SUPREME COURT
STATE OF WASHINGTON
SUPREME COURT NO. 1042078

NO. 864220-I

IN THE COURT OF APPEALS, OF THE STATE OF WASHINGTON
DIVISION I

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KESTER PHILLIPS,
Plaintiff-Petitioner,

VS.

SWEDISH HEALTH SERVICES,
Defendant-Respondent.

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# RESPONSE TO PETITION FOR DISCRETIONARY REVIEW

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Ryan P. Hammond, Bar No. 38888
rhammond@littler.com
Madhura Panjini, Bar No. 54370
mpanjini@littler.com
LITTLER MENDELSON, P.C.
One Union Square
600 University Street, Suite 3200
Seattle, Washington 98101.3122
206.623.3300

***Attorneys for Respondent***
***SWEDISH HEALTH SERVICES***

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## I. INTRODUCTION

On March 12, 2025, the Washington Court of Appeals, Division I reversed and remanded this case, with an instruction to the trial court to compel arbitration (the "**Decision**"). After agreeing with Defendant-Respondent Swedish Health Services ("**Swedish**") that the Decision "addressed" key issues, provides "clarity to the public[,]" and should be published, Plaintiff-Petitioner Kester Phillips ("Dr. Phillips") now seeks discretionary review under RAP 13.4(b)(3) and RAP 13.4(b)(4) arguing the appellate court erred. Petition for Discretionary Review ("**Petition**") at 2.

In seeking discretionary review, it's notable that Dr. Phillips simply restates (oftentimes verbatim) the same arguments that he presented to the appellate court—which were fully addressed in the Decision—and contradicts admissions he made during the January 22, 2025 oral argument, all while ignoring Swedish's substantive responses and the appellate court's analysis. *See* Swedish's Opening Brief ("**Op. Br.**"); Dr. Phillips's Response Brief ("**Resp.**"); Swedish's Reply Brief ("**Reply**"). In short, Dr. Phillips continues to disregard

the arbitration agreement he signed and demonstrates his fundamental misunderstanding of arbitration law.

Dr. Phillips's Petition fails to demonstrate that any significant question of law under the Constitution of the State of Washington or of the United States is involved or an issue of substantial public interest is involved to warrant review by this Court. Importantly, regardless of how Dr. Phillips attempts to frame his issues in his Petition, he conceded during oral argument (and Swedish agrees) that "this case presents ***not* an issue of constitutional interpretation, but . . . is really a matter of contract interpretation.**" Wash. Court of Appeals oral arg., *Phillips v. Swedish Health Servs.*, No. 86422-0-I (Jan. 22, 2025), 8:50-9:09, video recording by TVW, https://tvw.org/video/division-1-court-of-appeals-2025011478/?eventID=2025011478 (emphasis added) (hereinafter, "**Oral Arg. Tr.**").

Dr. Phillips fails to meet his burden under RAP 13.4(b)(3) or RAP 13.4(b)(4) and review by this Court is not warranted.

## II. IDENTITY OF THE DEFENDANT-RESPONDENT

Defendant-Respondent is Swedish Health Services ("Swedish").

## III. DECISION BELOW

On December 11, 2023, Dr. Phillips filed a complaint against his former employer, Swedish, in King County Superior Court, in derogation of his obligation to file any claims related to his employment in arbitration. *See* CP at 1-8.

On January 19, 2024, Swedish filed a Motion to Compel Arbitration. CP at 9-43. On February 13, 2024, the trial court summarily denied Swedish's Motion to Compel Arbitration. CP at 101-103.

On March 12, 2024, Swedish filed a Notice of Appeal of the trial court's summary denial. On October 23, 2024, the parties had fully briefed the appeal, and on January 22, 2025 the Court of Appeals, Division I (Chief Judge Cecily C. Hazelrigg, Acting Chief Judge Bill A. Bowman, and Judge Linda W.Y. Coburn) held oral argument.

On March 12, 2025, the appellate court issued the Decision, granting Swedish's appeal, and reversing and remanding the trial court's summary denial with an instruction to compel arbitration.

On April 4, 2025, Swedish filed a Motion to Publish the Decision and on April 16, 2025, Dr. Phillips filed a response agreeing that "there are sufficient issues which were addressed by the Court's decision which provide clarity to the public, and resolve issues of first impression[.]"

On April 21, 2025, the appellate court granted Swedish's Motion to Publish.

## IV. ISSUES PRESENTED FOR REVIEW

1. Is Dr. Phillips entitled to file for discretionary review at this juncture when the appellate court has entered its Decision compelling arbitration? **(Answer: No.)**

2. Even if Dr. Phillips is entitled to file for discretionary review at this juncture, has he met the criteria for review under RAP 13.4(b)(3) or RAP 13.4(b)(4) to warrant review by this Court? **(Answer: No.)**

## V. COUNTER STATEMENT OF THE CASE

Dr. Phillips spends four pages of his brief discussing facts that do not impact the issue on appeal.

It is undisputed that Dr. Phillips signed the Employment Agreement. Op. Br. at 3-4; *see generally* Resp. at 2-3.

It is undisputed that the Employment Agreement's plain language requires arbitration of employment claims and includes delegation of the validity and enforceability analysis of the Agreement to the arbitrator. Decision at 5; Op. Br. at 3-4; *see generally* Resp. at 38.

It is undisputed that Dr. Phillips is bringing claims "arising from or relating to" his employment with Swedish. Op. Br. at 3-4, 13-15; *see generally* Resp. at 4-6.

It is undisputed that the Employment Agreement does not mandate confidentiality. CP 26-43.

It is undisputed that Swedish operates five hospitals and approximately 200 clinics through the Puget Sound, serving patients throughout the region. CP 65. It is undisputed that Swedish's IRS Form 990 reflects 13,822 individuals employed; millions of dollars of

good and services provided by out-of-state contractors; millions of dollars in Medicare revenue; transacts with out-of-state financial institutions; and generally, discusses how Swedish delivers "services across seven states[.]" CP 65. It is undisputed that as a condition of his employment, Dr. Phillips was required to maintain eligibility for Medicare funds. Oral Arg. Tr. at 7:05-8:15.

## VI. ARGUMENT WHY DISCRETIONARY REVIEW SHOULD BE DENIED

### A. Review of Orders Directing Arbitration Are Barred Under the Federal Arbitration Act and the Washington Uniform Arbitration Act.

Under either the Federal Arbitration Act ("**FAA**"), 9 U.S.C. § 1, *et seq.* or the Washington Uniform Arbitration Act ("**WUAA**"), Chapter 7.04A RCW, orders compelling arbitration are not immediately appealable.

The FAA represents Congress's intent "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Sink v. Aden Enter. Inc.*, 352 F.3d 1197, 1200 (9th Cir.2003) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983)). Section 16 of the FAA bars appeals of

interlocutory orders compelling arbitration and staying judicial proceedings. 9 U.S.C. § 16(b)(2)-(3); *Gonzalez v. Coverall N. Am., Inc.*, 754 F. App'x 594, 595 (9th Cir. 2019); *Bushley v. Credit Suisse First Bos.*, 360 F.3d 1149, 1153 (9th Cir. 2004).

The same principle applies to the WUAA. *See* RCW 7.04A.280 (listing exhaustive list of grounds for appeal; does not include an appeal taken from an interlocutory order compelling arbitration); *see also FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 413 P.3d 1, 5 (2018) (denying appeal of order compelling arbitration, in part, for failing to identify valid grounds for appeal) (citing cases); *Flagg v. Turner*, 151 Wash. App. 1029 (2009) ("an order compelling arbitration is not final and therefore is not appealable.") (citing *Teufel Const. Co. v. American Arbitration Ass'n*, 472 P.2d 572 (1970)).

As such, pursuant to the plain meaning of the FAA and WUAA, Dr. Phillips may not seek discretionary review of the Decision compelling arbitration at this juncture.

### B. Discretionary Review Is Not Warranted Under RAP 13.4(b)(3) or RAP 13.4(b)(4).

Even if orders compelling arbitration were appealable at this juncture, Dr. Phillips fails to meet his burden under RAP 13.4(b)(3) or RAP 13.4(b)(4) and review by this Court is not warranted.

Although Dr. Phillips presents his Petition as invoking constitutional issues, he conceded during oral argument that the issue at hand is contractual. Oral Arg. Tr. at 8:50-9:09 ("this case presents ***not* an issue of constitutional interpretation, but . . . is really a matter of contract interpretation.***") (emphasis added); *see also Supreme Court. City of Spokane v. Taxpayers of City of Spokane*, 758 P.2d 480 (1988) (constitutional claims that are not adequately briefed will not be considered by the court).

Furthermore, Dr. Phillips's Petition does not rise to the level of involving a substantial public interest. Dr. Phillips conceded that state law discrimination claims could be arbitrated so long as arbitration does not impose confidentiality, and that he did not give up his right to pursue his state law discrimination claims. Decision at 6.

Given his concessions, and an analysis of the record and caselaw, the appellate court properly remanded with an instruction to compel arbitration. Based on how the case was decided below, this Court should deny review and none of Dr. Phillips's scattershot arguments impact this analysis:

### C. Both the FAA and WUAA Apply to the Arbitration Provision.

Swedish moved to compel arbitration under both the FAA and the WUAA. CP at 11-17. Dr. Phillips argues that FAA does not apply to the parties' Arbitration Provision. Petition at 18-26. Specifically, he claims (1) the Arbitration Provision only cited to the WUAA so the FAA does not apply; (2) his job at Swedish did not involve interstate commerce; and (3) "no court has found a basis for federal jurisdiction to invoke the FAA." *Id.* at 2-3, 18-26. Dr. Phillips's arguments miss the mark for several reasons:

#### 1. The FAA Applies, Even When Not Expressly Mentioned.

Dr. Phillips argues that because the FAA is not mentioned in the parties' Arbitration Provision, it does not apply. Petition at 19-21. Dr. Phillips fails to recognize the broad applicability of the FAA, even where the parties' contract is silent on the matter. *See* CP at 12 (citing

cases); Op. Br. at 6-7 (citing cases); *see also Coleman v. Impact Pub. Sch.*, 29 Wash. App. 2d 1045, 2024 WL 550246, at *1 (2024) (unpublished) (applying FAA even when not mentioned in arbitration agreement as it "applies to all employment contracts except for employment contracts of certain transportation workers.") (citing cases); *cf. Rittmann v. Amazon.com, Inc.*, 383 F. Supp. 3d 1196, 1202-03 (W.D. Wash. 2019), *aff'd*, 971 F.3d 904 (9th Cir. 2020) (declining to enforce arbitration agreement where FAA's "transportation worker" exemption applied and where parties "explicitly contracted for Washington law to *not* apply to the Arbitration Provision," and noting "if the parties intended Washington law to apply if the FAA was found to be inapplicable, they would have said so or even remained silent on the issue.") (emphasis added); *Wal-Mart Stores, Inc. v. Helferich Pat. Licensing, LLC*, 51 F. Supp. 3d 713, 718-19 (N.D. Ill. 2014) (applying FAA notwithstanding state law incorporation as "the Agreement does not contain language evidencing any intent of the parties to specifically opt out of the FAA in favor of the Illinois Uniform Arbitration Act.").

Parties need not identify the FAA in an arbitration agreement as it ***applies automatically*** to employment contracts with limited exemptions not present here. *See e.g.*, *Vaden v. Discover Bank*, 556 U.S. 49, 58 (2009) (discussing that Congress enacted the FAA to overcome judicial resistance to arbitration" and to declare "a national policy favoring arbitration of claims that parties contract to settle in that manner") (internal quotation marks and citations omitted).

Conversely, the WUAA, does ***not*** automatically apply to employment agreements. RCW 7.04A.030 ("This chapter does not apply to any arbitration agreement between employers and employees or between employers and associations of employees."). As such, parties must expressly incorporate the WUAA for the state law to apply in employment agreements (as the parties did here). *See, e.g.*, *Burnett v. Pagliacci Pizza, Inc.*, 196 Wn.2d 38, 47 n.1 (2020) (parties may include WUAA in employment agreement) (citing cases).

One might ask why an employer would take a dual approach to drafting an Arbitration Provision. The answer is obvious: to ensure disputes between the employer and the employee are compelled to arbitration. For instance, if a dispute arises and a court were to find

that the parties' agreement to arbitrate falls outside of the purview of the FAA—e.g. interstate commerce not implicated, "transportation worker" exemption applies—the state arbitration law, which may not have such requirements or carveouts, serves as a gap filler to ensure the parties' intent to arbitrate is effectuated.

*Southwest Airlines v. Saxon* is illustrative of this approach. There, the employer sought to enforce an arbitration agreement under the FAA with an employee, an airline ramp supervisor. *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 454 (2022). The employee argued that the FAA did not apply to her, citing the "transportation worker" exemption. *Id.* The Northern District of Illinois enforced the arbitration agreement. *Id.* The Seventh Circuit reversed. *Id.* at 454-55. The Supreme Court ultimately ruled that the employee "frequently loads and unloads cargo on and off airplanes that travel in interstate commerce" and therefore, was exempt from the FAA under the "transportation worker" exemption. *Id.* at 463.

A month after the Supreme Court remanded the *Saxon* case, the employer moved to compel arbitration under Illinois state law, which did not contain a "transportation worker" exemption. *Sw.*

*Airlines Co. v. Saxon*, No. 19-cv-403-SJC, ECF No. 96 at 3 (N.D. Ill. Mar. 10, 2023). The district court compelled arbitration, notwithstanding the employee's objection that the employer had waived its right to compel arbitration under state law because it has not raised these grounds in the initial motion to compel four years prior. *Id.* at 3-6, 9.

### 2. Dr. Phillips's Position Implicates Interstate Commerce.

Dr. Phillips argues that "[i]t is hard to imagine a profession less involved in interstate commerce than Dr. Phillips' [sic] provision of specialized medical care in a clinical setting for a hospital located in Seattle, *Washington*." Petition at 23-26 (emphasis in original). Dr. Phillips ignores Swedish's evidence, the appellate court's reasoning (Decision at 8-10), and fails to acknowledge decades-long caselaw on the interstate commerce requirement.

***First,*** trial courts may take "judicial notice of public documents if the authenticity of those documents cannot be reasonably disputed." *See Jackson v. Quality Loan Serv. Corp.*, 186 Wash. App. 838, 844 (2015) (citing *Berge v. Gorton*, 88 Wash.2d 756, 763 (1977); ER 201(b)(2)). Swedish properly cited to its 2022 IRS

Form 990 to support its interstate commerce argument. CP at 65; *see Hindu Am. Found., Inc. v. Kish*, No. 2:22-CV-01656-DAD-JDP, 2023 WL 5629296, at *2 (E.D. Cal. Aug. 31, 2023) (taking judicial notice of IRS Form 990) (citing cases). In relevant part, Swedish's IRS Form 990 reflects 13,822 individuals employed; millions of dollars of good and services provided by out-of-state contractors; millions of dollars in Medicare revenue; transactions with out-of-state financial institutions; and generally, discusses how Swedish delivers "services across seven states[.]"

Furthermore, as discussed during the oral argument, Dr. Phillips was required to maintain eligibility for Medicare funds. Oral Arg. Tr. at 7:05-8:15. Dr. Phillips's only response during oral argument was that he "really struggle[d] with that argument"—effectively a non-response as it is so obvious that Swedish (and, by virtue of being a former Swedish employee, Dr. Phillips too) engaged in interstate commerce such that the FAA applies. Oral Arg. Tr. at 13:21-14:35.

***Second,*** an individual employee need not cross state lines for their employment to involve interstate commerce, ***so long as their***

***activity involves interstate commerce in the aggregate***. *Citizens Bank v. Alafabco*, *Inc.*, 539 U.S. 52, 56-57 (2003) (citing cases). Here, as described above, Swedish's work bears on interstate commerce in a "substantial way." *Id.* As such, its work (and the work of Dr. Phillips) necessarily involves interstate commerce. *See, e.g.*, *Valley View Health Care, Inc. v. Chapman*, 992 F. Supp. 2d 1016, 1039 (E.D. Cal. 2014) (discussing "no legitimate dispute" that plaintiff medical providers engaged in interstate commerce "given their use and provision of goods and services and receipt of revenues").

**D. RCW 49.44.085 Is Preempted by the FAA.**

Under Dr. Phillips's theory, Petition at 7-10, 16-18, in any lawsuit in which a federal or state discrimination claim is pled, any agreement of the parties to arbitrate that claim was instantly invalidated on June 7, 2018, when RCW 49.44.085 took effect.

Put differently, Dr. Phillips argues that in a dispute between an employer and an employee in Washington, the fact that the plaintiff has pleaded a state or federal discrimination claim automatically means that dispute must be heard by a court and not by an arbitrator,

regardless of whether a valid arbitration agreement exists, effectively nullifying Section 2 of the FAA as to any and all such claims.

Dr. Phillips is mistaken and underscore his fundamental misunderstanding of state and federal precedent.

***First***, as Acting Chief Judge Bill A. Bowman aptly noted during oral argument, "we have a Supreme Court that said you can arbitrate [Washington Law Against Discrimination] claims[.]" Oral Arg. Tr. 17:35-17:40; *see also* Decision at 6-7 ("Furthermore, our Supreme Court in *Adler* rejected the argument that [Washington Law Against Discrimination] requires a judicial forum for discrimination claims.") (citing cases).

***Second***, the question is not whether arbitration is "specifically . . . mention[ed]," Petition at 9, it's whether RCW 49.44.085 discriminates against arbitration agreements, either expressly or by disfavoring agreements that have the defining features of arbitration agreements. *See Chamber of Com. of the United States of Am. v. Bonta*, 62 F.4th 473, 486 (9th Cir. 2023).

The FAA's saving clause permits arbitration provisions to be invalidated by generally applicable contract defenses but does not

permit defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue to invalidate an otherwise valid arbitration agreement. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339-40 (2011) (citing cases).

*Bonta* is directly instructive on this point. In *Bonta*, the Ninth Circuit reviewed a direct challenge by the U.S. Chamber of Commerce to Section 432.6 of the California Labor Code, which contained similar language to RCW 49.44.085. *Bonta*, 62 F.4th at 478; *compare* California Labor Code Section 432.6 ("A person [in an employment relationship] shall not . . . [be] require[d] . . . ***to waive any right forum, or procedure for a violation of [California antidiscrimination laws] . . . including the right to file or pursue a civil action or complaint*** . . . .") (emphasis added) *with* RCW 49.44.085 ("A provision of an employment contract . . . is void and unenforceable if it requires an employee ***to waive the employee's right to publicly pursue a cause of action arising under [Washington] or federal antidiscrimination laws*** . . . .") (emphasis added).

The *Bonta* Court found the FAA preempted the California statute for several reasons. In relevant part:

- Although the California statute did not "expressly bar arbitration agreements" it "disfavor[ed] the formation of agreements that have the essential terms of an arbitration agreement." *Bonta*, 62 F.4th at 486. Because a person who enters into an arbitration agreement must necessarily "waive" their right to bring a civil action, the *Bonta* Court found the California statute "burdens the defining feature of arbitration agreements." *Id.*
- The California statute "single[d] out arbitration provisions as an exception" to generally applicable law as it limited employers by prohibiting "a contract with non-negotiable terms essential to an arbitration agreement." *Id.* at 487 (internal quotations and citations omitted).

The analysis in *Bonta* directly applies to RCW 49.44.085, and courts that have considered the issue have likewise found the Washington statute preempted by the FAA. *See Juan Pablo De Pax Jovel v. WTC Ventures Inc. et al.*, Case No. 86609-5-I,

Commissioner's Ruling Granting Discretionary Review in Part (Wash. App. Div. I July 8, 2024) (unpublished) (rejecting argument that "employment contracts that preclude employees from pursuing discrimination claims publicly in open court are void and unenforceable as against public policy" as RCW 49.44.085 preempted by FAA)[1]; CP at 9-10, 72-100 (citing and attaching *Carlile v. Waste Connections of Wash.*, No. 2:21-cv-00276-SAB, ECF No. 13 (E.D. Wash. Dec. 3, 2021) (unpublished) (in employment discrimination case, holding parties' arbitration provision was outside the scope of RCW 49.44.085 and holding RCW 49.44.085 is preempted by FAA); *Logan v. Lithia of Seattle, Inc.*, No. 18-2-19068-1 SEA, Dkts. 23, 34 (King Cty. Sup. Ct. July 12, 2019) (unpublished) (in employment discrimination case, holding RCW 49.44.085 is preempted by federal law and requiring parties to arbitrate claims where arbitration agreement incorporated both the FAA and WUAA)).

Specifically, in relevant part:

- RCW 49.44.085 inherently disfavors arbitration agreements, as a person who enters into an arbitration agreement must

[1] Pursuant to GR 14.1(a), this unpublished decision is not binding.

necessarily waive their right to bring a civil action. Dr. Phillips blandly argues RCW 49.44.085 is facially neutral and applies to all contracts, not just arbitration agreements, but on its face—as in *Bonta*—it is not. Petition at 9; *Bonta*, 62 F.4th at 486.

- RCW 49.44.085 singles out arbitration provisions as an exception to generally applicable law as it limits non-negotiable terms an employer may include in an agreement. As discussed in *Bonta*, "[i]t is irrelevant that the non-negotiable terms disapproved by [the California statute] could also apply to other sorts of contractual provisions (such as forum-selection clauses) because 'the Supreme Court has emphasized that the focus should be on whether the statute, either on its face or as applied, imposes burdens on arbitration agreements that do not apply to contracts generally.'" *Id.* at 487 (citing cases).

As with the California statute, RCW 49.44.085's deterrence of an employer's willingness to enter into an arbitration agreement is

antithetical to the FAA's "liberal federal policy favoring arbitration agreements." *Moses H. Cone*, 460 U.S. at 24.

Because RCW 49.44.085 does not place arbitration agreements "on an equal plane with other contracts," it does not fall within the FAA's saving clause. *Kindred Nursing Ctrs. Ltd. v. Clark*, 581 U.S. 246, 252 (2017). As such, to the extent Dr. Phillips raises RCW 49.44.085 as a defense to enforcement of the Agreement, it is preempted by the FAA as analyzed in *Bonta* and the long line of cases discussed in that decision—and as other courts in Washington have already so held.

### E. Regardless, RCW 49.44.085 Has No Impact Here as Confidentiality Is Not Required.

Even if RCW 49.44.085 is not preempted by the FAA, it has no impact on Dr. Phillips's case. CP 65, Op. Br. 17-18.

RCW 49.44.085 purports to void any provision of an employment contract "if it requires an employee to resolve claims of discrimination ***in a dispute resolution process that is confidential***." (emphasis added).

The Arbitration Provision does not mandate confidentiality and Dr. Phillips—neither in briefing at the trial or appellate levels nor at

oral argument—has ever identified any provision mandating confidentiality. *See* Oral Arg. Tr. 18:00-18:45. Instead, he continues to selectively quote Rule 23 of the AAA Employment Rules to support his argument. Petition at 13.

As Swedish has repeatedly argued, in full, Rule 23 of the AAA Employment Rules reads: "Confidentiality The arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality, ***unless the parties agree otherwise or the law provides to the contrary***." CP 67, Op. Br. 22-23.

Dr. Phillips has argued that the law does not permit confidentiality. The plain language of Rule 23 states that the arbitrator has to follow the law. The provisions of the Arbitration Provision are far from the "secret arbitration tribunal" which Dr. Phillips claims. CP at 45; *Romney v. Franciscan Med. Grp.*, 186 Wn. App. 728, 744-45 (2015) (rejecting same confidentiality argument from plaintiffs as agreement "permit[ted] the parties to agree to not apply the confidentiality clause and in fact prohibit[ed] such confidentiality where the law would prohibit it."). Many other courts have rejected

the same argument, and Dr. Phillips's argument does not warrant review by this Court. *See Altshuler v. Space Expl. Tech. Corp.*, No. 2:25-CV-00831-JHC, 2025 WL 1654563, at *2 (W.D. Wash. June 11, 2025) (rejecting same argument as "the arbitration agreement provides that confidentiality shall not be maintained if 'required by law'" and "contrary to Plaintiff's contentions, [the provision was] consistent with RCW 49.44.085").

### F. The Arbitration Provision is Not Substantively Unconscionable and Severance is Possible.

Dr. Phillips then argues the Arbitration Provision should be voided on substantively unconscionability grounds and that severance is not possible. *See* Petition at Section V.B.

Section V.B. of Dr. Phillips's Petition is virtually identical to his response briefs filed in the trial and appellate courts. *Compare* Petition Section V.B. *with* Resp. IV.D-F *with* CP at 51-57. He fails to respond to Swedish's substantive responses and the appellate court's reasoning, and does not develop any new argument.

"Substantive unconscionability exists when a provision in the contract is one-sided. . . . In determining if a contractual provision is one-sided or overly harsh, courts look at whether the provision is

'[s]hocking to the conscience,' 'monstrously harsh,' and 'exceedingly calloused.'" *Romney v. Franciscan Med. Grp.*, 186 Wn. App. 728, 740 (2015). Dr. Phillips's scattershot attempts to critique the parties' arbitration agreement repeatedly miss the mark, and the Court should not credit them.

***First,*** the Arbitration Provision does not limit damages. The Parties' Arbitration Provision provides:

> If a court, applying applicable substantive law, would be authorized to award punitive or exemplary damages, the arbitrator(s) shall have the same power, but the arbitrator(s) otherwise shall not award punitive or exemplary damages.

CP at 42, ¶ 2.6. Reading this provision in its entirety reveals that it is entirely consistent with the Court's ruling in *Zuver*: if a Court would be able to authorize punitive or exemplary damages, the arbitrator would as well; otherwise the arbitrator may not do so. Courts regularly uphold similar provisions in arbitration agreements. *See, e.g.*, *McKee v. AT & T Corp.*, 164 Wash. 2d 372, 401 (2008) (holding limitation on punitive damages not unconscionable as provision allowed such an award "expressly authorized by statute.").

***Second,*** the Arbitration Provision does not require confidentiality. *See* Part VI.B.2, *supra*.

***Third,*** the Arbitration Provision does not prohibit discovery. As with the other arguments above, Swedish finds it instructive to start with the full text of the Arbitration Provision, which provides: "There shall be no discovery or dispositive motions (such as motions for summary judgment or to dismiss or the like), ***but the arbitrator may authorize such discovery as is necessary for a fair hearing of the dispute."*** CP at 41.

The U.S. Supreme Court has noted that limitations on discovery are to be expected in an arbitration agreement, one of the justifications for the lower cost of arbitration. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) ("Although those procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."). Indeed, these specific discovery provisions have been previously upheld. *See, e.g.*, *Newell v. Providence Health & Servs.*, 9 Wash. App. 2d 1038 (2019) (upholding same discovery

procedures because "the parties agreed that by default discovery would be substantially limited.").

The inapposite cases upon which Dr. Phillips relies—which are merely copy pasted from his briefing below—have been repeatedly substantively addressed and distinguished by Swedish and are incorporated herein. *See* Op. Br. 24-26; Reply at 15-16.

In any event, if the Court finds any term in the Arbitration Provision improper, severance is the proper remedy. *Id.*

**G. The Parties "Clearly and Unmistakably" Delegated Issues of Arbitrability to the Arbitrator.**

Dr. Phillips then argues the appellate court erred by abiding by the Arbitration Provision to delegate questions of arbitrability to the arbitrator. Petition at 27-29. In doing so, Dr. Phillips repeatedly cites to inapposite cases:

- Dr. Phillips misrepresents *Lamps Plu*s. Petition at 27. Reading further, Chief Justice Roberts discussed: Although parties are free to authorize arbitrators to resolve such questions, we will not conclude that they have done so based on "silence or ambiguity[.]" 139

S.Ct. 1407, 1417 (2019). As described in the lower courts, the "silence or ambiguity" analyzed by the *Lamps Plus* Court is not present here.

- *Saleemi* does not even apply as that case involved the WUAA and did not include a delegation clause. 292 P.3d 108 (2013).
- Dr. Phillips misrepresents *Romney.* Petition at 28. Reading further, Division I discussed: "Courts will also refer to arbitration any dispute which the parties have clearly and unmistakably agreed to submit to arbitration . . . Thus, absent an agreement by the parties, the issue of whether class arbitration is available is a gateway issue of arbitrability properly decided by the superior court." 399 P.3d 1220, 1224 (2017) (citing cases) (finding there was no "clear or unmistakable" delegation so appropriate for court to address arbitrability questions).
- Dr. Phillips misrepresents *Raab*. Petition at 28. There, the *Raab* Court specifically discussed how the parties'

arbitration provision "does not speak of the authority delegated to the Utah arbitrator at all" and as such, that is why the superior court was not limited in its arbitrability. 536 P.3d 695, 706 (2023), *review granted*, 2 Wash. 3d 1022, 544 P.3d 25 (2024), *and aff'd*, 565 P.3d 895 (2025).

- Dr. Phillips misrepresents *Heights*. The *Heights* Court found "[t]he plain language of the contract shows that the parties shared a clear intent to submit all disputes relating to the contract to arbitration" and limited the trial court's initial analysis to "whether the parties agreed to arbitrate the submitted claims." 200 P.3d 254, 257 (2009)
- *Oakley* does not even apply. There, Division I found that the arbitration agreement referring "'any . . . dispute . . . relating to the scope, validity, or enforceability' of the agreement to binding arbitration" to be a "a clear and unmistakable delegation of these issues to the

arbitrator." 23 Wash. App. 2d 218, 225, 516 P.3d 1237, 1241 (2022).

Here, the Parties' Arbitration Provision expressly states that "[w]hether a controversy or claim is covered by this Agreement shall be determined by the arbitrator." As Division I correctly held, "[t]his language is broad, mandatory, and unambiguous; it delegates the threshold question of arbitrability to the arbitrator." Decision at 15-16.

### H. Swedish is Entitled to Attorney's Fees and Costs.

Should the Court deny Dr. Phillips's Petition, Swedish requests the Court award attorney's fees and costs it incurred in responding to the Petition. *See* RAP 18(j). Swedish was the prevailing party on appeal and has filed a Cost Bill with Division I.

## VII. CONCLUSION

This case does not merit review by this Court. Dr. Phillips merely reproduces arguments already presented, oftentimes verbatim, without any consideration for Swedish's arguments or the appellate court's reasoning. He fails to demonstrate that any significant question of law under the Constitution of the State of Washington or

of the United States is involved or an issue of substantial public interest is involved to warrant review by this Court.

I certify that Defendant-Respondent's Response to Plaintiff-Petitioner's Petition for Discretionary Review has 4,966 words.

RESPECTFULLY SUBMITTED this 16th day of July, 2025

*/s/ Ryan P. Hammond*
Ryan P. Hammond, Bar No. 38888
rhammond@littler.com
Madhura Panjini, Bar No. 54370
mpanjini@littler.com
LITTLER MENDELSON, P.C.
One Union Square
600 University Street, Suite 3200
Seattle, Washington 98101.3122
206.623.3300

***Attorneys for Respondent***
***SWEDISH HEALTH SERVICES***

## CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2025, I caused the foregoing document entitled ***RESPONSE TO PETITION FOR DISCRETIONARY REVIEW*** to be filed with the Clerk of the Supreme Court of the State of Washington, via the WA State Appellate Courts' Portal, and a true and correct copy of the same to be sent via email to the following:

**Counsel for Respondent/Plaintiff**

Sean D. Leake, WSBA No. 52658
Sheryl J. Willert, WSBA No. 08617
WILLIAMS, KASTNER & GIBBS PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
(206) 623-6600
sleake@williamskastner.com
swillert@williamskastner.com
rmcdade@williamskastner.com
tdondero@williamskastner.com

I declare under the penalty of perjury under the laws of the State of Washington that the above is true and correct. Executed on July 16, 2025, at Seattle, Washington.

*s/Colette Pringle-Saunders*
Colette Pringle-Saunders,
Attorney Practice Coordinator
cpsaunders@littler.com

4905-6241-7479.5

**LITTLER MENDELSON**

**July 16, 2025 - 1:23 PM**

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| **Appellate Court Case Number:** | 104,207-8 |
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Address:
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