The Honorable Raquel Montoya-Lewis
Motion confirmed for: April 29, 2016, at 1:30pm
Oral argument not requested

ROBERT W. FERGUSON
Attorney General
COLLEEN M. MELODY
WSBA No. 42275
Assistant Attorney General
Civil Rights Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

STATE OF WASHINGTON
SKAGIT COUNTY SUPERIOR COURT

KEVAN COFFEY, Plaintiff, 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. HOBBS, 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.	NO. 15-2-00217-4 AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF WASHINGTON

ATTORNEY GENERAL OF WASHINGTON
Civil Rights Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

TABLE OF CONTENTS

I. INTRODUCTION 1

II. IDENTITY AND INTEREST OF AMICUS CURIAE 1

III. ARGUMENT 2

A. Washington's Long-Standing Public Policy Guarantees Abortion Access for Women While Respecting Individual Providers' Conscience Rights 3

1. Washington law provides strong protections for abortion access 3

2. Washington law also recognizes individual providers' conscience rights 5

B. The Hospital District Violates the Reproductive Privacy Act's Parity Mandate Because It Does Not Provide Elective Abortions 6

1. The Hospital District is covered by the Reproductive Privacy Act 7

2. The Hospital District violates the Reproductive Privacy Act by providing maternity care services but not elective abortions 9

3. Respecting providers' conscience rights does not excuse the Hospital District from complying with the parity requirement 12

IV. CONCLUSION 14

ATTORNEY GENERAL OF WASHINGTON
Civil Rights Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

TABLE OF AUTHORITIES

Cases

Am. Legion Post #149 v. Wash. State Dep't of Health,
164 Wn.2d 570, 192 P.3d 306 (2008) 5

Amalgamated Transit Union Local 587 v. State,
142 Wn.2d 183, 11 P.3d 762 (2000) 8

Bour v. Johnson,
122 Wn.2d 829, 864 P.2d 380 (1993) 13

City of Seattle v. Mesiani,
110 Wn.2d 454, 755 P.2d 775 (1988) 11

Grimwood v. Univ. of Puget Sound, Inc.,
110 Wn.2d 355, 753 P.2d 517 (1988) 13

Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.,
122 Wn.App. 736, 87 P.3d 774 (2004) 13

Roe v. Wade,
410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) 3

Skagit Co. Pub. Hosp. Dist. No. 304 v. Skagit Co. Hosp. Dist. No. 1,
177 Wn.2d 718, 305 P.3d 1079 (2013) 7, 11

State v. Dep't of Pub. Serv.,
1 Wn.2d 102, 95 P.2d 1007 (1939) 11

State v. Koome,
84 Wn.2d 901, 530 P.2d 260 (1975) 5

State v. Lessley,
118 Wn.2d 773, 827 P.2d 996 (1992) 13

State v. Pub. Serv. Comm'n of Wash.,
101 Wash. 601, 172 P. 890 (1918) 13

State v. Roggenkamp,
153 Wn.2d 614, 106 P.3d 196 (2005) 11

Stormans, Inc. v. Selecky,
586 F.3d 1109 (9th Cir. 2009) 6

Young Ams. for Freedom v. Gorton,
91 Wn.2d 204, 588 P.2d 195 (1978) 1

ATTORNEY GENERAL OF WASHINGTON
Civil Rights Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

Statutes

Laws of 1970, ch. 3, § 2 3

Laws of 1970, ch. 3, § 3 5

Laws of 1992, ch. 1, §§ 1–13 3

RCW 39.36.020(2)(a)(i) 2

RCW 43.10.030 1

RCW 48.43.065(1)–(2) 6

RCW 70.02.020(1) 4

RCW 70.44.003 ..... 7, 9

RCW 70.44.010 ..... 1, 7

RCW 70.44.060(6) 7, 9

RCW 70.44.110 2

RCW 70.44.460 7

RCW 70.47.160(1) 6

RCW 70.47.160(2)(a) 5

RCW 70.245.190(1)(a)–(d) 6

RCW 9.01.150 7

RCW 9.02 1

RCW 9.02.005–.902 2

RCW 9.02.100 ..... 2, 4, 8, 11

RCW 9.02.100(2) 1

RCW 9.02.100(4) ..... passim

RCW 9.02.110 ..... 4, 6

RCW 9.02.140 4

RCW 9.02.150 ..... 2, 5, 6, 14

RCW 9.02.160 ..... passim

ATTORNEY GENERAL OF WASHINGTON
Civil Rights Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

RCW 9.02.170(6) 1, 2, 6, 7

RCW 9.02.902 4

RCW 9A.50.020 4

Other Authorities

2013 Op. Att'y Gen. No. 3 ..... passim

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

Comm. Health Plan of Wash., Medicaid Managed Care Model Handbook V1 19–26 (2015), http://chpw.org/resources/State_Apple_Health_Handbook.pdf 4

Mary C. Segers & Timothy A. Byrnes, *Introduction*, *in* Abortion Politics in American States (1995) 3

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

Office of the Sec'y of State, Elections & Voting, Past Initiatives & Referenda, List of All Initiatives to the People http://www.sos.wa.gov/elections/initiatives/statistics_initiatives.aspx 4

Wash. State Hosp. Ass'n, Rural Hospitals, http://www.wsha.org/our-members/rural-hospitals/ 7

Regulations

WAC 284-43-5150 4

ATTORNEY GENERAL OF WASHINGTON
Civil Rights Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

I. INTRODUCTION

The people of the State 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.

Skagit County Public Hospital District No. 1 d/b/a Skagit Regional Health (the "Hospital District") is a municipal corporation under RCW 70.44.010 and a state entity under RCW 9.02.170(6). As a state entity, the Hospital District is subject to the Reproductive Privacy Act, RCW 9.02, a state statute governing access to birth control and abortion. Key provisions of the Reproductive Privacy Act confer duties on state entities like the Hospital District. One such duty is a duty of parity, which requires the Hospital District to provide abortion services that are substantially equivalent to the maternity care services it provides. *See* RCW 9.02.160.

Despite providing an array of maternity care services, the Hospital District concedes that it does not offer elective abortions. This practice discriminates against the right to choose abortion and violates the Reproductive Privacy Act's parity provision. The Attorney General respectfully submits that the Hospital District's practices violate RCW 9.02.100(4) and RCW 9.02.160.

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 the submission of amicus curiae briefs on matters that affect the public interest. *See Young Ams. for Freedom v. Gorton*, 91 Wn.2d 204, 212, 588 P.2d 195 (1978).

ATTORNEY GENERAL OF WASHINGTON
Civil Rights Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

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 "no 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 previously issued a formal opinion on the application of the Reproductive Privacy Act to public hospital districts. *See* 2013 Op. Att'y Gen. No. 3. The Attorney General submits this brief 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, a law enacted by a vote of the people in 1991, which governs abortion access in Washington. RCW 9.02.005–.902. The Reproductive Privacy Act provides an explicit right for women to choose abortion prior to viability of the fetus, prohibits state interference with abortion, 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 imposes duties on state entities, including a duty of parity. RCW 9.02.160. This duty 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.

The Hospital District is a state entity as defined by RCW 9.02.170(6), and therefore is subject to the Reproductive Privacy Act, including the requirement that it provide equivalent maternity and abortion services. The undisputed evidence shows that the Hospital District provides extensive maternity care services but does not offer elective abortions. This practice

ATTORNEY GENERAL OF WASHINGTON
Civil Rights Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

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 requires respect for the conscience rights of individual health care providers who object to abortion and choose not to participate. These dual policies—which guarantee access for patients while respecting the rights of providers—co-exist throughout 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 and became the first state to legalize elective abortion through the popular vote. *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). 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, 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. Mary T. Hanna, *Washington: Abortion Policymaking Through Initiative*, *in* Abortion Politics in American States 155.

In 1991, Washingtonians again voted in favor of abortion rights, this time adding detail and clarifying the proper role of the state. Laws of 1992, ch. 1, §§ 1–13. Initiative 120, titled the "Reproductive Privacy Act," declares that the "right of privacy with respect to personal

ATTORNEY GENERAL OF WASHINGTON
Civil Rights Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

reproductive decisions" is a "fundamental right" of each individual. RCW 9.02.902; RCW 9.02.100. The law 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); RCW 9.02.110. The Reproductive Privacy Act limits the state's ability to impose regulations that restrict abortion rights, requiring that any regulation be 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. Washington voters have never approved a ballot measure limiting abortion. *See* Office of the Sec'y of State, Elections & Voting, Past Initiatives & Referenda, List of All Initiatives to the People http://www.sos.wa.gov/elections/initiatives/statistics_initiatives.aspx (listing rejected Initiative 471 in 1984, which would have prohibited public funding for abortion, and rejected Initiative 694 in 1998, which sought to criminalize late-term abortions). 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. Washington State's 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* Comm. Health Plan of Wash., Medicaid Managed Care Model Handbook V1 19–26 (2015), http://chpw.org/resources/State_Apple_Health_Handbook.pdf (covering "maternity care," "reproductive health," "contraceptive services," and "pregnancy terminations, voluntary").

ATTORNEY GENERAL OF WASHINGTON
Civil Rights Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

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. Wash. State 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.") (citations omitted). 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 "no objecting hospital, physician, nurse, hospital employee nor any other person shall be under any duty . . . to participate in the termination of pregnancy if such hospital or person objects to such termination." Laws of 1970, 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 (emphasis added). In 1995, the Legislature added a similar provision to the Health Care Access Act, the statute governing Washington's basic health plan, by exempting "individual health care provider[s], religiously sponsored health carrier[s], or health care facilit[ies]" from participating in specific services "if they object to so doing for reason of conscience or religion." RCW 70.47.160(2)(a).

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

ATTORNEY GENERAL OF WASHINGTON
Civil Rights Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

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), *petition for cert. pending* (No. 15-862); 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 the abortion rights of patients while also accommodating the conscience rights of individual providers and private medical facilities. RCW 9.02.110; RCW 9.02.150. The Reproductive Privacy 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. *See* RCW 9.02.170(6) (defining "state" as "the state of Washington and counties, cities, town, municipal corporations, and quasi-municipal corporations"). Any state entity that provides maternity services must provide substantially equivalent abortion services. RCW 9.02.160; *see also* 2013 Op. Att'y Gen. No. 3 at 6–7. The Hospital District is covered by this parity requirement, but does not offer elective abortions despite offering extensive maternity care services. The Hospital District's practice violates the Reproductive Privacy Act and cannot be excused on

ATTORNEY GENERAL OF WASHINGTON
Civil Rights Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

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; RCW 70.44.010. Pursuant to that authority, the Hospital District operates Skagit Valley Hospital and a system of Skagit Regional Clinics. *See* Plaintiff's Response to Hospital District's Motion for Summary Judgment on the Construction of RCW 9.01.150 & Cross Motion for Summary Judgment ("Plaintiff's Cross Motion"), Ex. A at 7–8 (Docket No. 106) (identifying 18 "facilities owned and operated by the district"); *see also Skagit Co. Pub. Hosp. Dist. No. 304 v. Skagit Co. Hosp. Dist. No. 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 Co. Hosp. Dist. No. 1*, 177 Wn.2d at 720–21. Rural public hospital districts play a critical role in communities that may have few health care choices. *See* RCW 70.44.460 (defining rural public hospital districts as those that "do not include a city with a population greater than fifty thousand"). Indeed, "[e]very 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. 18, 2016); *see also id.* (describing rural hospitals as "anchors of the local health system"). To further its public health purpose, the Hospital District is permitted to levy taxes to support its programs. *See* RCW 70.44.060(6).

The Reproductive Privacy Act places certain duties on the "state," defined to include municipal corporations. RCW 9.02.170(6). As a municipal corporation, the Hospital District is a covered state entity under the plain language of the Reproductive Privacy Act. *Id.*; *see*

ATTORNEY GENERAL OF WASHINGTON
Civil Rights Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

also 2013 Op. Att'y Gen. No. 3 at 4–5 ("Because public hospital districts are organized as municipal corporations under [state law], a public hospital district is the 'state' for purposes of [the Reproductive Privacy Act]."); Plaintiff's Cross Motion, Ex. S at 1 (Hospital District's Resolution No. 3339 acknowledging that RCW 9.02.160 applies to the Hospital District).

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. "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 Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 219, 11 P.3d 762 (2000); 2013 Op. Att'y Gen. No. 3 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." 2013 Op. Att'y Gen. No. 3 at 7.

The Hospital District resists this application, arguing that only its charity care program is a covered program for purposes of RCW 9.02.160. *See* Hospital District's Response to Plaintiff's Motion for Summary Judgment Under RCW 9.02.100 & .160 ("Hospital District's Response") at 7–14 (Docket No. 127). This construction, however, is untenable on its face because it ignores Medicaid and other publically subsidized health care programs that the Hospital District administers outside of its charity care program. *See* Hospital District's Response, Decl. of Hospital District's Chief Operating Officer Mike Liepman, Tab 9 at 11 (differentiating the Hospital District's charity care program from "Medical Assistance through the State"). As the Hospital District concedes, continued Medicaid funding for abortion was a "key provision" of the Reproductive Privacy Act. *See* Hospital District's Response at 9.

ATTORNEY GENERAL OF WASHINGTON
Civil Rights Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

Moreover, RCW 9.02.160 should not be construed only to require the state to respect the abortion rights of poor 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 collected by the Hospital District and its entire maternity care program is covered by the parity requirement of RCW 9.02.160. *See* 2013 Op. Att'y Gen. 3 at 7 (concluding that 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. Plaintiff's Cross Motion, Ex. A at 9 (Hospital District's interrogatory response identifying "the total number of women who received maternity care" each year between 2010 and 2015). Nine of the Hospitals District's locations offer maternity care, *id.* at 8, including "counseling before conception," "prenatal care," "complete maternity care and delivery," and "follow-up services," *see id.*, Ex. K at 1 (Hospital District's promotional materials); *id.*, Ex. M at 1–3 (same). The Skagit Valley Hospital Family Birth Center advertises "comprehensive services" in "all stages of prenatal care and childbirth." *Id.*, Ex. M at 1–2. Across its locations, 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. *Id.*, Ex. A at 5–7 (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.

ATTORNEY GENERAL OF WASHINGTON
Civil Rights Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

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." Plaintiff's Cross Motion, Ex. A at 12 (Hospital District's interrogatory response). The Hospital District also did not offer elective medication terminations. *Id.* Instead, patients who seek elective abortions are refused service and referred to outside providers. *See id.*, Ex. Q at 1 (Hospital District's "script" for providing referrals for "callers seeking elective terminations, either via medication or surgical means"); *see also* Decl. of Chief Med. Officer Dr. Connie Davis at ¶ 2 (Docket No. 66) (explaining that "[a]bortions can be divided into two general categories: 'elective' terminations and 'medically indicated' terminations," and stating that the Hospital District "performs medically indicated terminations at its facilities" but not "elective terminations, which [it] currently does not surgically perform") (emphasis original). 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* Hospital District's Response at 2 ("[T]he district's hospital provides maternity care but does not currently perform elective abortions."). 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. *See id.*, Ex. M at

ATTORNEY GENERAL OF WASHINGTON
Civil Rights Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

1–2. On these undisputed facts, the Hospital District's maternity and abortion practices cannot plausibly be characterized as "substantially equivalent."[1] *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.

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." 2013 Op. Att'y Gen. No. 3 at 8; *see also Skagit Co. Hosp. Dist. No. 1*, 177 Wn.2d at 725 (although not binding on the court, "[o]pinions of the attorney general are entitled to considerable weight"). The Attorney General respectfully submits that the Hospital District's admitted practices violate RCW 9.02.100(4) and RCW 9.02.160.

---

[1] The Hospital District urges a reading of the statute that would allow it to provide comprehensive maternity services, but nonetheless refuse to provide elective abortions, as long as it provides "<u>information</u> about available abortion facilities." Hospital District's Response at 16 (emphasis original). The Court should reject this strained reading, and instead follow the familiar rule that each word in RCW 9.02.160 should be read as part of a whole. *See, e.g.*, *State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005) (declining to adopt a construction that would sever one word "from the surrounding context and read that word if it stood alone"). The statute 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).

ATTORNEY GENERAL OF WASHINGTON
Civil Rights Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

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

Throughout its briefing and related declarations, the Hospital District implies that it should be excused from non-compliance with the Reproductive Privacy Act. Offering generalized allegations, the Hospital District invites the Court to assume that the obligation to respect providers' conscience rights prevents the Hospital District from complying with its obligation to provide substantially equivalent abortion services. This argument fails for two reasons.

First, the Hospital District offers only conclusory allegations about its providers' willingness to participate in abortion. *See* Hospital District's Response at 14 (alleging that "a 'provide both or provide neither' mandate would as a practical matter require hospital districts in some parts of our State to stop delivering babies"); *id.*, Decl. of Hospital District's Chief Operating Officer Mike Liepman at ¶ 12 (alleging that "physicians necessary to provide [elective abortions] have exercised their legal right to opt out"); Decl. of Chief Med. Officer Dr. Connie Davis at ¶ 2 (the Hospital District's "current providers decline to participate in [elective] terminations").

Apart from these broad statements, the Hospital District has submitted no evidence that each and every one of its dozens of doctors and nurses who provide maternity services objects to abortion.[2] *See* Plaintiff's Cross Motion, Ex. A at 10 (Hospital District's interrogatory responses listing 143 doctors and nurses who provided maternity care in 2014 alone). The allegations about provider objections are conclusory and insufficient to support the Hospital

---

[2] Prior to 2015, it does not appear that the Hospital District's failure to provide abortions was based on data. The Hospital District "historically has not tracked" providers' "ethical or other concerns" about abortion, and has not documented those "who have refused to perform or participate in Terminations." The Hospital District first conducted a survey of doctors in 2015 in response to this litigation. *See* Plaintiff's Cross Motion, Ex. N at 41–45 (Hospital District's interrogatory responses).

ATTORNEY GENERAL OF WASHINGTON
Civil Rights Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

District's claims. *See, e.g.*, *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn.App. 736, 744, 87 P.3d 774 (2004) (explaining that "mere allegations, denials, opinions, or conclusory statements" are insufficient to establish facts at summary judgment); *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359–60, 753 P.2d 517 (1988) (explaining that a party's self-serving opinion and conclusions are insufficient to defeat a motion for summary judgment). This Court should decline to assume, based only on the general allegations in its moving papers, that none of the Hospital District's providers is willing to provide elective medical or surgical 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 Hospital District implies that its duty to respect providers' rights stands in irreconcilable conflict with its duty to offer abortion services. This Court, however, should decline any invitation to assume that the Hospital District cannot comply with both duties. 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 v. Lessley*, 118 Wn.2d 773, 781, 827 P.2d 996 (1992) ("When two statutes appear to conflict, every effort should be made to harmonize their respective provisions.") (citation omitted); *State v. Pub. Serv. Comm'n of Wash.*, 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* 2013 Op. Att'y Gen. No. 3 at 2 (declining to direct "exactly how"

ATTORNEY GENERAL OF WASHINGTON
Civil Rights Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

public hospital districts must comply with the Reproductive Privacy Act). 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. Simply put, the Hospital District may not hide behind RCW 9.02.150 in order to justify a violation of RCW 9.02.160—it must comply with both.

IV. CONCLUSION

The Attorney General asks this Court to uphold the Reproductive Privacy Act's mandate that state entities not discriminate against women seeking abortion services, including the requirement that state entities that provide maternity services also provide substantially equivalent abortion services. The Attorney General submits that 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).

RESPECTUFLLY SUBMITTED this 19th day of April 2016.

ROBERT W. FERGUSON
Attorney General

COLLEEN MELODY, WSBA #42275
Assistant Attorney General
Civil Rights Unit
Attorney for Amicus Curiae
Attorney General of Washington

ATTORNEY GENERAL OF WASHINGTON
Civil Rights Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744