NO. 75769-5

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

KEVAN COFFEY,

Plaintiff/Respondent,

v.

PUBLIC HOSPITAL DISTRICT NO. 1, SKAGIT COUNTY WASHINGTON d/b/a Skagit Regional Health, CLARK D. TODD, in his official capacity, BALISA E. KOETJE, in her official capacity, JAMES L. HOBB, SR., in his official capacity, PATTIE K. LEWIS, in her official capacity, BRUCE G. LISSER, in his official capacity, JEFFREY JAMES MILLER, in his official capacity, STANTON C.G. OLSON, in his official capacity, and GREGG A. DAVIDSON, in his official capacity,

Defendants/Appellants.

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF WASHINGTON

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I. INTRODUCTION

The people of Washington have declared the right to choose or refuse to have an abortion a "fundamental right." RCW 9.02.100(2). Over 45 years ago, Washington voters first provided access to abortion through the popular vote. Through the same referendum, Washingtonians recognized the rights of individual health care providers to opt-out of participating in abortion for reasons of conscience. Since then, abortion access rights and provider conscience rights have co-existed in Washington.

Those rights are codified in the Reproductive Privacy Act, RCW 9.02. Key provisions of the Act place duties on state entities, including Skagit County Public Hospital District 1 (the Hospital District). Despite providing an array of maternity care services, the Hospital District concedes that it does not offer or provide care for women choosing elective abortions. Based on the plain language of the statute, the trial court ruled that the Hospital District's practices violate the Act's parity requirement (RCW 9.02.160) and its antidiscrimination provision (RCW 9.02.100(4)). It rejected the Hospital District's contention that RCW 9.02.150 precludes it from hiring or contracting with a provider to offer elective termination services. This Court should affirm.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Attorney General is the legal adviser to the State of Washington. *See* RCW 43.10.030. The Attorney General's constitutional and statutory powers include filing amicus curiae briefs on matters of public interest. *See Young Ams. for Freedom v. Gorton*, 91 Wn.2d 204, 212, 588 P.2d 195 (1978).

This case involves the proper application of the Reproductive Privacy Act to a taxpayer-funded public hospital district. *See* RCW 70.44.110; RCW 39.36.020(2)(a)(i). This case also requires the Court to construe the Hospital District's duty to provide abortion services and its duty to respect the conscience rights of individual health care providers. *Compare* RCW 9.02.100 (characterizing the right to make "personal reproductive decisions" as a "fundamental right"), *with* RCW 9.02.150 (providing that "[n]o person or private medical facility" may be required to "participate in the performance of an abortion if such person or private medical facility objects"). The Attorney General issued a formal opinion on the application of the Reproductive Privacy Act to public hospital districts, which has been cited by the parties and the trial court. Op. Att'y Gen. 3 (2013).[1] The Attorney General submits this brief

[1] The Hospital District refers to the Attorney General opinion as an "opinion letter." *See, e.g.*, Appellants' Opening Br. at 34; Appellants' Reply Br. at 17. As a point of clarification, the cited opinion is not simply a letter from an attorney in the Office of

to help protect the important rights at stake in this case and to support a proper interpretation of the relevant statutes.

III. ARGUMENT

In the health care context, Washington State has a long history of protecting the rights of both patients and providers. One example is the Reproductive Privacy Act, RCW 9.02, a law enacted by a vote of the people in 1991. The Act provides an explicit right for women to choose abortion prior to viability of the fetus, prohibits state interference with that right to choose, limits state regulation of abortion, and protects individuals and private medical facilities who object to abortion from being required to participate in the performance of an abortion. The statute also imposes duties, including a duty of parity that requires state entities offering maternity services also to offer abortion services so that women may choose from a complete set of reproductive health care options. RCW 9.02.160.

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the Attorney General responding to a legal inquiry. It is a formal opinion of the Attorney General, produced through lengthy research and review, that provides "the considered legal opinion of the constitutionally designated 'legal adviser of the state officers.'" *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 308, 268 P.3d 892 (2011) (quoting Const. art. III, § 21). Formal Attorney General opinions are not binding on any court, but they generally are "entitled to great weight." *Id.* (quoting *Seattle Bldg. & Const. Trades Council v. Apprenticeship & Training Council*, 129 Wn.2d 787, 803, 920 P.2d 581 (1996)); *accord Skagit County Pub. Hosp. Dist. 304 v. Skagit County Pub. Hosp. Dist. 1*, 177 Wn.2d 718, 725, 305 P.3d 1079 (2013).

The Hospital District is a municipal corporation under RCW 70.44.010 and thus a state entity as defined by RCW 9.02.170(6). It therefore is subject to the Reproductive Privacy Act, including the requirement that it provide substantially equivalent maternity and abortion services. The Hospital District provides extensive maternity care services but does not offer services for elective abortions. This practice discriminates against the right to choose to have an abortion in violation of RCW 9.02.100(4) and violates the parity requirement in RCW 9.02.160.

A. Washington's Long-Standing Public Policy Guarantees Abortion Access for Women While Respecting Individual Providers' Conscience Rights

Washington voters and policymakers have long supported abortion rights. State law also respects the conscience rights of individual health care providers who object to participating in abortion. These dual policies—which guarantee access for patients while respecting the rights of providers—co-exist in Washington law and complement one another.

1. Washington law provides strong protections for abortion access

Washington's longstanding public policy supports women's access to a full range of reproductive health care services, including abortion. In 1970, three years before *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), Washington voters passed Referendum 20, becoming

the first state to legalize elective abortion through the popular vote.[2] Referendum 20 permitted abortions within the first four months of pregnancy when performed by, or under the supervision of, a licensed physician. Laws of 1970, 2d Ex. Sess., ch. 3, § 2. The state began providing public funding for abortion for poor women in the mid-1970s and continued to provide state funding after federal funding was eliminated.[3]

In 1991, Washingtonians again voted in favor of abortion rights, adding detail and clarifying the proper role of the state. Laws of 1992, ch. 1, §§ 1-13.[4] Initiative 120, the Reproductive Privacy Act, declares that the "right of privacy with respect to personal reproductive decisions" is a "fundamental right" of each individual. RCW 9.02.100. The Act prohibits the state from discriminating against, denying, or interfering with a woman's "right to choose to have an abortion prior to viability of the fetus, or to protect her life or health." RCW 9.02.100(4), .110. Any

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[2] *See* Mary C. Segers & Timothy A. Byrnes, *Introduction, in Abortion Politics in American States* 4 (1995); Byron N. Fujita & Nathaniel N. Wagner, *Referendum 20—Abortion Reform in Washington State, in The Abortion Experience* 232 (Howard J. Osofsky & Joy D. Osofsky eds., 1973).

[3] Mary T. Hanna, *Washington: Abortion Policymaking Through Initiative, in Abortion Politics in American States* 155 (1995).

[4] Washington voters have never approved a ballot measure limiting abortion. *See* Office of Sec'y of State, Elections & Voting, Past Initiatives & Referenda, List of All Initiatives to the People, https://www.sos.wa.gov/elections/initiatives/statistics_initiatives.aspx (last visited Apr. 6, 2017) (listing rejected Initiative 471 (1984), which would have prohibited public funding for abortion, and rejected Initiative 694 (1998), which sought to criminalize late-term abortions).

restriction on abortion is valid only if it is medically necessary to protect the life or health of the woman, consistent with established medical practice, and the least restrictive of all available alternatives. RCW 9.02.140.

The Reproductive Privacy Act is one piece of a larger public policy supporting broad access to reproductive health care in Washington. Other laws and regulations make it unlawful to exclude contraceptives from coverage in a comprehensive health plan, WAC 284-43-5150, disclose reproductive health care information without a patient's consent, RCW 70.02.020(1), or obstruct or threaten patients or providers at a health care facility, RCW 9A.50.020. The Washington State Health Care Authority recognizes that low-income women must have an equal opportunity to exercise their reproductive rights, and the state Medicaid program covers contraception and termination services in addition to maternity care. *See* Cmty. Health Plan of Wash., *Your Medical Benefits Book 2016: Medicaid Managed Care Model Handbook V1*, at 19-26, http://chpw.org/resources/State_Apple_Health_Handbook.pdf (covering "maternity care," "reproductive health," "contraceptive services," and "pregnancy terminations, voluntary").

Finally, the Washington Supreme Court recognizes that the privacy rights enshrined in the state and federal constitutions encompass "the right

of any woman to terminate an unwanted pregnancy[.]" *State v. Koome*, 84 Wn.2d 901, 904, 530 P.2d 260 (1975) (striking down a parental notification requirement); *see also Am. Legion Post 149 v. Dep't of Health*, 164 Wn.2d 570, 600, 192 P.3d 306 (2008) ("Fundamental liberty interests include the right . . . to use contraception, to bodily integrity, and to abortion."). In short, state law makes clear that women have the right to choose to have an abortion, and multiple provisions of state law support that fundamental right.

2. Washington law also recognizes individual providers' conscience rights

In addition to protecting abortion rights, Washington has long respected the conscience rights of providers who object to providing abortion services. The 1970 ballot measure legalizing elective abortion provided that "[n]o hospital, physician, nurse, hospital employee nor any other person shall be under any duty . . . to participate in a termination of pregnancy if such hospital or person objects to such termination." Laws of 1970, 2d Ex. Sess., ch. 3, § 3. The 1991 Reproductive Privacy Act refined and replaced the language governing who may object, providing that "[n]o person or *private* medical facility may be required by law or contract in any circumstances to participate in the performance of an abortion if such

person or *private* medical facility objects to so doing." RCW 9.02.150 (emphases added).

The Reproductive Privacy Act's treatment of patients and providers is evenhanded and deliberate, an approach reflected across Washington's health care statutes. For example, the Health Care Access Act "recogniz[es] the right of conscientious objection to participating in specific health services," while also "recogniz[ing] the right of individuals . . . to receive the full range of services covered under the basic health plan." RCW 70.47.160(1). Similar provisions apply in the emergency-contraception, end-of-life, and insurance contexts. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1115-16 (9th Cir. 2009) (describing Washington's regulatory balance that requires pharmacies to deliver emergency contraception to patients while also creating "a right of refusal for individual pharmacists" who object to filling such prescriptions); RCW 70.245.190(1)(a)-(d) (Washington Death with Dignity Act provisions allowing health care providers to prescribe "medication to end [a terminally ill patient's] life in a humane and dignified manner" while protecting the rights of providers who "refus[e] to participate"); RCW 48.43.065(1)-(2) (Insurance Reform Act provision protecting the right of enrollees to receive "the full range of services covered under the plan" while also protecting the rights of health carriers that object to

providing "payment for a specific service . . . for reason of conscience or religion").

The Reproductive Privacy Act fits squarely within this model, requiring state entities to respect a patient's fundamental right to choose an abortion while also accommodating the conscience rights of individual providers and private medical facilities. RCW 9.02.100(2), .110, .150. The Act's parity mandate is one element of the deliberate balance of rights that state entities like the Hospital District must observe.

B. The Hospital District Violates the Reproductive Privacy Act's Parity Mandate Because It Does Not Provide Elective Abortions

The Reproductive Privacy Act places duties on state entities, including the Hospital District. *See* RCW 9.02.170(6) (defining "state" to include "quasi-municipal corporations"). Any state entity that provides "maternity care benefits, services, or information" must provide "substantially equivalent benefits, services, or information" to women choosing abortion. RCW 9.02.160; *see also* Op. Att'y Gen. 3 (2013), at 6-7. The Hospital District is covered by this parity requirement, but does not offer elective abortions despite offering extensive maternity care services. CP 29. The Hospital District's practice violates the Act and cannot be excused on the grounds that some or all of the Hospital District's individual providers may object to participating in abortion.

1. The Hospital District is covered by the Reproductive Privacy Act

The Hospital District is a municipal corporation authorized by the legislature to "provide hospital services and other health care services for the residents of [its] district[]." RCW 70.44.003, .010. Pursuant to that authority, the Hospital District operates Skagit Valley Hospital and a system of Skagit Regional Clinics. CP 196-97. *See also Skagit County Pub. Hosp. Dist. 304 v. Skagit County Pub. Hosp. Dist. 1*, 177 Wn.2d 718, 729, 305 P.3d 1079 (2013) (holding that rural public hospital districts like Skagit Valley "operate in a governmental capacity when providing health care services").

The Hospital District is a rural public hospital district. *Skagit County Hosp. Dist. 304*, 177 Wn.2d at 720-21. Rural public hospital districts play a critical role in communities that may have few health care choices. "Every day, rural hospitals in Washington State provide access to essential health care services. Without these important community resources, many may not have access to health care at all." Wash. State Hosp. Ass'n, *Rural Hospitals*, http://www.wsha.org/our-members/rural-hospitals/ (last visited Apr. 6, 2017); *see also id.* (describing rural hospitals as "anchors of the local health system").

As a state entity, the Hospital District is bound by the parity requirement of RCW 9.02.160 and must provide abortion services that are substantially equivalent to any maternity services provided in the programs it administers or funds. *See* CP 425-426 (Hospital District's Resolution No. 3339 acknowledging that RCW 9.02.160 applies to the Hospital District). "Program" is not defined in the Reproductive Privacy Act, so it should be given the ordinary, broad meaning that the average voter would have understood. *See Amalg. Transit Union Local 587 v. State*, 142 Wn.2d 183, 219, 11 P.3d 762, 27 P.3d 608 (2000); Op. Att'y Gen. 3 (2013), at 6-7 (noting that the dictionary definition of "program" is "extraordinarily broad," and the term is used over 4,000 times and in many ways throughout the Revised Code of Washington). Applying the ordinary definition of "program," the Hospital District is covered anytime it "contracts for the provision of maternity care benefits, services, or information to women, and subsidizes those benefits through public funds[.]" Op. Att'y Gen. 3 (2013), at 8.

The Hospital District argues that only its charity care program is a covered program for purposes of RCW 9.02.160. *See* Appellants' Opening Br. at 29-34. This construction, however, is untenable on its face because it ignores Medicaid and other publicly subsidized health care programs that the Hospital District administers outside of its charity care

program. *See* CP 177 (differentiating the Hospital District's charity care program from "Medical Assistance through the State"). As the Hospital District conceded, continued Medicaid funding for abortion was a "key provision" of the Reproductive Privacy Act. CP 550.

Moreover, RCW 9.02.160 should not be construed to require only state-funded programs for low-income residents to respect the abortion rights of women. The purpose of public hospital districts is to provide health care for all "residents of such districts." *See* RCW 70.44.003. The Hospital District levies taxes to subsidize this public purpose. *See* RCW 70.44.060(6). Under the plain language of the Reproductive Privacy Act, the Hospital District's maternity program is funded "in whole or in part" with taxes the District collects, and its entire maternity care program thus is covered by the parity requirement of RCW 9.02.160. *See* Op. Att'y Gen. 3 (2013), at 7 (hospital districts are covered by RCW 9.02.160 "even if the [hospital district's] funds provide only a portion of the cost of the benefits or services and regardless of whether the maternity care is provided directly or by contracting with a health care provider").

2. The Hospital District violates the Reproductive Privacy Act by providing maternity care services but not elective abortions

There is no dispute that the Hospital District administers a wide range of maternity care services. Indeed, the Hospital District provides

maternity care to more than 1,600 women per year. CP 198. Nine of the Hospital District's locations offer maternity care, CP 197, including "counseling before conception," "prenatal care," "complete maternity care and delivery," and "follow-up services." CP 302, 318-20. The Skagit Valley Hospital Family Birth Center advertises "comprehensive services" in "all stages of prenatal care and childbirth." CP 318-19. The Hospital District did more than $36 million in maternity-related business between 2010 and 2014, with more than $5,800,000 coming from taxpayer support. CP 194-96 (totals from responses 2 and 4). Based on this evidence, it is clear that the Hospital District administers a "program" that provides "maternity care benefits, services, [and] information" for purposes of the Reproductive Privacy Act. *See* RCW 9.02.160.

Despite providing an array of maternity care services, the Hospital District admits that it "did not perform any elective surgical or procedural terminations between 2010 and August 2015." CP 202. Nor did it offer elective medication terminations. *Id.* Instead, patients who seek elective abortions are refused service and referred to outside providers. *Id.*; *see also* CP 418-20 (Hospital District's "script" for providing referrals for "callers seeking elective terminations, either via medication or surgical means"). In short, the Hospital District concedes that it does not offer elective abortions at its hospital or network of clinics.

The Hospital District's practices violate the plain terms of the Reproductive Privacy Act, which obligates state providers of maternity care to provide "substantially equivalent benefits, services, or information to permit [women] to voluntarily terminate their pregnancies." *See* RCW 9.02.160. Although the statute does not define "substantially equivalent" practices, the Hospital District can make no credible argument that its practice meets that standard. Apart from a possible referral to an outside provider, the Hospital District concedes that it does not provide *any* information or services to permit a patient voluntarily to terminate a pregnancy. *See* CP 543 ("[T]he district's hospital provides maternity care but does not currently perform elective abortions."). It does not track the number of women who seek information relating to termination services or who were referred for termination services. CP 200-01. The record shows no indication that the Hospital District provides any sort of follow up care service or care to women who are referred. As the trial court aptly put it, "the Hospital District shrugs its shoulders and informs patients that they will have to find that aspect of their healthcare elsewhere." CP 33.

This refuse-and-refer policy stands in clear contrast with the "comprehensive services" provided in "all stages of prenatal care and childbirth" at many of the Hospital District's locations. CP 318-20. On

these undisputed facts, the Hospital District's maternity and abortion practices cannot plausibly be characterized as "substantially equivalent." *See City of Seattle v. Mesiani*, 110 Wn.2d 454, 458, 755 P.2d 775 (1988) (rejecting the city's practices as violating "any possible interpretation of the constitutionally required [standard]"). The Hospital District's admitted practice violates the parity requirement of RCW 9.02.160.

The Hospital District suggests it provides substantially equivalent abortion services because it provides "information" about Planned Parenthood and does not perform "elective caesarian sections" for the convenience of the mother. Appellants' Opening Br. at 37-43. The trial court properly characterized this argument as a "fairly tortured reading" of the Reproductive Privacy Act that contravenes the stated policies of the Act. CP 30-31. The Act directs substantial equivalence between "maternity care benefits, services, or information" and "benefits, services, or information to permit [voluntary terminations]." RCW 9.02.160. The Hospital District provides comprehensive maternity *services*, so it must also provide substantially equivalent abortion *services*. Isolating "information" in the second clause, as the Hospital District proposes, violates the "fundamental rule" that "each word, phrase, clause, and sentence must be considered with reference to the other words, phrases,

clauses, and sentences appearing in the statute." *See State v. Dep't of Pub. Serv.*, 1 Wn.2d 102, 111, 95 P.2d 1007 (1939).

The "elective caesarian section" comparison posited by the Hospital District is off-base.[5] That situation would present an issue of timing, not consequence. If the "elective C-section" is not performed, the same result—a birth—presumably will occur anyway, just at a different time. In sharp contrast, the intended consequence of an elective abortion—termination of a pregnancy—is unlikely without the procedure. There is no logical equivalence between the two procedures.

Moreover, the Hospital District's attempt to equate the two procedures demonstrates a fundamental misunderstanding of the seriousness with which the majority of women view a decision to choose an abortion.[6] To treat the decision to obtain an abortion as comparable to a scheduling decision for convenience is disrespectful to those women.

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[5] The record contains no example or discussion of the Hospital District's having encountered a patient who requested an "elective C-section." The Attorney General understands this comparison to refer to a hypothetical situation in which a pregnant woman requests the surgery in advance of the anticipated delivery date for reasons unrelated to her health or the health of the fetus.

[6] *See, e.g.*, Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 Persp. on Sexual & Reprod. Health 110, 117 (2005), https://www.guttmacher.org/sites/default/files/pdfs/journals/3711005.pdf ("Most women in every age, parity, relationship, racial, income and education category cited concern for or responsibility to other individuals as a factor in their decision to have an abortion" in contrast to "the perception (voiced by politicians and laypeople across the ideological spectrum) that women who choose abortion for reasons other than rape, incest and life endangerment do so for 'convenience'"[.]); *accord* M. Antonia Biggs et al., *Understanding why women seek abortions in the US*, 13 BMC Women's Health 29

In addition, the Hospital District's practice violates the Reproductive Privacy Act's non-discrimination mandate. *See* RCW 9.02.100(4) ("The state shall not discriminate against the exercise of [abortion] rights in the regulation or provision of benefits, facilities, services, or information."). A public hospital district that provides maternity services while refusing to provide substantially equivalent abortion services "effectively discriminates against the fundamental rights protected by RCW 9.02.100." Op. Att'y Gen. 3 (2013), at 8.

3. Respecting providers' conscience rights does not excuse the Hospital District from complying with the parity requirement

Finally, the Hospital District contends that its obligation under RCW 9.02.150 to respect providers' conscience rights prevents the District from complying with its obligation under RCW 9.02.160 to provide substantially equivalent abortion services. Appellants' Opening Br. at 21-26. This argument fails for two reasons.

First, the Hospital District offers only conclusory allegations about its providers' willingness to participate in abortion. *See, e.g.*, CP 161, ¶ 2; 171, ¶ 12. Apart from these broad statements, the Hospital District has submitted no evidence that each and every one of its dozens of doctors and

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(2013), https://bixbycenter.ucsf.edu/sites/bixbycenter.ucsf.edu/files/biggs_gould_foster_whi7-2013.pdf.

nurses who provide maternity services objects to abortion. *See* CP 199 (Hospital District's interrogatory responses listing 143 doctors and nurses who provided maternity care in 2014 alone). Significantly, it appears that the Hospital District had no data at all regarding providers' willingness to perform abortions, since it "historically has not tracked" providers' "ethical or other concerns" about abortion, and did not document those who refused to perform or participate in terminations. CP 364-67. The Hospital District's first survey of doctors was conducted in 2015 in response to this litigation. *Id.* These conclusory allegations are insufficient to support the Hospital District's claims that provider objections, rather than District policy, drive its decision not to perform elective abortions.

Second, and more importantly, even if none of the Hospital District's current providers is willing to participate in abortion, the Hospital District must identify an alternative means of complying with the Reproductive Privacy Act's parity requirement. The trial court rejected the Hospital District's contention that it cannot comply with both duties, CP 31-32, and this Court should affirm. A central tenet of statutory construction requires courts, where possible, to read provisions in harmony with one another rather than reach for "[s]trained, unlikely or unrealistic interpretations" that create conflict. *See Bour v. Johnson*, 122 Wn.2d 829, 835, 864 P.2d 380 (1993); *State ex rel. Tacoma Ry. &*

Power Co. v. Pub. Serv. Comm'n, 101 Wash. 601, 610, 172 P. 890 (1918) ("It is a familiar canon of construction that the different sections or provisions of the same statute should be so construed as to harmonize and give effect to each . . . .").

Here, no conflict exists. The Reproductive Privacy Act does not dictate how state entities must fulfill their responsibility to provide "substantially equivalent" abortion services. *See* RCW 9.02.160. The Hospital District is free to explore options that best serve the needs of its community. *Accord* Op. Att'y Gen. 3 (2013), at 2 (declining to advise "exactly how" public hospital districts must comply with RCW 9.02.160). For example, it might be possible for the Hospital District to create a comprehensive women's clinic, contract with providers offering a full range of reproductive health care, or otherwise expand its network to include providers willing to perform medical and surgical abortions at the Hospital District's locations. What the Hospital District may not do is to hide behind RCW 9.02.150 as a reason to justify a violation of RCW 9.02.160—it can and must comply with both statutes.

IV. CONCLUSION

The Reproductive Privacy Act mandates that state entities—including public hospital districts—not discriminate against women seeking abortion services, and it requires those state entities providing

maternity services also to provide substantially equivalent abortion services. The Hospital District's undisputed practices violate the parity requirement in RCW 9.02.160 and constitute unlawful discrimination against a woman's fundamental right to choose to have an abortion as prohibited by RCW 9.02.100(4). This Court should affirm the trial court's ruling.

RESPECTFULLY SUBMITTED this 7th day of April 2017.

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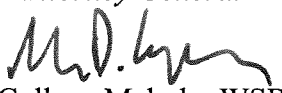

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of the Amicus Curiae Brief Of The Attorney General of Washington to be served on the following via e-mail:

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