited CN process, however, does not provide for public hearings. RCW 70.38.115(9).¹⁸ Expedited transactions afford the public the opportunity to submit written comments only, during a short 20-day window. WAC 246-

¹⁷ In addition, Washington’s business corporations law recognized these types of transactions long before the legislature adopted RCW 70.38.105(4)(b). *See* Laws 1933 ch. 1985 (enacting Washington’s Private Business Corporations Act, Title 23 of the RCW); Laws 1965 ch. 53 (repealing Title 23 and replacing it with the Washington Business Corporation Act, Title 23A of the RCW); Laws 1989 ch. 1965 (repealing Title 23A and replacing it with RCW 23B.01 *et seq.*); Laws 1967 ch. 235 (enacting Washington’s nonprofit corporations act). The legislature was not acting in a corporate law vacuum when it passed RCW 70.38.105(4)(b).

¹⁸ *See also* “Licenses, Permits, and Certificates,” Washington State Department of Health, *available at* www.doh.wa.gov/LicensesPermitsandCertificates/FacilitiesNewReneworUpdate/CertificateofNeed/ReviewProcess.

310-150(1)(a). So the Department's claim boils down to this: the public's inability to offer written comments during a brief period of time justifies amending RCW 70.38.105(4)(b) to require expensive CN review for many transactions that, over the last 30 years, the Department ruled fell outside the statute. Only the legislature can change the law to achieve this result. *See Swinomish*, 178 Wn.2d at 601.

c. The Department Lacks Authority to Expand the CN Law by Rule

Nor can the Department justify the New Control Rule by selectively invoking some of the CN law's over-arching goals, or by relying on RCW 70.38.135(3)(c). *See* Dept. Br. at 18, 22-24. The Department admits the legislature authorized it "to implement the [CN] program in this state *pursuant to the provisions of this chapter.*" RCW 70.38.105(1) (emphasis added); Dept. Br. at 18 (citing same). The legislature thus limited the Department's authority to implementing the CN law within the metes and bounds of that law. Yet the Department asserts that under RCW 70.38.135(3)(c), it has "broad authority to promulgate rules to implement the statute," including "defining undefined statutory terms." Dept. Br. at 18. From there, the Department reasons it has authority to expand the scope of projects and providers subject to CN review under RCW 70.38.105(4) whenever "access" or "health

planning”—two of the CN law’s several overarching purposes—might be a concern. *See id.* at 18, 22-24. Neither the CN law generally nor RCW 70.38.135(3)(c) grant the Department such authority.

“If an enabling statute does not authorize a particular regulation, either expressly or by necessary implication, that regulation must be declared invalid despite its practical necessity or appropriateness.” *In re Impoundment of Chevrolet Truck*, 148 Wn.2d 145, 156-57 (2002) (internal quotation marks omitted). “To hold otherwise would be to defer to an agency the power to determine the scope of its own authority.” *Id.* at 157 (internal quotation marks omitted).

Applying this principle, the Court in *State v. Munson* invalidated an agency rule promulgated under a general enabling statute because the rule effectively amended the statute at issue. 23 Wn. App. 522 (1979) (cited and discussed in *In re Impoundment*, 148 Wn.2d at 156). In *Munson*, the Department of Fisheries adopted a regulation that made fishing in certain areas unlawful unless the Department specifically opened those areas, while the underlying statute made such fishing lawful. *Id.* at 524. The Department promulgated the rule under an enabling statute that gave it “general power to make regulations specifying when the taking of food fish is lawful or prohibited, and such regulations as may be necessary to carry out the purposes and duties of the department.” *Id.* at

524-25. In declaring the rule invalid, the Court explained “the department’s power to regulate for conservation [did] not include power to reverse its statutory duty by making all fishing areas closed unless specifically opened by department regulations.” *Id.* at 524. *See also Swinomish*, 178 Wn.2d at 576, 597-99 (legislative declaration did not give agency broad authority to enact a rule inconsistent with the statute).

But as with the general enabling statute in *Munson* (and the general legislative declaration in *Swinomish*), the CN law does not authorize the Department to expand the CN law to reach additional, unregulated transactions whenever “access” or “health planning” could be promoted. To the contrary, RCW 70.38.135(3)(c) provides: “Upon review of recommendations, if any, from the board of health or the office of financial management as contained in the Washington health resources strategy,” the Secretary shall have authority to “(c) Promulgate rules in implementation of the provisions of this chapter, including the establishment of procedures for public hearings for predecisions and post-decisions on applications for certificate of need.”

Here, there is no Washington health resources strategy, and the Department did *not* promulgate the New Control Rule upon recommendation “from the board of health or the office of financial management.” Rather, it promulgated the Rule solely in response to a

directive from the Governor that, in the Department's words, "does not carry any statutory weight." See AR 71, 75, 79, 91, 105, 1211-12, 1213-18; Dept. Br. at 6-7.¹⁹ More significantly, the Department cites no authority supporting its conclusion that RCW 70.38.135(3)(c) displaces basic administrative law principles and allows the Department to expand the reach of the CN laws. Quite the opposite: Washington courts have repeatedly interpreted RCW 70.38.135(3)(c) as simply giving the Department "authority to promulgate rules setting up the process for obtaining a CN." *St. Joseph*, 125 Wn.2d at 736; *Children's Hosp. & Med. Ctr. v. Wash. State Dep't of Health*, 95 Wn. App. 858, 866 (1999) (same); *Overlake Hosp. Ass'n v. Dep't of Health of State of Wash.*, 170 Wn.2d 43, 50 (2010) (same).

The New Control Rule does not establish procedures or criteria for CN applications. Instead, it expands the scope of the CN law by determining, as the legislature already did in RCW 70.38.105(4)(b), ***which projects and providers***, in the first instance, require a CN application.

When the legislature wants to do so, it knows how to grant an agency the authority to define what conduct is regulated. See, e.g., *Chi. Title Ins. Co. v. Wash. State Office of Ins. Comm'r*, 178 Wn.2d 120, 144 (2013)

(discussing statute expressly delegating authority to agency to add and

¹⁹ In fact, the only input from the OFM shows no evidentiary basis exists for the New Control Rule. CP 400, 452.

define additional conduct to the list of regulated conduct). The CN laws grant no such authority.

Nor, contrary to the Department's claim, does RCW 70.38.105(4) leave an interpretive gap for the Department to fill. *See* Dept. Br. at 18-19. "Legislative inclusion of certain items in a category implies that other items in that category are intended to be excluded." *Bour v. Johnson*, 122 Wn.2d 829, 836 (1993). Courts have "never held that [the legislature] must repeat itself or use extraneous words before [courts] acknowledge its unambiguous intent." *Friends of Earth*, 446 F.3d at 144.

RCW 70.38.105(4) means what it says: the "sale, purchase or lease of part or all of any existing hospital" must undergo CN review; other transactions do not require CN review, even if they result in a change in control (but no transfer) of a hospital. The legislature did not need to expressly exclude other change-in-control transactions to make RCW 70.38.105(4)(b) plain. *See Bour*, 122 Wn.2d at 836; *Friends of Earth*, 446 F.3d at 144; *Edelman*, 152 Wn.2d at 590 (no interpretive gap where legislature specified to which entities and entity structures campaign contribution limit applied).

d. The Department's Interpretation Is Not Reasonable

Even if the Court were to find the Department's perception of

supposed changes in transactions since 2009 exposes an ambiguity in RCW 70.38.105(4)(b) or an interpretive gap the Department has authority to fill, it should still find the Department's sweeping expansion unreasonable. The New Control Rule does not seek to regulate only transactions in which an actual transfer of a hospital occurs. Rather, it regulates any joint venture, affiliation, or other agreement involving any *indirect* change in control of *any part* of a hospital. WAC 246-310-010(54).

In its Notice of Proposed Rulemaking, the Department stated that through the New Control Rule, it was “amending the [CN] rules to address *health care facility* affiliations, corporate restructuring, mergers and other arrangements,” even though RCW 70.38.105(4)(b)—the statute it was purporting to define—regulates *only* hospitals, not “health care facilities.” AR 79 (emphasis added). Consistent with that broad notion, the Department admitted in its Motion to Stay that it would apply the Rule, and subject to CN review, all kinds of transactions that in no way resemble sales or purchases of hospitals, such as:

- Deaconess Medical Center's acquisition of a physician practice, even though the CN law does not require CNs for physician practice acquisitions;
- An understanding between Swedish Health Services in Seattle and Olympic Memorial Hospital in Port Angeles under which Swedish agreed to work with Olympic to provide expanded access to services in Port Angeles, even though no change in control of

either hospital occurred; and

- An agreement between UW Medicine and PeaceHealth under which PeaceHealth may refer patients needing complex tertiary and quaternary care to UW Medicine, even though no change in control of either hospital occurred.

Sigman Decl. ¶¶ 6-7, 9; WSHA's Response at 8-9.

As written, the New Control Rule also would require a CN application every time a struggling rural hospital were to contract with a larger hospital to run its neonatal intensive care unit; or any hospital were to contract with third-parties to operate the hospital's laundry, cafeteria, electronic recordkeeping, customer service, or collections services—all of which would involve an “indirect” change in “control” of “part” of a hospital. The Department may claim it does not *intend* to apply the Rule to these types of health care facility transactions, or even to those identified in its Motion to Stay. But that only highlights the extent to which the Department's Rule overreaches. On its face, the Rule extends so far beyond the “sale, purchase or lease” of a “hospital” language in RCW 70.38.105(4)(b) as to be unreasonable. *See, e.g., Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1209, 1212 (D.C. Cir. 1996) (invalidating agency interpretation as unreasonable).

Washington courts have consistently invalidated agency rules that, like the New Control Rule, are inconsistent with or change the underlying statute, and this Court should do so here. *See, e.g., Edelman*, 152 Wn.2d

at 591 (invalidating rule that added language to and was inconsistent with statute); *Impoundment*, 148 Wn.2d at 154-55 (invalidating agency rule that made permissive statute mandatory); *Swinomish*, 178 Wn.2d at 586-87 (invalidating agency rule as “not consistent with the statute,” among other things); *Bostain*, 159 Wn.2d at 714-17 (rejecting rule that was “not consistent with the plain language of the statutes being implemented”); *Dot Foods*, 166 Wn.2d at 920-21 (invalidating agency rule that added language to and was inconsistent with statute); *Munson*, 23 Wn. App. at 524-26 (invalidating rule that reversed agency’s statutorily-defined duty).

B. The Court Also May Affirm on the Alternative Ground the Department Acted Arbitrarily and Capriciously

This Court may affirm on the alternative ground that the Department’s unsupported change in interpretation is arbitrary and capricious. CP 20-22, 317-18.²⁰ “Agency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances.” *Puget Sound Harvesters Ass’n v. Wash. State Dep’t of Fish & Wildlife*, 157 Wn. App. 935, 945 (2010). After considering the relevant portions of the rulemaking file and the agency’s explanations for adopting the rule, *id.*, the Court “must scrutinize the record to determine if the result was reached through a process of reason,

²⁰ “[A]n appellate court can sustain the trial court’s judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it.” *LaMon v. Butler*, 112 Wn.2d 193, 200-01 (1989).

not whether the result was itself reasonable in the judgment of the court.”
Rios v. Wash. Dep’t of Labor & Indus., 145 Wn.2d 483, 501-02 (2002)
(internal and quotation marks omitted) (emphasis added). An agency rule
is “arbitrary and capricious if the agency has,” among other things,
“offered an explanation for its decision that runs counter to the evidence
before the agency.” *Greater Yellowstone Coalition, Inc. v. Servheen*, 665
F.3d 1015, 1023 (9th Cir. 2011) (quoting *Motor Vehicles Mfrs. Ass’n of
U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Here, the Department acted arbitrarily and capriciously in adopting
the New Control Rule because it disregarded the facts—other than the fact
the Governor wanted to expand the reach of the CN laws. RCW
34.05.325(6)(a)(i) required the Department to include in its Concise
Explanatory Statement “the agency’s reasons for adopting the rule.” The
only reason the Department identified for adopting the Rule was the
Governor’s directive. AR 1211-12, 79-80, 91-133, 1189-97, 1220-21.
Yet the “circumstances” are that for 30 years, the Department had
consistently interpreted RCW 70.38.105(4)(b) as written, *i.e.*, as limited to
sales, purchases, or leases of hospitals, but *not* as applying to other
transactions involving an “indirect” change in control of a hospital—all
without any adverse consequences. *See* CP 372, 452, 400. Where, as
here, the statute has remained unchanged, the agency must take its

concerns to the legislature. *Dot Foods*, 166 Wn.2d at 921.

The Department also acted arbitrarily and capriciously because the rulemaking file contains no data or facts supporting the New Control Rule, and the Department failed to consider the OFM Report—the only evidence on the policy justifications for the Rule. CP 448 ¶ 4, 454 ¶ 4, 458 ¶ 3,449-50. Before rulemaking even commenced, the Governor had identified the purpose of the OFM study as helping to “inform policymaking.” CP 373. The resulting report found *no evidence* that communities with religiously affiliated hospitals have less access to services than do communities with secular hospitals. CP 400, 452. The Department’s failure to consider the findings in the midst of the rulemaking is inexplicable and shows the Rule was promulgated without the evidentiary support the Department assumed it would find—but that does not exist.²¹

²¹ The Superior Court granted the Department’s motion to strike the OFM Report and the circumstances surrounding its curious omission from the original administrative record. Because the OFM Report, delivered to the Department on November 27, 2013, is proof of a failure to consider highly relevant data in its decision-making, that report is properly considered as evidence in this administrative review proceeding under RCW 34.05.562(1)(b) and (c). While the evidence was not material to the Superior Court’s dispositive ruling that the Department lacked the authority to promulgate the New Control Rule, it is properly considered by this Court on appeal. *See Beers v. Ross*, 137 Wn. App. 566, 571-72 (2007) (appellate court considered wrongfully excluded evidence de novo). Or, if the Court remands the case for further proceedings on the arbitrary and capricious alternative ground for striking down the regulation, it should order the Superior Court to supplement the record with the evidence on the OFM Report under RAP 2.4(a).

VI. CONCLUSION

The Department of Health has the power to implement the CN laws, but not to change or expand them to achieve its broad policy objectives or to accommodate directives from the Governor. The Department lacks statutory authority to amend and expand RCW 70.38.105(4)(b) through the New Control Rule, and the Department acted arbitrarily and capriciously in adopting that Rule. The changes the Department seeks are for the legislative branch to consider; they cannot be accomplished by agency fiat. The Court should uphold the Superior Court's decision invalidating the New Control Rule.

RESPECTFULLY SUBMITTED this 3rd day of November, 2014.

Davis Wright Tremaine LLP
*Attorneys for Petitioner Washington
State Hospital Association*

By s/ Douglas C. Ross
Douglas C. Ross, WSBA #12811
Brad Fisher, WSBA #19895
Rebecca Francis, WSBA # 41196

Riddell Williams PS
*Attorneys for Petitioner Washington
State Hospital Association*

By s/ Barbara A. Shickich
Barbara A. Shickich, WSBA #8733

CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2014, I caused a true and correct copy of the foregoing document to be served as follows:

Attorneys for Appellant:

Joyce A. Roper, Senior Asst. Attorney General () By U. S. Mail
Agriculture & Health Division (✓) ***By E-Service Per***
Office of the Attorney General ***Agreement of Counsel***
P.O. Box 40109 () By Facsimile
Olympia, WA 98504-0109 () By Messenger

Laura J. Watson, Deputy Solicitor General
Office of the Attorney General
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504-0100

Laura Watson: Lauraw2@atg.wa.gov
Joyce Roper: Joycer@atg.wa.gov
cc to:
AHD Division electronic filing mailbox at AHDOLYEF@atg.wa.gov
SGO Division electronic filing mailbox at SGOOLYEF@atg.wa.gov
Kristin Jensen: KristinJ@atg.wa.gov
Krystle Berry: KrystleB@atg.wa.gov

DATED this 3rd day of November, 2014.

s/ Douglas C. Ross
Douglas C. Ross, WSBA #12811

OFFICE RECEPTIONIST, CLERK

To: Cadley, Jeanne
Cc: 'JoyceR@atg.wa.gov'; 'lauraw2@atg.wa.gov'; 'AHDOLYEF@atg.wa.gov';
'SGOOLYEF@atg.wa.gov'; 'KristinJ@atg.wa.gov'; 'KrystleB@ATG.WA.GOV';
'bshickich@riddellwilliams.com'; Ross, Douglas; Fisher, Brad; Francis, Rebecca; Ratti,
Denise; McAdams, Barbara; Cygnor, Jennifer
Subject: RE: WSHA v. DOH - No. 90486-3: Corrected Answering Brief of WSHA

Received 11-25-2014

Supreme Court Clerk's Office

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: Cadley, Jeanne [mailto:JeanneCadley@DWT.COM]
Sent: Tuesday, November 25, 2014 4:36 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: 'JoyceR@atg.wa.gov'; 'lauraw2@atg.wa.gov'; 'AHDOLYEF@atg.wa.gov'; 'SGOOLYEF@atg.wa.gov';
'KristinJ@atg.wa.gov'; 'KrystleB@ATG.WA.GOV'; 'bshickich@riddellwilliams.com'; Ross, Douglas; Fisher, Brad; Francis,
Rebecca; Ratti, Denise; McAdams, Barbara; Cygnor, Jennifer
Subject: WSHA v. DOH - No. 90486-3: Corrected Answering Brief of WSHA

Case Name: *Washington State Hospital Association v. Washington State Department of Health*
Case No.: 90486-3

Dear Clerk:

Please find attached for filing in the above-referenced matter the *Corrected Answering Brief of Respondent Washington State Hospital*. The Clerk's Papers citations on pages 2, 11, 13, 14, 15, 49, and 50 have been corrected to correspond to the Supplemental Clerk's Papers numbered 360-460 prepared by Thurston County Superior Court.

Submitted by Attorneys for Respondent by:

Douglas Ross
Phone: 206-757-8135
WSBA No. 12811
Email: douglasross@dwt.com

Brad Fisher
Phone: 206-757-8042
WSBA No. 19895
Email: bradfisher@dwt.com

Rebecca Francis
Phone: 206-757-8285

WSBA No. 41196

Email: rebeccafrancis@dwt.com

Barbara Shickich

Phone: 206-624-3600

WSBA No. 8733

Email: bshickich@riddellwilliams.com

cc: Counsel of Record (per service agreement of parties)

Sent on behalf of Douglas C. Ross by:

Jeanne Cadley | Davis Wright Tremaine LLP

1201 Third Avenue, Suite 2200 | Seattle, WA 98101

Tel: (206) 757-8436 | Fax: (206) 757-7700

Email: jeannecadley@dwt.com | Website: www.dwt.com

Anchorage | Bellevue | Los Angeles | New York | Portland | San Francisco | Seattle | Shanghai | Washington, D.C.