IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 21-0458

STATE OF WEST VIRGINIA *ex rel.*
West Virginia University Hospitals, Inc.,

Petitioner,

v.

REBECCA MORRIS, Administratrix of the Estate of BRYAN MORRIS,

Respondent.

The Honorable PHILLIP D. GAUJOT, Judge
Circuit Court of Monongalia County, West Virginia
Civil Action No. 20-C-331

BRIEF OF *AMICI CURIAE*, MOUNTAIN HEALTH NETWORK, INC. AND CAMC HEALTH SYSTEM, INC. IN SUPPORT OF PETITIONER

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IDENTITIES OF *AMICI CURIAE*, THEIR INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE[1]

I. Identities of *Amici Curiae*

Amicus Mountain Health Network, Inc. ("MHN") is a Huntington, West Virginia-based not-for-profit health delivery system comprised of Cabell Huntington Hospital, a 303-bed teaching hospital for Marshall University Schools of Medicine, Pharmacy and Nursing; St. Mary's Medical Center, a 393-bed teaching hospital that operates St. Mary's Schools of Nursing, Respiratory Care and Medical Imaging; Hoops Family Children's Hospital, a 72-bed pediatric specialty hospital within Cabell Huntington Hospital; HIMG, a 60-member multi-specialty physician group; and a management agreement with Pleasant Valley Hospital, a 101 acute-bed hospital. The reach of MHN's health care services extends to West Virginians living in twenty-three (23) counties within the state, as well as to individuals in Kentucky and Ohio.

Amicus CAMC Health System, Inc. is a healthcare services system comprised of Charleston Area Medical Center, Inc. ("CAMC"), CAMC Foundation, Inc., and CAMC Health Education and Research Institute. CAMC is the second-largest health system in West Virginia, owning and operating a tertiary regional referral center and teaching hospital comprised of four hospital facilities currently licensed for a total of 956 beds. This includes CAMC General Hospital, CAMC Memorial Hospital and CAMC Women and Children's Hospital, in Charleston, West Virginia, and CAMC Teays Valley Hospital in Hurricane, West Virginia. CAMC employs more than 7,700 people across its various health facilities, and more than 700 doctors have admitting privileges across this system. CAMC serves as the accredited sponsoring institution for 14

[1] Pursuant to W.Va. R. App. P. 30(e)(5), undersigned counsel states that it authored this proposed *Amici Curiae* Brief, in whole, on behalf of *Amici*. Undersigned counsel regularly represents *Amici* in medical malpractice litigation, and *Amici* specifically retained undersigned counsel at their standard hourly rate to prepare and submit this *Amici Curiae* Brief on their behalf.

graduate medical education residency/fellowship programs, three pharmacy residency programs, a doctoral psychology internship program, and a School of Nurse Anesthesia. CAMC has one of the top heart programs in the United States; is a Robotic and Urology Center of Excellence; has the highest-level newborn intensive care unit and pediatric intensive care unit in West Virginia; and is one of the busiest Level I Trauma Centers in the state.

II. *Amici's* Interest in the Outcome of this Appeal

Naturally, given their widespread role in the health care of West Virginia's population, *Amici's* respective hospital systems are regularly involved in civil lawsuits based on allegations of medical malpractice, which are governed by the West Virginia Medical Professional Liability Act ("MPLA").[2] In such cases, *Amici* are often targeted for care and treatment provided by non-employee physicians based on theories of ostensible agency. Whenever a non-employee physician has the requisite insurance coverage under W. Va. Code § 55-7B-9(g), *Amici* can often avoid frivolous ostensible agency claims meant only to increase the liability pool. The functional premise of § 55-7B-9(g)'s protection of hospitals from ostensible agency liability emanates from the MPLA's central purpose of balancing the interests of injured patients' access to compensation from duly insured providers while also limiting frivolous claims, reducing healthcare costs, and the ultimate goal of stabilizing the climate of West Virginia's healthcare system for patients and providers alike.

The Monongalia Circuit Court's Order, if affirmed, would severely prejudice *Amici* and all other hospitals in the state of West Virginia insofar as it would open the flood gates to new ostensible agency claims for any and all non-employed providers who are on shared-limit malpractice policies. This would undo vital progress made toward stabilizing the cost of

[2] W. Va. Code § 55-7B-1, *et seq.*

malpractice insurance premiums, keeping quality healthcare providers in the state, and preventing runaway healthcare costs, which would harm not just *Amici* and West Virginia's healthcare workers, but indeed, all West Virginians.

Such is the source of the *Amici's* interest in the outcome of this case.

III. Source of *Amici's* Authority to File

The A*mici's* source of authority to file will be if the Supreme Court of Appeals of West Virginia ("this Court") grants A*mici's Motion for Leave to File Amicus Brief.*

QUESTION PRESENTED

Section 55-7B-9(g) of the MPLA protects hospitals from vicarious liability from liability arising from the actions of non-employee healthcare providers based on ostensible agency liability. This protection exists "***unless*** the alleged agent does not maintain professional liability insurance covering the ***medical injury*** which is the subject of the action **in the aggregate amount of at least $1 million *for each occurrence***" (emphasis added).

The question to which *Amici* wish to provide input is whether ostensible agency protections endure under § 55-7B-9(g) when two alleged ostensible agents are insured by a group policy that provides a shared limit of $1,500,000, or, if each respective ostensible agent must carry their own individual policy with a minimum of $1,000,000 in coverage to receive such protection.

SUMMARY OF *AMICI'S* POSITION

The Court should reverse the Monongalia Circuit Court's Order and find as a matter of law that the language of § 55-7B-9(g) allows for ostensible agency protections when more than one alleged ostensible agent is insured under the same group policy with shared limits equal to or greater than $1,000,000. Not only does the language of the statute clearly and unambiguously support this interpretation, but also, the practical consequences of such a finding would reflect the

legislature's obvious intent to make ostensible agency protections the default rule, as opposed to an exception. Conversely, affirming the Monongalia Circuit Court's Order and finding that the language of § 55-7B-9(g) is limited in its application requires reading language into § 55-7B-9(g) which is simply not there, and, contravenes legislative purpose. Such a finding would also undermine the MPLA's objective of balancing injured patients' access to fair and adequate compensation while also maintaining reasonable limits on insurance and healthcare costs.

DISCUSSION

This Court has previously identified that the MPLA is "an act designed to be in derogation of the common law."[3] Accordingly, when interpreting the language of the MPLA, the examination "is guided, at all times, by the recognition that the [MPLA] alters the 'common law and statutory rights of our citizens to compensation for injury and death'".[4] "[W]here there is any doubt about the meaning or intent of a statute in derogation of the common law, the statute is to be interpreted in the manner that makes the least rather than the most change in the common law" and must "generally be given a narrow construction."[5] The foregoing rules for interpreting the MPLA do not, however, obviate the main tenets of statutory construction, which are (1) that "[p]lain statutory language does not need to be construed"[6], and (2) "[t]he primary rule of statutory construction is to **ascertain and give effect to the intention of the Legislature.**"[7]

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[3] *Phillips v. Larry's Drive-In Pharm., Inc.*, 220 W. Va. 484, 491, 647 S.E.2d 920, 927 (2007).
[4] *Id.*
[5] *Id.* at 492, 647 S.E.2d at 928.
[6] *Tribeca Lending Corp. v. McCormick,* 231 W. Va. 455, 456, 745 S.E.2d 493, 494 (2013).
[7] Syl. Pt 8, *Vest v. Cobb*, 138 W.Va. 660, 76 S.E.2d 885 (1953) (emphasis added).

I. A Plain Reading of W. Va. Code § 55-7B-9(g) is That Ostensible Agency Protection Applies in the Case *Sub Judice.*

Plain statutory language does not need to be construed.[8] W. Va. Code § 55-7B-9(g) states, in relevant part,

> A health care provider may not be held vicariously liable for the acts of a nonemployee pursuant to a theory of ostensible agency unless the alleged agent does not maintain professional liability insurance covering the medical injury which is the subject of the action in the aggregate amount of at least $1 million for each occurrence.

Whether § 55-7B-9(g) confers ostensible agency protections in the case *sub judice,* as with any case, can be determined by simply reading the plain statutory language with the names of each respective party added in. When this "test" is applied to each alleged ostensible agent in the underlying action, § 55-7B-9(g) reads as follows:

> "**West Virginia University Hospitals, Inc.** may not be held vicariously liable for the acts of **Allison Tadros, M.D.** pursuant to a theory of ostensible agency unless **Dr. Tadros** does not maintain professional liability insurance covering the medical injury which is the subject of the action in the aggregate amount of at least $1 million for each occurrence."
>
> and
>
> "**West Virginia University Hospitals, Inc.** may not be held vicariously liable for the acts of **Rachel Polinski, M.D.** pursuant to a theory of ostensible agency unless **Dr. Polinski** does not maintain professional liability insurance covering the medical injury which is the subject of the action in the aggregate amount of at least $1 million for each occurrence."

By adding the respective parties' names into § 55-7B-9(g) and applying the plain language of the statute to each, the appropriate application of § 55-7B-9(g) is obvious: if a provider has professional liability insurance coverage for the subject injury in the aggregate of at least $1,000,000, **which each does,** West Virginia University Hospitals, Inc. (hereinafter, "Petitioner", or "WVUH") cannot be liable for that agent under a theory of ostensible agency.

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[8] *Tribeca,* at 231 W. Va. 456, 745 S.E.2d 494.

Respondents would presumably argue that this analysis fails to account for the fact that two would-be ostensible agents share the same $1,500,000 policy limit. "It is not for the Court arbitrarily to read into [a statute] that which it does not say. Just as Courts are not to eliminate through judicial interpretation words that were purposely included, we are obligated not to add to statute something that Legislature purposely admitted."[9] Ironically, the Monongalia Circuit Court's Order references this same quote from *Banker v. Banker*[10] as a basis for its ruling, but does exactly the opposite by adding language to § 55-7B-9(g) to explain the basis of its erroneous interpretation:

> The statute itself specifically provides that, "A healthcare provider may not be held vicariously liable for acts of a nonemployee **(not nonemployees)** pursuant to a theory of ostensible agency unless the alleged agent **(not agents)** does not maintain professional liability insurance covering the medical injury which is the subject of the action in the aggregate amount of at least $1,000,000 per each occurrence."[11]

Despite the Monongalia Circuit Court's own recognition of the need to not add words to plain statutory language, its Order relies on the addition of plural forms of "nonemployees" and "agents" to justify its interpretation of § 55-7B-9(g). As demonstrated *supra,* adding words to § 55-7B-9(g) is not necessary to glean its obvious application, and is also an improper method for construing statutory meaning. By contrast, simply analyzing the language of § 55-7B-9(g) against each respective party provides clear instruction that § 55-7B-9(g) confers ostensible agency in the case *sub judice.* As such, *Amici* ask that this Court apply § 55-7B-9(g) as written and reverse the Circuit Court's Order.

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[9] *Banker v. Banker*, 196 W. Va. 535, 547, 474 S.E.2d 465, 477 (1996).
[10] May 12, 2021 Ord. of Cir. Ct., p. 8.
[11] *Id.*, p. 5 (emphasis added).

II. The Legislature's Intent Behind W. Va. Code § 55-7B-9(g) Was to Place Strong Restrictions on Ostensible Agency Claims.

Subscribing to the maxim of *expressio unius est exclusio alterious,* the Monongalia Circuit Court's Order concludes that the absence of the phrase "without respect to the number of physicians involved" within § 55-7B-9(g), while appearing elsewhere in the MPLA, evidences a Legislative intent to narrowly extend ostensible agency protections.[12] However, the intent of the Legislature in its implementation of § 55-7B-9(g) is readily apparent, and such inferential exercises are not needed to ascertain it. On March 8, 2003, the Legislature amended the MPLA through H.B. 2122 to add sweeping limitations on liability for health care providers.[13] In addition to the ostensible agency protections codified in § 55-7B-9(g), H.B. 2122 also introduced the formation of the Physician's Mutual Insurance Company, placed limitations on "loss of chance", shifted from joint and several liability to simple several liability, and discarded the $1,000,000 non-economic damage cap in favor of the current two-tier cap system.[14]

Consistent with these new limitations on the common law rights of West Virginia's citizens, H.B. 2122 also amended § 55-7B-1, titled, "Legislative findings and declaration of purpose", to include the following language (in bold) evidencing the Legislature's intent:

> ". . . it is the duty and responsibility of the Legislature to balance the rights of our individual citizens to **adequate and reasonable compensation** with the broad public interest in the provision of services by qualified health care providers **and health care facilities** who can themselves obtain the protection of reasonably priced and extensive liability coverage."[15]

The reason for the addition of "health care facilities" to § 55-7B-1 can be found later in the Section:

> ". . . the cost of . . . liability insurance coverage has continued to rise dramatically, and that the increasing unavailability of professional liability coverage has resulted in the state providing professional liability insurance coverage; and that the

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[12] May 12, 2021 Ord. of Cir. Ct., p. 9.
[13] H.B. 2122, 2003 Reg. Sess. (W. Va. 2003).
[14] *Id.*
[15] *Id.* (emphasis added).

> unavailability and high costs of professional liability coverage have exacerbated the state's loss of physicians, which, together with other costs and taxation incurred by health care providers and health care facilities in this state, have created a competitive disadvantage in attracting and retaining qualified physicians and other health care providers."[16]

These modifications to the Legislature's declaration of purpose unequivocally show the Legislature's intention, which was the continued effort to stabilize healthcare costs and malpractice insurance premiums, keeping providers from leaving the State, and maintaining injured patients' access to "adequate and reasonable compensation." As with all of the iterations of the MPLA, this has required a balancing of placing effective limitations on liability exposure without placing too great limitations on the common law rights of West Virginians. Perhaps most revelatory of the Legislature's intention in the passage ostensible agency protections was a proposed change to § 55-7B-9(e) in the Judiciary Committee Substitute version of H.B. 2122, **which sought to completely abolish ostensible agency liability in medical malpractice cases.**[17][18] While this revision did not survive in the final version enacted into law, the fact that the Judiciary Committee version of H.B. 2122 would have abolished ostensible agency outright reflects that the Legislature's intent: **§ 55-7B-9(g), as written, makes ostensible agency protections the rule, as opposed to an exception, such that ostensible agency liability only serves as an avenue of recourse in cases where there is insufficient liability coverage for a given claim.** This is especially apparent by the specific placement of the word "unless" within the text of § 55-7B-9(g):

> A health care provider **may not** be held vicariously liable for the acts of a nonemployee pursuant to a theory of ostensible agency **unless** the alleged agent does not maintain professional liability insurance covering the medical injury

[16] H.B. 2122, 2003 Reg. Sess. (W. Va. 2003) (emphasis added).
[17] The Committee Substitute version of H.B. 2122 proposed that § 55-7B-9(e) state, in relevant part, "A health care provider may not be held vicariously liable for the acts of a nonemployee health care provider or health care professional through the principles of ostensible agency."
[18] H.B. 2122, 2003 Reg. Sess. (Judiciary Committee Substitute) (W. Va. 2003).

which is the subject of the action in the aggregate amount of at least $1 million for each occurrence.[19]

This construction presumes that in most medical negligence lawsuits, a would-be ostensible agent will have "adequate and reasonable" insurance coverage so as to obviate the need to expose a non-employer to liability. In most medical professional liability cases in West Virginia, $1,000,000 in global coverage is more than sufficient to account for an "adequate and reasonable" measure of a plaintiff's damages. In fact, a 2019 report from the West Virginia Offices of the Insurance Commissioner analyzed a sample of 88 medical malpractice cases from 1999 to 2018.[20] Based on this sample, in that twenty-year timeframe, the average cost to settle a medical malpractice lawsuit was $233,286.[21] The highest average settlement in a single year was 2015, in which the average cost to settle was $335,000.[22] Similarly, the same report analyzed the judgment awards provided in those 88 cases over the same twenty-year period and found that the average medical malpractice judgment award was $439,537.[23] The largest average judgment award for a single year from this study was in 2007, in which one case from this sample was tried to verdict and garnered an award of $1,000,000.[24] Given that the average medical malpractice settlement or judgment award falls far short of $1,000,000, having a *minimum* of $1,000,000 in global coverage for any one claim in most cases is far more than "adequate", and is certainly therefore reasonable.

The Legislature's intent in passing § 55-7B-9(g) was clearly to impose broad limitations on a plaintiff's ability to impose ostensible agency liability on hospitals if "adequate and reasonable" insurance coverage of $1,000,000 was otherwise available. To interpret § 55-7B-9(g)

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[19] W. Va. Code § 55-7B-9(g) (emphasis added).
[20] West Virginia Offices of the Insurance Commissioner's 2019 Annual Medical Malpractice Report, at pp. 23, 27, Available Online at: https://www.wvinsurance.gov/Portals/0/pdf/reports/2019_med_mal_report.pdf?ver=2020-01-23-153604-467
[21] *Id.* p. 27.
[22] *Id.*
[23] *Id.* p. 23.
[24] *Id.*

as requiring every provider to carry their own policy with a minimum of $1,000,000 before a hospital can be protected from an ostensible agency claim would require many MPLA cases to have liability coverage that far exceeds the potential exposure before ostensible agency protections kick in. It would also make ostensible agency protections so rare as to be effectively useless, which is in clear contravention of legislative intent. The Court should therefore interpret § 55-7B-9(g) in a manner consistent with the Legislature's purpose, find as a matter of law that § 55-7B-9(g) provides ostensible agency protections in the case *sub judice,* and reverse the Monongalia Circuit Court's Order.

III. Public Policy Interests Weigh Heavily in Favor of Maintaining Broad Ostensible Agency Protections.

In addition to being consistent with the Legislature's express intent, broadly effective ostensible agency protections are needed to preserve the vital cost-regulating functions of the MPLA. As this Court knows, the original purpose of the MPLA was to stabilize the medical professional liability insurance market, which was in dire condition prior to the MPLA's reforms. Now, countless physicians and mid-level providers across West Virginia are now insured through competitively priced shared-limit policies. **Significantly, these policies are largely tailored to conform with the longstanding interpretation of § 55-7B-9(g) that these policies protect non-employing hospitals from ostensible agency liability.** If the Monongalia Circuit Court's Order is affirmed, providers covered under group policies would be targeted for the sole purpose of suing multiple insureds under the same policy to dilute the policy limits. The result would be a flood of new ostensible agency claims against hospitals and other similar healthcare facilities across the State, which again, would undermine the Legislature's purpose of stabilizing the medical professional liability insurance market.

The breadth of the adverse effects of affirming the Monongalia Circuit Court's Order cannot be understated. In addition to affecting providers' practice group policies, hospital insurance premiums would increase to account for the increase in potential liability exposure. Hospitals' credentialing standards would undergo a paradigm shift, which would have ripple effects across all practice groups and insurance carriers. These impositions would be particularly untimely now, as West Virginia's healthcare systems are still struggling from the financial impacts of the ongoing COVID-19 pandemic. Ultimately, healthcare costs overall would surely increase to account for these new added costs of operation. Judicial economy would suffer too, as numerous existing civil suits would be amended to add new ostensible agency claims, prompting even more continuances on our State's already backlogged court system.

Furthermore, the benefits of eviscerating the ostensible agency protections of § 55-7B-9(g) would not begin to outweigh the costs. Today, providers in medical professional liability litigation carry primary policies of at least $1,000,000 per occurrence to conform with § 55-7B-9(g). In the uncommon instance in which a plaintiff's damages exceed $1,000,000 for a single occurrence, healthcare practice groups typically purchase excess policies to allow for additional coverage. It is exceedingly rare in the present climate that a practice group lacks a policy to account for excess liability. **Ironically, it has been the cost-stabilizing effects of the various iterations of the MPLA on malpractice insurance premiums that has made the ubiquity of sufficient malpractice coverage (and particularly, excess coverage) a reality in West Virginia.** Now, the Monongalia Circuit Court's Order, if affirmed, has the potential of undoing this good work. Therefore, the public policy needs of West Virginia's healthcare system—and the people it serves—require the Monongalia Circuit Court's Order to be reversed.

IV. The Monongalia Circuit Court's Interpretation of W. Va. Code § 55-7B-9(g) Invites Strategic Pleading Which Will Functionally Disable Ostensible Agency Protections and Result in Judicial Waste.

According to the Monongalia Circuit Court's Order, "A plain reading of [§ 55-7B-9(g)] shows that claims of ostensible agency against a medical provider, like WVUH, are **only** barred if each alleged ostensible agent individually has a minimum of $1,000,000 of medical professional liability insurance coverage."[25] If affirmed, this would spell the *de facto* repeal of the MPLA's ostensible agency protections altogether. Presently, settled principles of vicarious liability in West Virginia allow for a plaintiff, as master of his or her claims, to name an individual physician and/or his or her actual employer/practice group as defendants in a lawsuit. In many cases, a physician's practice carries professional liability insurance covering claims against the practice as a whole, as well as the individual physicians and/or mid-level providers. Depending on how the policy is written, certain providers may have individual coverage limits of at least $1,000,000, whereas other insureds—typically mid-level providers—often share coverage limits.

If the Monongalia Circuit Court's Order is upheld, § 55-7B-9(g)'s ostensible agency protections can be easily circumvented through clever pleading. A plaintiff need only sue enough insured providers in a given practice as needed to dilute the policy's coverage limits below $1,000,000 per insured. The result would be a marked increase in the number of individual healthcare providers named as defendants (as well as an increase in claims against non-employer hospitals based on ostensible agency).

Respondents may suggest that the pre-suit notice requirements of the MPLA will serve as a filter from any such frivolous claims. While the MPLA's pre-suit notice requirements largely serve as an effective tool for reducing frivolous lawsuits, experienced plaintiffs' attorneys in West

[25] May 12, 2021 Ord. of Cir. Ct., p. 5 (emphasis added).

Virginia are adept at providing minimally sufficient "notice" of their claims to move a case forward to the complaint phase. In reality, the influx of new claims and defendants will require untold amounts of additional discovery to substantiate the veracity of these claims. All this additional expense, time, and strain on the judiciary would occur in the name of plaintiffs accessing ostensible agency liability and enlarging the pool from which liability can be apportioned, the ultimate purpose of which is to subvert the MPLA's reforms.

The application of § 55-7B-9(g) as proposed by *Amici* preserves the Legislative intent to make ostensible agency accessible only in circumstances where an individual provider is underinsured. By contrast, the application imposed by the Monongalia Circuit Court's Order threatens to turn that standard on its head and make ostensible agency a presumed avenue of liability for plaintiffs until proven otherwise through adequate discovery. As such, the Court must reverse to protect and preserve the legislative purpose of the MPLA.

CONCLUSION

Amici, Mountain Health Network, Inc. and CAMC Health System, Inc., respectfully request that the Court grant Petitioner's Appeal, and reverse the Monongalia Circuit Court's Order interpreting § 55-7B-9(g) as not conferring ostensible agency protections in the case *sub judice*. The simplest way to divine the plain statutory meaning of § 55-7B-9(g) is to apply the names of each respective party to the language of the statue. In so doing, § 55-7B-9(g) is clear and unambiguous: because Dr. Tadros and Dr. Polinski *each* have a policy with at least $1,000,000 of liability coverage for the purported injury, an ostensible agency claim against Petitioner is barred. Not only is this the plainest construction of § 55-7B-9(g), but also, this application is squarely aligned with the Legislature's intent. The Legislative history of H.B. 2122 makes clear that the Legislature sought to strengthen the MPLA's limitations on ostensible agency liability as part of

its continued effort to regulate runaway costs and stop the exodus of quality healthcare providers, and a broad application of § 55-7B-9(g) is vital in this regard. An affirmation of the Circuit Court's Order, by contrast, would not only subvert the intent of the Legislature, but would also negatively impact the cost of healthcare and medical professional liability insurance statewide.

Respectfully submitted,

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AND
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CERTIFICATE OF SERVICE

The undersigned counsel for *Amici* does hereby certify that the foregoing ***"Motion for Leave to File Amicus Curiae Brief in Support of Petitioner's Appeal"*** and ***"Brief of Amici Curiae, Mountain Health Network, Inc. and CAMC Health System, Inc. in Support of Petitioner"*** were served on this 30th day of September, 2021, by postage prepaid, first class U.S. Mail, to the following:

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