No. 75769-5

WASHINGTON STATE COURT OF APPEALS
DIVISION I

KEVAN COFFEY,

Plaintiff/Respondent,

v.

PUBLIC HOSPITAL DISTRICT NO. 1, SKAGIT COUNTY, WASHINGTON d/b/a SKAGIT REGIONAL HEALTH et al.,

Defendants/Appellants.

BRIEF OF *AMICUS CURIAE* LEGAL VOICE

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TABLE OF CONTENTS

I. Interests of *Amicus Curiae* 1

II. Introduction 1

III. Statement of the Case 2

IV. Argument 2

A. Washington Voters Enacted the Reproductive Privacy Act to Prevent the State from Using Its Considerable Power to Discriminate Against a Person's Exercise of the Fundamental Constitutional Right to Choose Abortion. 2

B. A Public Hospital District that Offers Maternity Care Services Must Also Offer Voluntary Termination Services to Fulfill the Statutory Mandate of Providing "Substantially Equivalent Benefits, Services, or Information." 8

C. The "Substantial Equivalent" of Providing Maternity Care Services Is Providing Abortion Services. 11

1. Providing a Referral to an Outside Provider Is Not "Substantially Equivalent" to Providing On-Site Services. 11

2. RCW 9.02.160 Requires a Public Entity to "Provide" Substantially Equivalent Services, Not Merely to "Permit" Women to Access Substantially Equivalent Services from a Third Party 14

D. RCW 9.02.160 Is Not Limited to Programs with Income Eligibility Criteria; It Applies to *Any* Program. 15

E. RCW 9.02.150 Does Not Relieve a State Entity of Its Obligation to Provide Substantially Equivalent Services. 17

V. Conclusion 20

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Ansonia Bd. of Educ. v. Philbrook,
479 U.S. 60, 107 S. Ct. 367, 93 L. Ed. 2d 305 (1986)…….18

Harris v. McRae,
448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980)……...3, 4

Maher v. Roe,
432 U.S. 464, 97 S. Ct. 2376, 53 L. Ed. 2d 484 (1977)……3, 5, 6

McCormack v. Hiedeman,
694 F.3d 1004 (9th Cir. 2012)……13

Rust v. Sullivan,
500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991)……7

Stormans v. Wiesman,
794 F.3d 1064 (9th Cir. 2015)……...12, 19

Webster v. Reproductive Health Services,
492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989)….4, 5, 6, 7, 9

State Cases

Citizens Alliance for Property Rights Legal Fund v. San Juan County,
184 Wn.2d 428, 359 P.3d 753 (2015)……9

Five Corners Family Farmers v. State,
173 Wn.2d 296, 268 P.3d 892 (2011)……..17

In re Forfeiture of One 1970 Chevrolet Chevelle,
166 Wn.2d 834, 215 P.3d 166 (2009)……9

Gray v. Suttell & Assocs.,
181 Wn.2d 329, 334 P.3d 14 (2014)……..9

Honeycutt v. State, Dep't of Labor & Indus.,
197 Wn. App. 707, 389 P.3d 773 (2017)…….15

Kumar v. Gate Gourmet,
180 Wn.2d 481, 325 P.3d 193 (2014)……..18

Rest. Dev., Inc. v. Cananwill, Inc.,
150 Wn. 2d 674, 80 P.3d 598 (2003)……...16

Safeco Ins. Cos. v. Meyering,
102 Wn.2d 385, 687 P.2d 195 (1984)……..10

State v. J.P.,
149 Wn.2d 444, 69 P.3d 318 (2003)……10

State Statutes

Reproductive Privacy Act, RCW 9.02…….*passim*

Regulations

WAC 246-863-095…….19

WAC 246-869-010…….19

Other Authorities

Adam Sonfield, *Rights vs. Responsibilities: Professional Standards and Provider Refusals*, 8 Guttmacher Policy Review Issue 3
(Aug. 1, 2005)……..11

Cassandra Tate, *Abortion Reform in Washington State*
HistoryLink.org Essay 5313 (Feb. 26, 2003)……..6

Cynthia J. Berg et al., *Overview of Maternal Morbidity During Hospitalization for Labor and Delivery in the United States*
113 Obstetrics & Gynecology 1075 (2009)……...13

Cynthia Soohoo, *Hyde-Care for All: The Expansion of Abortion-Funding Restrictions Under Health Care Reform*
15 CYNY L. Rev. 391 (2012)…….3

Elizabeth Sepper, *Taking Conscience Seriously*,
98 Va. L. Rev. 1501, 1559
(2012)……..19, 20

Jill E. Adams & Jessica Arons, *A Travesty of Justice: Revisiting Harris v. McRae*, 21 Wm. & Mary J. of Women & L. (2014)……..3

Merriam-Webster Dictionary.……..15

Nadia N. Sawicki, *Mandating Disclosure of Conscience-Based Limitations on Medical Practice*, 42 Am. J. L. & Med. 85, 88 & n. 7 (2016) 11

Op. Atty. Gen. No. 3 (2013)……..17

Ross Tanaka, *Washington's Reproductive Privacy Act: An Interpretation and constitutional Analysis*, 90 Wash. L. Rev. 993 (2015)……13, 14

Ushma D. Upadhyay et al., *Incidence of Emergency Department Visits and Complications After Abortion* 125 Obstetrics & Gynecology 175 (2015)…….13

William M. Callaghan et al., *Severe Maternal Morbidity Among Delivery and Postpartum Hospitalizations in the United States* 120 Obstetrics & Gynecology 1029 (2012)……13

I. INTERESTS OF *AMICUS CURIAE*

The interests of *Amicus Curiae* Legal Voice are fully set forth in the Motion for Leave to File Brief of *Amicus Curiae* filed herewith.

II. INTRODUCTION

Washington's Reproductive Privacy Act ("RPA") codifies every individual's fundamental right of privacy with respect to personal reproductive decisions. RCW 9.02.100. The RPA also mandates that the State not discriminate against the exercise of these rights in the regulation or provision of benefits, facilities, services, or information, and that for State funded and administered programs, the State provide substantially equivalent benefits, services, or information for maternity care and pregnancy termination. RCW 9.02.100(4), 160.

These protections were enacted by a direct vote of the people at a time when the guarantees of *Roe v. Wade* were imperiled by a closely divided U.S. Supreme Court and access to abortion was being threatened across the country by laws that restricted government funding or provision of abortion. It was in this context that Washington voters acted to codify the "fundamental right of privacy with respect to personal reproductive decisions" and mandated that all State entities that administer or fund maternity care provide substantially equivalent abortion care.

The trial court correctly found that the substantial equivalent of providing maternity care services is providing services that would enable a woman to terminate a pregnancy. Providing "services" is not interchangeable with providing "information"; rather, referrals to a third-party clinic force pregnant persons to clear additional hurdles to exercise their rights to their choice of health-care services. The trial court's order properly construed the RPA, in keeping with the legislative purpose of protecting Washingtonians' right to privacy regarding personal reproductive decisions.

III. STATEMENT OF THE CASE

Amicus Curiae Legal Voice incorporates by reference and adopts Respondent's statement of the case.

IV. ARGUMENT

A. Washington Voters Enacted the Reproductive Privacy Act to Prevent the State from Using Its Considerable Power to Discriminate Against a Person's Exercise of the Fundamental Constitutional Right to Choose Abortion.

In 1973, the United States Supreme Court established in *Roe v. Wade* that individuals have a constitutional "right to privacy" that includes a woman's right to choose to terminate her pregnancy. 410 U.S. 113, 153, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). Almost immediately, however, the anti-choice movement began gaining traction around the country. States

began enacting statutes that effectively restricted a woman's right to choose by denying state funding for abortion services.[1] Likewise, in 1976, the federal government passed the Hyde Amendment, which limited federal Medicaid coverage of abortion care, allowing exceptions only for life-endangering pregnancies and those caused by rape or incest.[2]

The Supreme Court heard challenges to several of these statutes, and in each instance, upheld the restrictions, concluding that although the government cannot outlaw abortion altogether, it can, through the provision of funding and other services, express a preference for (*i.e.*, discriminate in favor of) childbirth over abortion. Specifically, in *Maher v. Roe*, 432 U.S. 464, 97 S. Ct. 2376, 53 L. Ed. 2d 484 (1977), the Court upheld a state law that limited Medicaid funding for abortions, finding that the right recognized in *Roe* "implies no limitation on a State's authority to make a value judgment favoring childbirth over abortion and to implement that judgment by the allocation of public funds." *Id.* at 471-74.

Shortly thereafter, in *Harris v. McRae*, 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980), the Court upheld the Hyde Amendment,

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[1] Cynthia Soohoo, *Hyde-Care for All: The Expansion of Abortion-Funding Restrictions Under Health Care Reform*, 15 CUNY L. Rev. 391, 402 (2012).
[2] *See* Jill E. Adams & Jessica Arons, *A Travesty of Justice: Revisiting* Harris v. McRae, 21 Wm. & Mary J. of Women & L. 5, 10-11 (2014) (discussing evolution of the Hyde Amendment).

again concluding that the government may encourage an "alternative activity deemed in the public interest" (i.e., childbirth) without running afoul of *Roe v. Wade*. 448 U.S. at 315. Four of the nine justices, however, disagreed. As Justice Brennan observed in his dissent, while the state is under no general obligation to fund abortions, "funding all of the expenses associated with childbirth and none of the expenses incurred in terminating pregnancy" coerces women into choosing childbirth by making them an offer they "cannot afford to refuse," thereby impinging on the fundamental "due process liberty right recognized in *Roe v. Wade*." 448 U.S. at 330, 333-34 (Brennan, J., dissenting).

In a final Supreme Court decision leading up to the Washington RPA, in *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989), the Court upheld a Missouri law that imposed restrictions on the use of public funds, facilities, and employees in performing, assisting with, or counseling on abortions. Writing for the 5-4 majority in a fractured opinion, Justice Rehnquist stated:

> If the State may "make a value judgment favoring childbirth over abortion and … implement that judgment by the allocation of public funds," … surely it may do so through the allocation of other public resources, such as hospitals and medical staff. … Thus we uphold the Act's restrictions on the use of public employees and facilities for the performance or assistance of nontherapeutic abortions.

492 U.S. at 510. Most troubling for proponents of abortion access, three of the Justices in the Court's majority (Rehnquist, White and Kennedy) suggested revisiting and narrowing *Roe*, and Justice Scalia suggested overturning it altogether. *Id.* at 521-22 (Rehnquist, White and Kennedy, JJ.) and 532 (Scalia, J., concurring in part and concurring in the opinion).

Thus, there was a great deal of concern in Washington over the outcome in *Webster*. Numerous Washington-based organizations and individuals participated as *amici curiae* before the Supreme Court, supporting the plaintiff's position that the statute was unconstitutional. These interested parties included the predecessor organization to Legal Voice (the Northwest Women's Law Center) and Washington Women United, 19 professors from the University of Washington, 49 Washington State legislators, and one U.S. Senator and four U.S. Representatives from Washington, who signed on to a total of seven *amicus* briefs.[3] The

[3] *See* Brief of Seventy-Seven Organizations Committed to Women's Equality as Amici Curiae in Support of Appellees, 1989 WL 1127689 (including the Northwest Women's Law Center and Washington Women United)*;* Amici Curiae Brief of 167 Distinguished Scientists and Physicians, Including 11 Nobel Laureates, in Support of Appellees, 1989 WL 1127711 (including eight University of Washington science professors); Brief of Amici Curiae on Behalf of 608 State Legislators from 32 States, 1989 WL 1127741 (including 49 Washington State legislators); Brief for Certain Members of Congress of the United States: Senator Howard Metzenbaum (D. OH.) et al in Support of Appellees, 1989 1127699 (including one U.S. Senator and four U.S. Representatives from Washington); Brief for a Group of American Law Professors as Amicus Curiae in Support of Appellees; 1989 WL 1127726 (including nine law professors from the University of Washington); Brief of Amici Curiae American Public Health Association,

Supreme Court issued its decision in *Webster* on July 3, 1989. Directly on its heels, less than a year later, Initiative 120 was filed in April 1990.

It was in this context, in the immediate aftermath of *Webster, Maher v. Roe, and Harris v. McRae*—decisions upholding laws restricting the use of public funds for abortion care—that voters sought to ensure that similar restrictions could not be enacted in Washington.[4] At the time, although Washington State had acted pre-*Roe* to liberalize onerous laws criminalizing abortion, that 1970 law did not go as far as *Roe*, nor far enough to protect against the types of restrictions passed in other states.[5]

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et. al in Support of Appellees; 1989 WL 1127723 (including the Associate Dean of the University of Washington School of Public Health and Community Medicine); and Brief of 281 American Historians as Amici Curiae Supporting Appellees; 1989 WL 1127703 (including a professor of history from the University of Washington).

[4] In light of the fact that Initiative 120 was enacted as a direct reaction to the deluge of attacks on state services for low-income women, it is hardly surprising that the voter's pamphlet, as well as much of the media coverage, emphasized the fact that, if enacted, the RPA would prevent similar outcomes in Washington and would guarantee that programs providing assistance to low-income women could not discriminate against abortion. *See* Brief of Appellant at 31-33 and material discussed therein. But the plain language of the statute makes clear that while helping to protect programs aimed at low-income individuals was certainly *one of* the aims of the Initiative, voters chose not to limit the law's applicability to such programs and instead chose to apply the nondiscrimination provisions to *any* program run by a state entity. *See infra* Section IV.D.

[5] After the Legislature passed the bill in 1970, Referendum 20 was presented to the voters for ratification. *See* Cassandra Tate, *Abortion Reform in Washington State*, HistoryLink.org Essay 5313 (Feb. 26, 2003), *available at* http://www.historylink.org/File/5313. Referendum 20, which passed by a 56.6 percent majority, protected women's ability to decide, with their doctors, whether or not they should terminate their pregnancies. Although Referendum 20 legalized abortion, it protected abortions only within the first four months of pregnancy, and required women to obtain permission from their husband or guardian. Laws of 1970, ch. 3, § 2. It also included a residency requirement, which mandated that women be a resident of

Initiative 120, also known as the Reproductive Privacy Act, prevented the State from using the considerable power that it wields through the "provision of benefits, facilities, services [and] information," to discriminate in favor of childbirth and against a woman's constitutional right to choose abortion.[6] RCW 9.02.100. In November 1991, voters approved of Initiative 120, which was codified as RCW 9.02.

Specifically, RCW 9.02.160 includes language directly refuting *Webster* and the line of cases that came before it, as follows:

> If the state provides, directly or by contract, maternity care benefits, services, or information to women through any program administered or funded in whole or in part by the state, the state shall also provide women otherwise eligible for any such program with substantially equivalent benefits, services, or information to permit them to voluntarily terminate their pregnancies.

Yet Appellants' interpretation of the RPA would yield precisely the same result as the decision in *Webster* that so many Washingtonians had

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Washington for at least 90 days before they could legally obtain an abortion within the state. *Id.* Subsequently, *Roe v. Wade* erased some of these restrictions on abortions, including restrictions on abortions in the first two trimesters, the residency requirement, and the limitations on which facilities could be deemed "acceptable." 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).

[6] It is also worth noting that in May 1991, just six months before the vote on Initiative 120, the Supreme Court upheld yet another restriction on the use of government funding for abortion services in *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991). The Court in *Rust* upheld a rule by the Secretary of Health and Human Services that prohibited projects that received federal Title X family-planning funding "from engaging in counseling concerning, referrals for, and activities advocating abortion as a method of family planning." 500 U.S. at 180. The Court concluded that the rule was justified, among other things, because it reflected "a shift in attitude against the 'elimination of unborn children by abortion.'" *Id*. at 186.

actively opposed: it would allow the State to use its financial power to discriminate against women who exercise their constitutional right to choose abortion. Such an interpretation is a clear misreading of the RPA.

As the trial court below observed, the Reproductive Privacy Act's mandate is to ensure that the State remains "choice neutral" by providing women access to termination services on an equal basis with maternity and childbirth services. CP 31. This legislative purpose is clearly expressed in RCW 9.02.110, which prevents the State from "deny[ing] or interfer[ing] with a woman's right to have an abortion prior to viability of the fetus, or to protect her life or health." More specifically, RCW 9.02.160 forbids state entities from appropriating resources in such a way as to make childbirth a more attractive option or to compel a woman to choose childbirth over termination by limiting the availability of services provided. CP 31; RCW 9.02.160.

B. A Public Hospital District that Offers Maternity Care Services Must Also Offer Voluntary Termination Services to Fulfill the Statutory Mandate of Providing "Substantially Equivalent Benefits, Services, or Information."

RCW 9.02.160 clearly and unambiguously forbids a state entity from offering maternity care services without offering substantially equivalent pregnancy termination services:

> If the state provides, directly or by contract, maternity care benefits, services, or information to women through any

> program administered or funded in whole or in part by the state, the state shall also provide women otherwise eligible for any such program with substantially equivalent benefits, services, or information to permit them to voluntarily terminate their pregnancies.

RCW 9.02.160. Thus, the statute creates three parallel, and separate, mandates: 1) if the State provides ***benefits*** covering maternity care, it must provide equivalent ***benefits*** covering pregnancy termination; 2) if the State provides maternity care ***services***, it must provide equivalent pregnancy termination ***services***; if the State provides ***information*** (including referrals) about maternity care, it must provide equivalent ***information*** (including referrals) about pregnancy termination. RCW 9.02.160.

A statute's words are to be interpreted according to the traditional rules of grammar. *Gray v. Suttell & Assocs.*, 181 Wn.2d 329, 339, 334 P.3d 14 (2014) (examining use of comma and the disjunctive "or" to separate two phrases); *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 839, 215 P.3d 166 (2009) (courts account for the ordinary meaning of words, basic rules of grammar, and statutory context). Here, using proper grammatical construction, "benefits" parallels "benefits," "services" parallels "services," and "information" parallels "information."

Additionally, the statute's use of distinct words—"benefits," "services," and "information" —must be given effect. *Citizens Alliance for Property Rights Legal Fund v. San Juan County*, 184 Wn.2d 428, 440,

359 P.3d 753 (2015) (when the Legislature uses two different terms in the same statute, courts presume terms to have different meanings). Further, all statutory language must be given effect, "'with no portion rendered meaningless or superfluous.'" *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999)). Appellants' interpretation would erase any distinction between the words "services" and "information," despite the fact that providing services and information imposes enormously different obligations. Allowing a State-run entity to offer a comprehensive maternity program, while supplying only information or referrals about termination services, does not ensure that the State remains choice neutral.

Finally, the statute's overall context and objective make clear that providing "information" cannot be equated to providing "services." The meaning most consonant with a statute's policy or obvious purpose must be given effect. *Safeco Ins. Cos. v. Meyering*, 102 Wn.2d 385, 392, 687 P.2d 195 (1984) (paramount concern in interpreting statute is to ensure interpretation consistent with the statute's underlying policy). Recognizing a difference between providing "services" and providing "information" is most consistent with the RPA's purpose of protecting the "fundamental right to choose or refuse to have an abortion." RCW 9.02.100(3).

C. The "Substantial Equivalent" of Providing Maternity Care Services Is Providing Abortion Services.

1. Providing a Referral to an Outside Provider Is Not "Substantially Equivalent" to Providing On-Site Services.

Referring women to outside abortion providers is not "substantially equivalent" to providing on-site maternity services. In addition to the fact that the plain language requires more, there are practical reasons why referral is not acknowledged to be an acceptable alternative to providing health-care services on site.

Again, the context in which Initiative 120 was adopted is instructive to understanding why "substantially equivalent" means something other than what Appellants posit. As one commentator observed, "Within weeks of the U.S. Supreme Court's decision in *Roe v. Wade* that legalized abortion nationwide in 1973, Congress passed legislation proposed by then-senator Frank Church (R-ID) to ensure providers' ability to withdraw" from personally providing abortion services, and other similar "conscience clauses" protecting providers who refused to provide services followed in federal and state law.[7] Indeed, in a

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[7] Adam Sonfield, *Rights vs. Responsibilities: Professional Standards and Provider Refusals*, 8 Guttmacher Policy Review, Issue 3 (Aug. 1, 2005), *available at* https://www.guttmacher.org/gpr/2005/08/rights-vs-responsibilities-professional-standards-and-provider-refusals. *See also* Nadia N. Sawicki, *Mandating Disclosure of Conscience-Based Limitations on Medical Practice*, 42 Am. J. L. & Med. 85, 88 & n.7 (2016) (noting federal and state laws protecting providers who choose not to provide

recent case challenging a Washington State rule involving health-care refusals, the Ninth Circuit explicitly acknowledged that providing facilitated referrals for prescription medication, where the refusing provider checks first that a drug is available elsewhere before referring a patient there, is not the same as providing the service on site. *Stormans v. Wiesman*, 794 F.3d 1064, 1078 (9th Cir. 2015). Yet in the robust public debate pitting individuals' religious freedom rights to refuse care against both patients' needs and ethical guidance by professional associations for health-care providers, no one suggests, as Appellants do here, that ***refusing*** care and referring a patient to another provider is the equivalent of ***providing*** care.

With regard to abortion care specifically, there are numerous practical reasons that referral to an off-site provider is not "substantially equivalent" to on-site abortion care. Most critically, delay in providing care can have negative health impacts. Delay increases the likelihood that the procedure will take place in a later gestational period, and even though abortion is very safe, delay into the second trimester does increase the

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from liability, and that "[m]any of these 'conscience clauses' were passed directly after the Supreme Court's decisions in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which established and reinforced a woman's constitutional right to terminate a pregnancy").

chance of a major complication.[8] Moreover, the farther patients must travel to obtain an abortion, the less likely they are to have one.[9] "This is especially true for young and low-income women, who are disproportionately disadvantaged by the costs of travel, including a reliance on public transportation, a lack of access to child care, and inflexible work hours."[10] When a person is denied a wanted abortion, carrying the pregnancy to term increases the risk of injury and death.[11]

In addition, stand-alone facilities can be more vulnerable to protests and violence than integrated hospitals.[12] Such disruption and

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[8] *See* Ushma D. Upadhyay et al., *Incidence of Emergency Department Visits and Complications After Abortion*, 125 Obstetrics & Gynecology 175, 181 (2015).

[9] Ross Tanaka, *Washington's Reproductive Privacy Act: An Interpretation and Constitutional Analysis*, 90 Wash. L. Rev. 993, 1014-15 (2015) (citations omitted).

[10] Tanaka, *supra* note 13, at 1014-15 (citations omitted). *See also McCormack v. Hiedeman*, 694 F.3d 1004, 1017 (9th Cir. 2012) (discussing barriers Idaho statute placed on abortion access, particularly for low-income women).

[11] Hospital deliveries are more than three times as likely to result in a major complication as a second-trimester abortion. William M. Callaghan et al., *Severe Maternal Morbidity Among Delivery and Postpartum Hospitalizations in the United States*, 120 Obstetrics & Gynecology 1029, 1034 (2012); *see also* Cynthia J. Berg et al., *Overview of Maternal Morbidity During Hospitalization for Labor and Delivery in the United States*, 113 Obstetrics & Gynecology 1075, 1077 (2009) (28.6% of hospital deliveries involve at least one complication, compared to 1% to 4% for a first-trimester abortion).

[12] *See McCormack*, 694 F.3d at 1017-18 (citing Rachel K. Jones & Kathryn Kooistra, *Abortion Incidence and Access to Services in the United States*, 2008, 43 Persp. on Sexual and Reprod. Health 41, 48 (2011) (finding that 57% of nonhospital providers experienced antiabortion harassment in 2008; levels of harassment were particularly high in the Midwest (85%) and the South (75%))). *See also* National Abortion Federation, 2015 Violence and Disruption Statistics (Apr. 2016), *available at* http://5aa1b2xfmfh2e2mk03kk8rsx.wpengine.netdna-cdn.com/wp-content/uploads/2015-NAF-Violence-Disruption-Stats.pdf ("since 1977, there have been 11 murders, 26 attempted murders, 42 bombings, 185 arsons, and thousands of incidents of criminal activities directed at abortion providers.").

threats often cause clinics to have to shut down temporarily, which can be detrimental to patients' health by causing delay or denial of care altogether, and even in the absence of a shutdown, the stress associated with clinic protests can cause complications during procedures.[13]

Accordingly, there is no plausible basis for concluding that referral to a separate facility is "substantially equivalent" to providing abortion services on site.

2. RCW 9.02.160 Requires a Public Entity to "Provide" Substantially Equivalent Services, Not Merely to "Permit" Women to Access Substantially Equivalent Services from a Third Party.

RCW 9.02.160 requires state entities to ***provide*** benefits, services, or information that would ***permit*** a woman to terminate a pregnancy, if they provide maternity services. A State entity may not shirk its duty to "provide" services by claiming that regardless of what services it actually provides, women are in any case "permitted" to obtain abortions.

RCW 9.02.160's use of the word "permit" in this context clearly requires something more than doing nothing at all, which would be the result of Appellants' proposed construction. Patients are "permitted" to obtain abortions regardless of what a public entity does or does not do. A

[13] Tanaka, *supra* note 13, at 1013 (citing Tara K. Kelly, Note, *Silencing the Lambs: Restricting First Amendment Rights of Abortion Clinic Protesters in* Madsen v. Women's Health Center, 68 S. Cal. L. Rev. 427, 437-39 (1995)).

requirement to "permit" a woman to terminate a pregnancy would be rendered meaningless if the word "permit" were given the passive construction urged by Appellants.

Rather, "permit" requires some form of action on the part of the State. The dictionary definition of "permit" is: 1) to consent to expressly or formally; 2) to give leave; or 3) to make possible. *Merriam-Webster Dictionary* "Permit." Merriam-Webster.com. Accessed April 1, 2017. https://www.merriam-webster.com/dictionary/permit. Here, "permit" clearly conveys the third definition, requiring State entities not merely to consent to women terminating pregnancies, but to make it possible for them to do so. *See, e.g., Honeycutt v. State, Dep't of Labor & Indus.*, 197 Wn. App. 707, 715-16, 389 P.3d 773 (2017) (in the context of the statute, "time ***allowed***" off for illness referred to time ***provided*** by the employer, rejecting claim that "allowed" carried a permissive or discretionary meaning). Thus, RCW 9.02.160 requires State entities to ***provide*** services that would ***enable*** women to terminate their pregnancies and not merely to ***refrain from obstructing*** patients from obtaining services elsewhere.

D. RCW 9.02.160 Is Not Limited to Programs with Income Eligibility Criteria; It Applies to *Any* Program.

The court below also correctly rejected the argument that RCW 9.02.160's mandate of parity extends only to services for low-income women. On its face, RCW 9.02.160 contains no income eligibility criteria

whatsoever and instead requires parity between maternity care and termination services for "***any*** program administered or funded in whole or in part by the state." *Id.* (emphasis added). Any claim that the statute's reference to a "program" is limited to programs with an express eligibility requirement would add words to the statute that are not there, contrary to rules of statutory construction. *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn. 2d 674, 682, 80 P.3d 598 (2003).

By stating that the State shall provide "women otherwise eligible for any such program" with substantially equivalent benefits, services, or information, RCW 9.02.160 merely recognizes that any person eligible to receive maternity care under a State program must also be eligible for substantially equivalent termination benefits, services, or information. RCW 9.02.160. Where a State entity "administer[s] or fund[s], in whole or in part," a maternity care program with no eligibility restrictions that is open to all, it must similarly offer termination services with no eligibility restrictions. For example, this same provision requires the State to include abortion coverage in all healt- care benefit plans for its own employees.

An Attorney General Opinion ("AGO") from 2013 reached precisely this conclusion, finding that RCW 9.02.160 applies broadly to

any "program" rather than those with income eligibility criteria.[14] Wash. Op. Atty. Gen. No. 3 (2013). The AGO reasoned that dictionary meaning of "program" is "extraordinarily broad," and "nothing on the face of RCW 9.02.160 suggests a narrow construction." *Id.* at 6-7. Based on this plain reading of the word "program," the AGO concluded that RCW 9.02.160's parity requirement was *not* limited to programs such as Medicaid or the State Basic Health Program, and did apply to a public hospital district's funding or administration of a hospital.

E. RCW 9.02.150 Does Not Relieve a State Entity of Its Obligation to Provide Substantially Equivalent Services.

While RCW 9.02.150 provides that "no person" may be required by law or contract to perform an abortion, that exception cannot be read so as to relieve an entire public ***entity*** of its obligation to provide substantially equivalent services. The obligation to provide imposed by RCW 9.02.160 falls on the ***institution***, not the individual. And the ability

[14] Formal Attorney General Opinions ("AGOs") are "entitled to great weight." *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 308-09, 268 P.3d 892 (2011) (quoting *Seattle Bldg. & Constr. Trades Council v. The Apprenticeship & Training Council*, 129 Wn.2d 787, 803, 920 P.2d 581 (1996)). This is so, in part, because "such opinions represent the considered legal opinion of the constitutionally designated "legal adviser of the state officers," *id*. (quoting Wash. Const. art. III, § 21), and courts presume the legislature is aware of formal AGOs, so failure to amend the statute in response to a formal opinion may be treated as a form of "legislative acquiescence in that interpretation." *Id*.

to invoke a so-called "conscience clause" such as that created by RCW 9.02.150 belongs to the individual, not the public entity.

RCW 9.02.160's requirement that the State provide abortion care substantially equivalent to maternity care, and RCW 9.02.150's mandate that no individual be required by law or contract to perform abortions, are easily reconcilable: no individual who objects to performing abortions need enter into a contract that includes providing abortion care as a job requirement. This harmonization ensures that the nondiscrimination provisions of the RPA are given effect while also appropriately protecting an individual's right to refrain from performing abortions.[15] This construction is most consistent with the voters' clearly expressed intent to ensure that the state does not discriminate between childbirth and abortion by making one service readily available but not the other.

Other laws in Washington and elsewhere strike this same balance between ensuring access while also protecting the right of the individual to

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[15] Appellants' assertion that plaintiff "invites" this Court to add an exemption to the RPA for a bona fide occupational qualification ("BFOQ"), Appellants' Reply Brief at 13, is a red herring, raised now for the first time in reply. Anti-discrimination laws governing employment already address BFOQs and reasonable accommodation of employees who refuse care on religious grounds. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68-69, 107 S. Ct. 367, 93 L. Ed. 2d 305 (1986) (discussing duty to accommodate under Title VII); *Kumar v. Gate Gourmet*, 180 Wn.2d 481, 502, 325 P.3d 193 (2014) (discussing duty to accommodate under Washington Law Against Discrimination). Yet no employment claim is at issue here. Instead, the issue here is whether the RPA requires ***public entities*** to provide abortion services. It does. It also does ***not*** require ***individuals*** to participate in providing those services if they object.

refuse to provide services. For example, Washington regulations govern the respective obligations of pharmacists and pharmacies to fill prescriptions.[16] The Washington State Board of Pharmacy explained in a Concise Explanatory Statement accompanying the regulations that the rules allow a pharmacy to accommodate an individual pharmacist with a religious or moral objection, so long as the ***pharmacy*** assures timely access to prescribed medications for patients.[17] Pharmacies may accommodate objecting pharmacists in any way they choose, including having another pharmacist available. *Id.* However, as the Statement explained, a pharmacy may not simply refer a patient to another pharmacy because the pharmacy has a duty to deliver lawfully prescribed medications to patients. *Id.*[18]

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[16] WAC 246-863-095 governs pharmacists, and while prohibiting pharmacists from destroying or refusing to return unfilled lawful prescriptions, does not require an individual pharmacist to dispense medication if the pharmacist holds a personal objection. WAC 246-869-010 requires pharmacies "to deliver lawfully prescribed drugs or devices to patients and to distribute drugs and devices approved by the U.S. Food and Drug Administration for restricted distribution by pharmacies ... in a timely manner consistent with reasonable expectations for filling the prescription."

[17] Washington State Board of Pharmacy Concise Explanatory Statement (June 25, 2007). *See also Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1078-79 (9th Cir. 2015) (discussing Concise Explanatory Statement; finding that patients' need for safe and timely access to lawfully prescribed medications was a valid goal and did not demonstrate discriminatory intent).

[18] Similar laws elsewhere likewise place the obligation on the institution to provide, while accommodating providers who have objections. *See* Elizabeth Sepper, *Taking Conscience Seriously*, 98 Va. L. Rev. 1501, 1559 (2012). Pennsylvania's law recognizes that "with an obligation to accommodate refusing providers it becomes 'imperative that the institutions obtain the services of responsible physicians and other necessary personnel whose

In enacting RCW 9.02.150 and 9.02.160 together, voters struck this same balance, imposing a non-delegable duty on State entities to provide substantially equivalent termination services, while also protecting an individual's right not to be forced to perform abortions. As with the pharmacy rules, RCW 9.02.150 does not negate the institution's duty—here, the Public Hospital District—to determine how to fulfill its obligation to ensure that substantially equivalent services are provided. What the Appellants cannot do, therefore, is avoid the duty imposed by RCW 9.02.160 to ensure that it provides patients with abortion care substantially equivalent to maternity care services that it provides.

V. CONCLUSION

For all the above-stated reasons, *Amicus Curiae* Legal Voice urges this Court to affirm the decision of the court below and hold that a public hospital district violates the Reproductive Privacy Act by refusing to provide pregnancy termination services where it has chosen to provide comprehensive maternity care services.

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personal views on abortion do not prohibit them from providing or participating in abortions or sterilizations.'" *Id.* (quoting 16 Pa. Code § 51.51(a) (2000)). California, like Washington, requires pharmacies to accept and fill prescriptions, while also allowing individual pharmacists to refuse to provide. *Id.* (citing Cal. Bus. & Prof. Code § 733(b)(3) (2010)).

RESPECTFULLY SUBMITTED this 6th day of April, 2017.

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