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NO. 97216-8

SUPREME COURT OF THE STATE OF WASHINGTON

SEIU 775,

Petitioner,

v.

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT
OF SOCIAL AND HEALTH SERVICES,

Respondent.

**ANSWER TO BRIEF OF AMICUS CURIAE NORTHWEST
JUSTICE PROJECT**

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I. INTRODUCTION

This Court should decline direct review. Northwest Justice Project (NJP) fails to show how this appeal presents a fundamental issue of public importance requiring urgent resolution, first and foremost because it focuses on issues not part of this appeal. The issues raised in SEIU 775's (SEIU) appeal are whether the shared benefit or informal support rules are consistent with wage and hour laws with respect to in-home personal care providers. Yet NJP focuses its briefing on whether the total benefits package for in-home personal care services is sufficient for Medicaid clients.

NJP's appeal to the adequacy of the State's allocation of personal care services benefits misses the mark, because SEIU's appeal will not call upon the Court to resolve that issue. SEIU has not challenged WAC 388-106-0125, which governs the base hours awarded to clients. Likewise, SEIU has not challenged WAC 388-106-0080 – 0110, the rules that set forth the CARE tool's methodology, which does not consider how long it takes to perform any specific task on behalf of a specific client in determining the total hours to be awarded. Since the parties have not raised these issues in the underlying case or this appeal, the relevant rulemaking files are not before the Court to enable the Court to make a judgment.

NJP fails to establish an issue of fundamental public importance because the issues it proffers to justify this Court’s immediate review are not issues that will be decided in this appeal. This Court should decline direct review.

II. RELIANCE ON PREVIOUS BRIEFING

DSHS relies on its previous Answer to Statement of Grounds for Direct Review (Answer to Statement of Grounds) for the facts of this case, the decision below, and the issues raised by the appeal.

III. REASONS WHY DIRECT REVIEW SHOULD BE DENIED

NJP’s reliance on the total benefit level that clients may receive is misguided because that is governed by separate rules, not challenged by SEIU, and not a part of this administrative rule challenge. NJP’s hypothetical scenarios meant to “illustrate” the challenged rules actually misconstrue them, and go no further toward establishing an issue of public importance because, again, SEIU’s challenge does not encompass those issues. Aside from these issues—not presented in this case—NJP merely reiterates arguments already made by SEIU and already addressed in prior briefing. There is no basis to accept direct review and the Court should decline it.

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A. The Overall Benefit Levels are Determined by Rules that Were Not Challenged by SEIU and are Not at Issue in this Case

This case is not a vehicle for the Court to examine the overall level of in-home personal care benefits provided to Medicaid clients. SEIU alleges in this appeal that DSHS's rules, which reduce a client's in-home personal care services benefit because of informal supports and shared benefits, violates wage and hour law and are arbitrary and capricious. *See* CP 164-79. SEIU does not allege that the baseline monthly hours set for each classification group in WAC 388-106-0125 (e.g., 393 hours for clients classified as "E High") are inadequate in any way.¹ *See id.* Nor does SEIU suggest that DSHS errs by awarding benefits without asking how much time a given task takes a client to complete.² *See id.* The only issues in this case are: 1) whether the informal support and shared benefits rules comply with wage and hour law; and 2) whether those same rules are arbitrary and capricious. *See* CP 164-79.

¹ Such an allegation would be meritless. Washington's system of long-term care is exemplary. *See* Answer to Statement of Grounds at 5-7, 14-15. While the undersigned is aware of no one source that compares benefits packages offered by the states, from what information is available Washington's package appears to be quite generous nationwide. *See* https://ca.db101.org/ca/programs/health_coverage/medi_cal/ihss/program2b.htm (last accessed September 10, 2019) (Washington offers 100 more hours per month than California's comparable program to the individuals with the highest degree of impairment). If the parties litigated this issue below, DSHS would have offered evidence of the relative generosity of Washington's in-home personal care services program.

² Again, such an allegation would be meritless. *Jenkins v. Dep't of Soc. and Health Servs.*, 160 Wn.2d 287, 299, 157 P.3d 388 (2007) ("We agree that DSHS may use the CARE assessment program to initially classify, rate, and determine a recipient's level of need because this process is consistent with the Medicaid program's purpose."); *see also Alexander v. Choate*, 469 U.S. 287, 303, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985).

NJP's attempts to use these issues, not raised by the parties, to establish an issue of fundamental public importance fails. *Contra* Brief of Amicus Curiae Northwest Justice Project In Support of Petitioner's Request for Direct Review (Brief of Amicus NJP) at 2-10. It is well settled that this Court generally will not address arguments raised only by amici, even constitutional ones. *See, e.g., Fields v. Dep't of Early Learning*, 193 Wn.2d 36, 41 n.1, 434 P.3d 999 (2019); *City of Seattle v. Evans*, 184 Wn.2d 856, 861 n.5, 366 P.3d 906 (2015). This Court should also not consider arguments raised only by amici when considering whether to accept or reject review under RAP 13.4(b). *Cf. Wood v. Postelthwaite*, 82 Wn.2d 387, 388, 510 P.2d 1109 (1973) ("Issues not raised in a petition for review will not be considered by this court.").

Moreover, the Court does not have the record before it that would be necessary to consider these issues. WAC 388-106-0125 determines the base in-home personal care hours. WAC 388-106-0080 through WAC 388-106-0110 sets out the general methodology of the CARE tool, including the kinds of questions it asks and its omission of any question about how long particular tasks take a client to complete. Because SEIU never challenged these rules, DSHS never transmitted the rulemaking files

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for them to the Thurston County Superior Court.³ *See generally* CP; *see also generally* AR. It is error to determine the validity of a rule without the rulemaking file before the Court. *See* RCW 34.05.370(4); *see also* *Washington Indept. Tele. Ass'n. v. Washington Utilities and Transp. Com'n.*, 148 Wn.2d 887, 906, 64 P.3d 606 (2003).

Here, NJP fails to establish an issue of fundamental public importance by pointing to issues regarding the total level of benefits in-home personal care services clients receive because such issues are not issues raised by SEIU's rule challenge. The Court does not have the record before it to address these issues, and this Court should not accept review to consider them.

B. NJP's Proffered Hypotheticals Fail to Establish a Basis to Accept Direct Review

NJP tries to create a fundamental issue of public importance out of hypothetical scenarios, but its hypotheticals are not helpful. First, NJP misconstrues the challenged rules in its imagined situations. It applies both the shared benefit rule and the informal support rule incorrectly. Second, the mere fact that the rules may reduce client benefit levels does not

³ Depending on the particular issues raised, a party raising a challenge to this aspect of CARE might be required to exhaust administrative remedies, which might include petitioning DSHS to enact a rule under RCW 34.05.330. *See Northwest Ecosystem Alliance v. Washington Forest Practices Bd.*, 149 Wn.2d 67, 75, 66 P.3d 614 (2003).

amount to an issue of fundamental public importance where SEIU does not challenge either rule on the basis that client benefits are inadequate.

Fundamentally, NJP does not apply the shared benefit rule correctly. The shared benefit rule has the consequence of reducing a client's total benefit from what it otherwise would be where the client and the provider, or more than one client in a multi-client household, share in the benefit of certain tasks. *See* WAC 388-106-0010. If there is no shared benefit, like NJP describes in its example of diabetic meal preparation for the client Mr. Jones by the caregiver Susan, then no shared benefit deduction would apply. *Contra* Brief of Amicus NJP at 12. The shared benefit deduction would only apply for meal preparation if Susan ate Mr. Jones's diabetic meals. *See* WAC 388-106-0010. Likewise, DSHS does not apply the shared benefit rule if there is, in fact, no shared benefit for other tasks, such as ordinary housework. *Id.*

NJP also misconstrues and misapplies the informal support rule. DSHS does not coerce care providers into providing informal supports by manipulating loving caregivers. *Contra* Brief of Amicus NJP at 14. In a management bulletin placed in the rulemaking file for the informal support rule, DSHS specifically instructed its case managers to have a conversation with the provider and only reduce the benefit for informal supports if the provider was willing and able to provide informal supports

understanding that doing so could result in a benefits reduction. CP at 254. Providers with close relationships to their clients can also still provide unpaid supports in excess of the benefit amount without causing a reduction to benefits. *Id.* NJP is simply wrong about the operation of this rule.

Aside from inaccurately applying the rules at issue, NJP fails to show how these applications of the rules create a fundamental issue of public importance in the context of SEIU's wage and hour challenge. NJP's point appears to be that, in at least some circumstances, the challenged rules result in clients receiving a smaller benefit than NJP thinks they should get. *See* Brief of Amicus NJP at 13. Even absent application of the challenged rules, a given client's benefits package might be smaller than what NJP or the client thinks is appropriate. For example, if a client is assessed by a DSHS case manager as needing help with relatively few tasks, and does not have any complicating factors, a client might be assessed at the "A-low" level and receive only 22 hours of in-home personal care services a month. *See* WAC 388-106-0125(6)(c). Such a client might reasonably believe that 22 hours is inadequate in their particular circumstances. But this is why clients have hearing rights to challenge the determination of hours they are eligible for. RCW 74.08.080; WAC 388-106-1305. And it has nothing to do with

SEIU's challenge, which alleges that *providers*, not clients, are injured by application of the shared benefit and informal support rules. *See* CP at 164-79. Aside from misapplying the challenged rules, all that NJP's hypothetical scenarios establish is that, in the context of a public benefits program, some recipients of public benefits would like more benefits than they are eligible for. That is not an issue of fundamental public importance in a case that challenges the benefits determination on the basis of wage and hour law. The Court should decline direct review.

C. This Case is Unlike Previous Cases Dealing with DSHS Rules

NJP, like SEIU, argues that the Court should accept direct review of this case citing previous cases dealing with DSHS rules that the Court struck down. *See* Brief of Amicus NJP at 7-10. Each of those cases is distinguishable, and previous briefing addressed this. *See* Answer to Statement of Grounds at 13-14. Additionally, none of those cases involved wage and hour challenges to DSHS rules. *Jenkins v. Dept. of Soc. and Health Servs.*, 160 Wn.2d 287, 157 P.3d 388 (2007); *Samantha A. v. Dept. of Soc. and Health Servs.*, 171 Wn.2d 623, 256 P.3d 1138 (2011); *Rekhter v. Dept. of Soc. and Health Serv.*, 180 Wn.2d 102, 109, 323 P.3d 1036 (2014). None of those cases form a basis upon which this Court should accept direct review. *See id.*

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D. The Challenged Rules do Not Violate Wage and Hour Law

Finally, NJP reiterates SEIU's argument that the challenged rules violate the Fair Labor Standards Act (FLSA) and the Minimum Wage Act (MWA). Brief of Amicus NJP at 15-16. DSHS showed why this allegation does not support the existence of a fundamental issue of public importance in prior briefing. *See Answer to Statement of Grounds at 9-14.* Briefly restated, the informal support rule allows only providers with close personal relationships with their clients to volunteer for tasks they would consider to be outside of the employment relationship with their clients. In that context, the tasks they agree to perform as informal supports are not within the ambit of any employment relationship that may exist with the client or DSHS.⁴ Rather, under the economic realities test used in both the FLSA and the MWA, these volunteer tasks are solely due to the personal relationship the provider has with the client. Therefore, the provider does not have to be compensated for doing them. And, if the provider ever wants to withdraw their consent to performing any personal care services without pay, the provider can do so at any time and the client's benefit will be recalculated to exclude informal supports from the provider. *See WAC 388-106-0050.*

⁴ Assuming for the sake of argument that an employment relationship does exist between DSHS and the provider. DSHS will address this contested issue in the briefing on the merits of SEIU's appeal.

As to the shared benefit rule, the rule does not require any provider to work without pay. The rule has the consequence of reducing a client's total available monthly hours, but DSHS pays providers for every hour of personal care services they perform. In fact, DSHS prohibits providers from working in excess of their client's benefit levels.⁵ WAC 388-71-0515.

Because the rules comply, straightforwardly so, with the FLSA and the MWA, there is no fundamental issue of public importance that requires this Court's urgent review. The Court should decline direct review.

IV. CONCLUSION

For the reasons stated above, NJP has failed to show that any issue of public importance warrants direct review by the Court. This case has to do with wage and hour issues—the total level of benefits otherwise allowed by DSHS rules is not at issue in this case. And, SEIU's challenges

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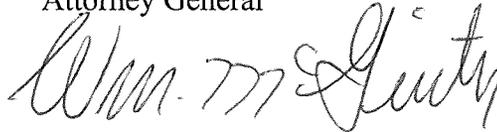
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⁵ Unless the provider and the client share a close personal relationship. *See* CP at 254.

to the informal support and shared benefit rules have no merit. There is no basis for this Court to accept direct review of SEIU's appeal.

RESPECTFULLY SUBMITTED this 3 day of October, 2019.

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A handwritten signature in black ink, appearing to read "Wm. McGinty", written in a cursive style.

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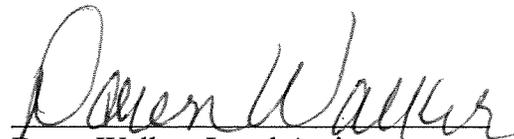
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

EXECUTED this 3rd day of October, 2019 at Olympia, WA.


Dawn Walker, Legal Assistant

SOCIAL AND HEALTH SERVICES DIVISION, ATTORNEY GENERALS OFFICE

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