No. 19-0251

STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of

ALIERA HEALTHCARE INC.,

Appellant.

THE ALIERA HEALTHCARE COMPANIES, INC.'S MOTION FOR SUMMARY JUDGMENT

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STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of **ALIERA HEALTHCARE INC.,** Appellant.	Case No. 19-0251 **THE ALIERA COMPANIES, INC.'S MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

On May 13, 2019, the Office of the Insurance Commissioner of the State of Washington ("OIC"), issued a cease and desist order against The Aliera Companies, Inc. ("Aliera"). In essence, OIC alleged that Aliera is transacting the business of insurance in Washington without proper authority. OIC ordered Aliera to immediately cease and desist from "[e]ngaging in or transacting the unauthorized business of insurance or acting as an unregistered health care service contractor or as an unlicensed discount plan organization in the state of Washington."[1] Additionally, OIC ordered Aliera to cease and desist from (i) "[s]eeking, pursuing and obtaining any insurance or discount plan business[,]" (ii) "[s]oliciting Washington residents to purchase any insurance or discount plan to be issued by an unauthorized insurer or unlicensed discount plan organization[,]" and (iii) "[s]oliciting Washington residents to induce them to purchase any insurance contract or discount plan."[2]

Also in May 2019, OIC issued a cease and desist order against Trinity Healthshare, Inc. ("Trinity"), a health care sharing ministry ("HCSM") that Aliera, through its subsidiaries, administers.[3] OIC similarly alleged that Trinity is engaged in transacting the unauthorized business of insurance. To avoid a protracted dispute, Trinity entered into a Consent Order with

[1] Declaration of Ethan Smith in Support of The Aliera Companies, Inc.'s Motion for Summary Judgment ("Smith Decl."), Ex. 1, *Aliera Cease and Desist Order No. 19-0251*; see also Smith Decl. Ex. 10, *Aliera Proposed Consent Order*.
[2] *Id.* at p. 1.
[3] Smith Decl., Ex. 2, *Trinity Consent Order* p. 3, ¶ 2. To clarify, Aliera is limited in its power to bind Trinity to any agreements. Both entities have consistently addressed regulatory inquiries and actions separately and individually, and no agency has been implied by their conduct.

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OIC.[4] The Consent Order has no preclusive or collateral estoppel effects in any action by any person or party other than OIC and allows Trinity to continue providing HCSM products to current Washington members through the end of 2020.

OIC's charges against Aliera fail as a matter of law. Aliera is not in the business of insurance and so not subject OIC's authority. Aliera's sole activities in Washington are providing administrative services to Trinity. The products that Trinity offers are not "insurance." Rather, Trinity is a HCSM—an *alternative* to traditional health insurance that is expressly excluded from the definition of insurance under Washington law. As such, regulation of HCSMs like Trinity is outside the scope of OIC's authority. Correspondingly, Aliera's administration of Trinity's non-insurance products is also outside OIC's statutorily defined authority.

OIC's charges hinge on its determination that Trinity is not a HCSM. However, OIC lacks the authority to make this determination, as doing so involves interpretation of federal statutes outside OIC's authority or expertise. Moreover, reaching this determination essentially presupposes that Trinity is in the business of insurance. That is, OIC only has the authority to determine whether Trinity is an HCSM *if it has already determined that Trinity is not an HCSM*. Such circular logic, and its implications for potential unfettered expansion of OIC's jurisdiction, must fail. Accordingly, OIC's charges should be dismissed as a matter of law.

Additionally, Washington's definition of HCSM is unenforceable. When codified, the definition was an unconstitutional delegation of authority. It has subsequently been rendered void and unintelligible by court decisions and Congressional actions that have eliminated key provisions of the Affordable Care Act ("ACA") on which the definition relies. To the extent the definition is still enforceable, Trinity meets the definition of a HCSM.

Finally, even if Aliera were subject to OIC's authority, OIC's allegations that Aliera misrepresented Aliera's products fail as a matter of law. Under the plain language of the statues and regulations upon which OIC relies, the alleged "misrepresentations" clearly do not violate the Washington Insurance Code.

[4] *Id.* at p. 1.

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Accordingly, all of OIC's charges against Aliera fail as a matter of law and must be dismissed.

II. FACTS AND PROCEDURAL HISTORY

A. Factual Background

Trinity is a 501(c)(3) non-profit HCSM built on the centuries-old Christian tradition of sharing and bearing one another's health care needs.[5] Its members hold a common set of ethical and religious beliefs, and they voluntarily agree to share their medical expenses in accordance with those beliefs.[6] Every member of Trinity is required to sign a Statement of Beliefs stating that he or she will maintain a healthy lifestyle and avoid foods, behaviors, and habits that produce sickness or disease in themselves or others.[7]

Aliera, through its operating subsidiaries, provides marketing, sales, and administrative services to Trinity for its HCSM products. Aliera's authority to act on Trinity's behalf is set forth in five separate agreements between Aliera's subsidiaries and Trinity, which are effective January 1, 2020 (the "Trinity Agreements").[8] The Trinity Agreements replace and supersede the Marketing Administration Agreement ("MAA") that the parties entered into in 2018.[9] Under the MAA, Aliera was the designated program manager for the marketing, sales, and administration of Trinity's HCSM program.[10] Under the Trinity Agreements, each of Aliera's subsidiaries have directly contracted with Trinity: Advevo, LLC provides marketing services; Ensurian Agency, LLC provides sales services (through sub-contractors); Tactic Edge Solutions, LLC provides IT platform and customer service related services; and USA Benefits & Administrators, LLC provides third-party administrator services.[11] Any reference to "Aliera" herein also includes a reference to any applicable subsidiary.

As explained in further detail below, under state and federal law, HCSMs are not

[5] Declaration of Shantanu Paul in Support of The Aliera Companies, Inc.'s Motion for Summary Judgment ("Paul Decl.") ⁋ 2.
[6] *Id.*
[7] *Id.*; *see also* Smith Decl. Ex. 3, *Trinity Bylaws.*
[8] Paul Decl. at ⁋ 3; Smith Decl. Ex. 4, *Trinity Agreements*.
[9] Paul Decl. at ⁋ 3; Smith Decl. Ex. 5, *2018 Marketing Administration Agreement*.
[10] Paul Decl. at ⁋ 3.
[11] *Id.*

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insurance. Thus, all of Aliera's administrative activity related to Trinity's HCSM products did not constitute the regulated business of insurance under the Washington Insurance Code.

Members always remain responsible for their own medical payments as set forth in the applicable member guidelines.

Through its subsidiary that provides third-party administrator services, Aliera facilitates Trinity's process for members to share their medical expenses.[12] Aliera does not undertake to indemnify or accept responsibility for any payment obligation.[13] Share requests for member's medical expenses are received from providers, and Aliera, on behalf of Trinity, reviews these requests in accordance with the member guidelines.[14] Payments of any eligible share requests are made after approval by Trinity, and eligible payments are made directly to the providers.[15] Members always remain responsible for their own medical payments as set forth in the applicable member guidelines.[16] Aliera also operates an online "Sharebox" solution for Trinity members, which allows Trinity members to view their contributions and share requests, share with other members, and review details of total share request amounts paid.[17]

Trinity has the ultimate obligation to administer the ministry and the HCSM program, and though it has delegated some duties to Aliera's subsidiaries, it maintains the obligation and ultimate power and duty to direct the activities of its HCSM.[18] This includes the administrative and marketing responsibilities assigned to Aliera and its subsidiaries.[19] Trinity also makes the final decision regarding any dispute or appeal concerning member-sharing eligibility.[20] Trinity and Aliera have separate legal existences, each have their own board and employees, and no Aliera officer, employee, or director is a Trinity employee or a member of Trinity's board or vice

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[12] *Id.* at ¶ 4.
[13] *Id.* at ¶ 4.
[14] *Id.* at ¶ 4.
[15] *Id.* at ¶ 4.
[16] *Id.* at ¶ 4.
[17] *Id.* at ¶ 4.
[18] *Id.* at ¶ 5.
[19] *Id.* at ¶ 5.
[20] *Id.* at ¶ 5.

versa. Aliera and Trinity are distinct and unaffiliated.[21] Indeed, OIC has treated Aliera and Trinity as distinct entities, issuing separate cease and desist orders to each and entering into a consent order with Trinity while continuing with its charges against Aliera.[22]

B. Procedural History

On September 11, 2018, OIC received a complaint from a carrier related to the potential "misrepresentation of health sharing products" as insurance and the recruitment of prospective brokers to sell those products to Washington consumers. The complaint alleged that Aliera, as the administrator for Trinity, was soliciting and recruiting agents to sell misleading products by using co-branded marketing communications that could lead the "average consumer" to believe they were purchasing healthcare insurance, rather than a membership in a HCSM. After receiving this complaint, OIC commenced an investigation to determine whether Trinity, with the administrative help of Aliera, was accurately representing itself to Washington consumers as a HCSM.

OIC published a "Final Investigative Report" regarding Trinity and Aliera on April 8, 2019.[23] The report determined that there was evidence to substantiate that Trinity "does not meet the statutory definition of a HCSM under RCW and Federal statute."[24] Accordingly, the report concluded that, in selling its products in Washington, Trinity was acting as an unauthorized insurer.[25] Regarding Aliera, the report determined that there was also evidence to substantiate that Aliera's "advertisements on behalf of Trinity are deceptive and have the capacity and tendency to mislead or deceive consumers to believe they are purchasing insurance rather than a HCSM membership, in violation of RCW 48.30.040, WAC 284-50-050 and 284-50-060."[26]

After publishing the report, OIC issued separate cease-and-desist orders to Trinity and Aliera, effectively ordering both entities to cease marketing or offering Trinity HCSM products

[21] *Id.* at ¶ 5.
[22] *See* Smith Decl. Ex. 2, *Trinity Consent Order* and Ex. 6, *Aliera Proposed Consent Order*.
[23] *See generally*, Smith Decl. Ex. 7, *OIC Final Investigative Report*.
[24] Smith Decl. Ex. 7, *OIC Final Investigative Report*, p. 2.
[25] *Id.*
[26] *Id.*

in the state of Washington.[27] Both Trinity and Aliera contested OIC's actions. Trinity and Aliera have always maintained that Trinity is a HCSM under all relevant definitions. However, in December of 2019, due to Trinity's stated desire to resolve the matter efficiently and swiftly, Trinity entered into a Consent Order with OIC, agreeing to cease offering its products in Washington and to pay a $150,000 fine.[28] The order explicitly did not determine any factual or legal issue in any jurisdiction or have any preclusive effect in any lawsuit or action by any person or party other than OIC.[29]

Aliera submitted a demand for hearing to contest OIC's charges against it,[30] disputing OIC's findings of fact, conclusions of law, and the application thereof. Because the Trinity products Aliera administered in Washington were intended to be issued only to members of an HCSM, which by definition does not constitute insurance, Aliera did not engage in the business of insurance so as to be subject to the statutes and regulations OIC alleges were violated. Furthermore, even if it were determined that Trinity was not an HCSM for purposes of the Washington Insurance Code, that determination cannot transform Aliera's activities as an administrator for Trinity into a violation because the Washington Insurance Code does not regulate third-party administrators, and Aliera at no time undertook to indemnify or be financially responsible for payment or pre-payment of any claims. In other words, Aliera did not engage in the business of insurance, and therefore OIC has no legal basis to support enforcement of its cease-and-desist order or to levy a fine against Aliera. Thus, the order should be revoked as a matter of law.

OIC has no legal basis to support its cease and desist or consent order against Aliera. Thus, cease and desist order should be vacated and the threatened fine should be declared unenforceable as a matter of law.

[27] Smith Decl. Ex. 1, 2.
[28] Smith Decl. Ex. 2, p. 1.
[29] *Id.* at p. 6 ¶ 7.
[30] Smith Decl. Ex. 8, *Aliera Demand for Hearing.*

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III. ISSUES PRESENTED

1. Whether OIC's charges against Aliera fail as a matter of law because Aliera, as administrator of the Trinity HCSM program, is not in the business of insurance and, thus, not subject OIC's statutorily defined authority.

2. Whether OIC's charges against Aliera should be dismissed as a matter of law because they require OIC to determine whether Trinity is an HCSM, a determination that OIC lacks the authority or expertise to make.

3. Whether OIC's charges against Aliera fail as a matter of law because Washington's definition of HCSM is unenforceable and, to the extent the definition is still enforceable, Trinity meets the definition of a HCSM.

4. Whether OIC's allegations that Aliera misrepresented Trinity's products fail as a matter of law because, under the plain language of the statues and regulations upon which OIC relies, the alleged "misrepresentations" clearly do not violate the Washington Insurance Code.

IV. EVIDENCE RELIED UPON

This motion relies upon the Declaration of Shantanu Paul in Support of The Aliera Companies, Inc.'s Motion for Summary Judgment and accompanying exhibits, the Declaration of Ethan Smith in Support of The Aliera Companies, Inc.'s Motion for Summary Judgment and accompanying exhibits, and all other pleadings and evidence on file in this matter.

V. ARGUMENT

A. Standard of Review

WAC 10.08.135,[31] which governs motions for summary judgment in administrative proceedings, provides:

> A motion for summary judgment may be granted and an order issued if the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

[31] While Administrative Procedure Act (RCW Ch. 34.05) does explicitly authorize agencies to grant summary judgment, a legislatively created agency or board, when acting in a quasi-judicial capacity, may employ summary procedure if there is no genuine issue of material fact. *Eastlake Cmty. Council v. Seattle*, 64 Wn. App. 273, 276, 823 P.2d 1132 ("Thus the Board was within its power to grant an order of summary judgment.") (citing *Asarco, Inc. v. Air Quality Coal.*, 92 Wn.2d 685, 697, 601 P.2d 501 (1979)); *Pierce Cty. v. State*, 144 Wn. App. 783, 804, 185 P.3d 594 (2008); *Verizon Northwest, Inc. v. Emp't Sec. Dep't*, 164 Wn.2d 909, 915-16, 194 P.3d 255 (2008).

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In ruling on a motion for summary judgment, the court must consider the material evidence and all reasonable inferences made from that evidence in the light most favorable to the nonmoving party. *Jacobsen v. State*, 89 Wn.2d 104, 108-109, 569 P.2d 1152 (1977). Factual issues may be decided on summary judgment if "reasonable minds could reach but one conclusion from the evidence presented." *Lane v. Harborview Med. Ctr.*, 154 Wn. App. 279, 288, 227 P.3d 297 (2010) (citing *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 47, 846 P.2d 522 (1993)).

The nonmoving party cannot defeat a motion for summary judgment by providing an affidavit containing conclusory statements. *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 430-31, 38 P.3d 322 (2002). Rather, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. *Repin v. State*, 198 Wn. App. 243, 262, 392 P.2d 1174 (YEAR) (quoting CR 56(e)). If the nonmoving party does not do so, summary judgment, if appropriate, shall be entered against the moving party. *Id.*

B. Because Aliera is not engaged in the business of insurance, OIC has no authority to issue a cease and desist order or levy a fine against Aliera

OIC's cease-and-desist order against Aliera is largely based upon the premise that Aliera was "[e]ngaging in or transacting the unauthorized business of insurance."[32] However, Aliera's administration of g Trinity's HCSM program does not constitute the business of insurance as defined in the Washington Insurance Code. Accordingly, and OIC has no authority to order Aliera to cease and desist its administrative business activity for Trinity.

1. Trinity's HCSM product is not insurance, so OIC has no authority to regulate Trinity or Aliera.

OIC's authority is explicitly limited to "insurance and insurance transactions." RCW 48.01.020. "Insurance" is defined as "a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies." RCW 48.01.040. "Insurance transaction" means

(1) Solicitation.

[32] Smith Decl. Ex. 1, p. 1.

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(2) Negotiations preliminary to execution.
(3) Execution of an insurance contract.
(4) Transaction of matters subsequent to execution of the contract and arising out of it.
(5) Insuring.

RCW 48.01.060.

Neither Trinity members, Trinity, nor Aliera undertake to indemnify one another, nor do they undertake to pay a specified amount upon determinable contingencies. Rather, with Aliera's ShareBox system, Trinity members choose whether to share funds with one another on a case-by-case basis.[33] By the very nature of its function as a voluntary contribution program with no assumption of risk or guarantee of payment, Trinity cannot be designated as an insurer. Furthermore, the member guidelines state that the member maintains the ultimate responsibility for payment of his or her own medical bills.[34] The hallmarks of an insurance agreement—assumption of risk, indemnification, and guaranteed payment—are all missing. *See Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211 (1979) ("the primary elements of an insurance contract are the spreading and undertaking of a policyholder's risk"). As Trinity's product does not meet the statutory definition of "insurance," it follows that Aliera's administrative activities related to Trinity's product do not involve the business of insurance. Thus, Aliera is not required to obtain any type of license to market Trinity's product in the State of Washington, and OIC lacks any authority to order otherwise.

Beyond the fact that Trinity's product does not meet the definition for "insurance," the Washington legislature *specifically exempted* HCSMs from the definition of "insurance." RCW 48.43.009 ("Health care sharing ministries are not health carriers . . . or insurers[.]"). However, the legislature was not asked by OIC and did not endeavor to define the term "health care sharing ministry" or otherwise elaborate on how HCSMs must obtain approval to operate. Rather, the legislature merely provided that the term HCSM has "the same meaning as in 26 U.S.C. Sec. 5000A," a provision of the federal Affordable Care Act ("ACA").

2. Because Washington's definition of HCSM is unenforceable as a matter of

[33] Paul Decl. ¶ 4.
[34] Smith Decl. Ex 9, *Trinity Member Guidelines*, p. 23.

law, OIC cannot base any enforcement action on Aliera and Trinity's alleged failure to meet that definition.

The Washington legislature's definition of HCSM is unenforceable because it violates the doctrine of separation of powers and due process. Washington's definition of HCSM simply refers the "meaning" of HCSM to the ACA. The insurance commissioner is not entitled to any deference in interpreting a federal statute, but the commissioner does have the ability and obligation to ask the legislative branch to enact laws that describe permitted and prohibited conduct. The Washington Insurance Code does not contain any of the HCSM standards upon which OIC bases the violations in question. OIC never sought clarifying legislation, engaged in any rulemaking process accompanied by public notice and comment, or even issued any unenforceable guidance from which Aliera could have had prior notice of OIC's position.

For context, under the original enacted version of the ACA, individuals who were members of an HCSM were exempt from the law's penalty for failing to obtain health insurance (the "individual mandate"). The ACA's definition was essentially an amendment to the federal tax code, exempting HCSM members from the individual mandate and the corresponding penalties for failure to enroll in health insurance. To determine whether an individual could claim this exemption, Congress defined a HCSM as an organization:

> (I) which is described in section 501(c)(3) and is exempt from taxation under section 501(a);
>
> (II) members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed;
>
> (III) which (or a predecessor of which) has been in existence at all times since December 31, 1999, and medical expenses of its members have been shared continuously and without interruption since at least December 31, 1999; and
>
> (V) which conducts an annual audit which is performed by an independent certified public accounting firm in accordance with generally accepted accounting principles and which is made available to the public upon request.

26 U.S.C. § 5000A(d)(2)(B).

Since the Washington legislature enacted RCW 48.43.009 incorporating the ACA's "meaning" of HCSM, the ACA has been repeatedly challenged in court and amended

substantially by Congress. Some of those challenges and changes have, in part, put the legality of these four requirements in question. First, the Tax Cuts and Jobs Act of 2017 eliminated the penalty for failing to obtain health insurance entirely by reducing the penalty to $0. 26 U.S.C. 5000A(c)(2)(B)(iii) *as amended by* Sec. 11081(a)(1), PL 115-97, 12/22/2017. Following the removal of the penalty, the individual mandate was held unconstitutional in *Texas v. United States*, 340 F.Supp.3d 579 (N.D. Tex. 2018). The *Texas* court also held that the individual mandate could not be severed from the rest of the ACA, and therefore determined that the entire law is unconstitutional. 240 F.Supp.3d at 618-19. On appeal, the Fifth Circuit affirmed the district court's holding that the individual mandate is unconstitutional. *Texas v. United States*, 945 F.3d 355, 393 (5th Cir. 2019). However, the court remanded the case back to the district court to, in part, "explain with more precision" which provisions of the ACA are inseverable from the individual mandate. *Id.* Before the District Court did so, the U.S. Supreme Court granted certiorari to review the case. *California v. Texas*, 140 S. Ct. 1262, 206 L. Ed. 253 (2020).

The Washington Legislature cannot transfer its power to render judgment on the substance of its own laws to the federal government. *Diversified Inv. P'ship v. Dep't of Soc. & Health Servs.*, 113 Wn.2d 19, 24 (1989). More specifically, the legislature cannot delegate its legislative authority to the Federal government. *See Id.* ("The Legislature is prohibited from delegating its purely legislative functions" and "[a] statute must be complete in itself when it leaves the hands of the Legislature.") Doing so would upend the principles of federalism upon which the American system of government is built, and would be unconstitutional. *Id.* at 28; *see also State v. Dougall*, 89 Wn.2d 118, 570 P.2d 135 (1977). While the Legislature may adopt existing federal rules, regulations, or statutes, when it does so, it must expressly incorporate the provisions of such statute, regulation or rule. *See Diversified Inv. P'ship*, 113 Wn.2d at 25.

Here, the legislature has attempted to delegate its power to render judgment on how to determine which HCSMs are legitimate, and therefore not subject to regulation by OIC. The legislature has attempted to allow the federal government to make that determination, by simply stating that HCSM would "have the same meaning as in" the ACA. However, the term's

"meaning" in the ACA is, to say the least, unsettled. First, as it stands today, the term HCSM means nothing at all in the ACA due to the repeal of the individual mandate. The federal government no longer uses the definition, because the federal government no longer determines whether members of a HCSM may claim an exemption from the mandate. Second, and relatedly, the legislature's definition does not expressly incorporate the specific provision of the ACA that defines HCSM. Rather, the legislature simply incorporates the "meaning" of HCSM "as in [the ACA]." On top of being an unconstitutional delegation of authority, this broad delegation of the legislature's authority to a federal statute simply gives way in this case. The individual mandate is obsolete. Therefore, the term HCSM has no meaning in the ACA. In any case, Washington's definition of HCSM is unenforceable as a matter of law, and OIC cannot base any enforcement action based on Aliera and Trinity's alleged failure to meet the requirements in the definition.[35]

3. Washington's definition of HCSM is void and meaningless because it incorporates the "meaning" of HCSM as set forth in the ACA, and the ACA's definition of HCSM has been rendered meaningless by the repeal of the individual mandate.

The ACA defined HCSM solely as an exemption from the individual mandate, which is now a nullity. The individual mandate has been functionally eliminated by Congress and struck down as unconstitutional by the courts. With the mandate invalidated, any exemptions from it are meaningless; there is no longer anything from which to be exempt. Thus, the term HCSM no longer has any meaning in the context of the ACA. Washington's HCSM definition incorproate by reference the "meaning" of HCSM for purposes of the ACA's definition. Because HCSM has no meaning in the context of the ACA, Washington's definition has been rendered unintelligible and meaningless as well. Accordingly, OIC had no reasonable legal basis from which to conclude that Trinity was not an HCSM, and therefore all of its charges against Aliera, which arise from this erroneous determination, must fail.

Though the legality of the entire ACA is pending before the U.S. Supreme Court, for

[35] Aliera submits that, even if it is not a HCSM as defined by federal and state law, it is nonetheless not subject to the jurisdiction of OIC because it is not engaged in the business of insurance. Aliera's administrative activity on behalf of Trinity's HCSM lacks several core distinguishing factors of insurance, such as distribution of risk between members, guaranteed payments upon specific events, and assumption of risk on behalf of the "insurer."

purposes of this case, the only truly relevant portions of the Act are those related to individuals seeking an exemption from the individual mandate. More specifically relevant is the provision exempting individuals enrolled in a HCSM (and the ACA definition of that term) from the mandate. As noted above, Congress removed the penalty for failing to comply with the individual mandate from the ACA. That removal has rendered the definition of a HCSM obsolete, regardless of the issues pending before the Supreme Court. Without the mandate, neither the IRS nor any other federal agency uses the definition of HCSM to make any determinations that the definition was enacted to guide the agencies in making. In other words, because there is no penalty to seek an exemption from, the definition serves no purpose. Therefore, it is obsolete. OIC cannot use an obsolete term to determine whether or not Aliera was administering a bona fide HCSM.

Even if the entire definition of HCSM is not obsolete, the removal of the penalty for failing to comply with the individual mandate surely rendered the third requirement in the ACA's HCSM definition obsolete. That requirement relates to the length of time an HCSM had to be in existence for a member to qualify for the exemption. Arguably, the requirement prohibits any HCSM formed after December 31, 1999, from having its members be eligible for the exemption from the individual mandate. This particular requirement is obsolete because its purpose and function is inextricably linked to the penalty.

In sum, the legislative purpose behind, and function of, the cut-off date to qualify for the HCSM exemption is tied inextricably to the penalty for failing to comply with the individual mandate. As Congress has since eliminated the penalty entirely from the ACA, the cut-off date has been rendered obsolete. Accordingly, even if the federal definition is still good law, and even if OIC can apply the definition, it is nonetheless immaterial whether Trinity and its predecessors have been in existence since 1999. The removal of the penalty for failing to comply with the individual mandate rendered that requirement null, and Trinity's HCSM cannot be considered "insurance" simply because of any potential failure to meet this requirement.

4. Trinity meets the requirements of the federal definition of HCSM, and as HCSMs are not insurance under Washington law, OIC lacks a legal basis for

its enforcement action.

Regardless of the constitutionality and legality of the ACA, Aliera submits that Trinity meets the ACA requirements for HCSMs. Because Washington's law states that HCSMs that meet the ACA requirements are "not insurance," OIC has no authority to regulate, fine, or issue any orders against Trinity or Aliera.

First, Aliera received confirmation from the Center for Medicare and Medicaid Services (CMS) that the IRS is the sole agency tasked with determining whether a HCSM meets the requirements as stated in the ACA.[36] Today, as the mandate no longer exists, the IRS no longer accepts nor denies designation of a HCSM. Thus, no federal agency currently makes any decisions regarding whether a HCSM meets the ACA requirements, and there is no way for Aliera or Trinity to obtain a determination one way or the other. However, Trinity has received approval from the IRS to operate as a 503(c).

Second, Trinity meets the ACA's four requirements to be a HCSM that previously qualified its members for an exemption from the individual mandate. Trinity's members agree to a common set of religious and ethical beliefs during enrollment, and they share medical needs accordingly and without regard to the state in which a member resides or works.[37] Trinity has upheld the longstanding Christian tradition of sharing members' medical expenses continuously, and without interruption, since 1997.[38] Finally, Trinity conducts an annual audit by an independent certified public accounting firm, and it is available to the public upon request.[39]

In its cease and desist order, OIC acknowledges that "Aliera is the administrator, marketer, and program manager for Trinity" and that Aliera is responsible for the development and administration of Trinity's HCSM.[40] Despite acknowledging that Trinity is a HCSM and is thus engaged in non-insurance activity, however, OIC brings charges that Aliera "1) failed to present Trinity's actual statement of faith, as defined by Trinity's own bylaws, 2) provided

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[36] Smith Decl. Ex. 10, *Aliera Communications with HMS.*
[37] Paul Decl. at ¶ 4; Smith Decl. Ex. 6.
[38] Paul Decl. at ¶ 7.
[39] *Id.*
[40] Smith Decl. Ex. 1, p. 2 ¶ 2.

misleading training to prospective agents about the nature of its HCSM products, [and] 3) provided misleading advertisements to the public and prospective HCSM customers about the nature of its HCSM products." All of OIC's charges rest on the incorrect basis that (1) Trinity is not a HCSM, and that (2) the product Aliera administered on behalf of Trinity was insurance.

5. The functions Aliera engaged in were those of a third-party administrator (TPA), which are not subject to OIC regulation.

As noted above, in its cease and desist order, OIC acknowledges that "Aliera is the administrator. . . for Trinity."[41] In administering Trinity's HCSM product in Washington, Aliera performed at most, if anything remotely related to the business of insurance, the duties of a third-party administrator (TPA). While OIC has attempted to obtain legislative authority to regulate TPAs, OIC has failed to obtain such authority. Therefore, OIC cannot regulate Aliera's TPA activity.

In the 2015-16 session of the Washington legislature, OIC requested legislation related to TPAs. *See* HB-2445. That proposed legislation contained the following definition:

> "Third-party administrator" or "TPA**"** means a person who performs one or more of the following functions on behalf of a carrier, either directly or indirectly, in connection with disability, health, or stop-loss coverage: Underwriting business; collecting charges or premiums; adjusting or settling claims; performing utilization reviews, credentialing providers, prior authorization of treatments or quality audits; acting as a benefit manager such as pharmacy benefit manager or radiology benefit manager. . ." (15 exceptions omitted as not relevant to this discussion).

This requested legislation, however, was not enacted. *See* HB 2445 bill history, *https://app.leg.wa.gov/billsummary?BillNumber=2445&Initiative=false&Year=2015.* Similarly, in the 2019-20 legislative session, OIC again attempted to obtain legislative authority to regulate TPAs. *See* HB 2959. This time, OIC included TPAs within the definition of "covered entities" that are required to report paid claims to OIC. *Id.* The definition of TPA was proposed to be "any person or entity who, on behalf of a health carrier or health care purchaser other than a tribal government or a Taft-Hartley trust, receives or collects charges or contributions for providers and facilities." *Id.* However, OIC was unsuccessful again. *See* HB 2959 bill history,

[41] Smith Decl. Ex. 1, p. 2-3 ¶ 7.

https://app.leg.wa.gov/billsummary?BillNumber=2959&Initiative=false&Year=2019#billhistory title.

The functions performed by Aliera in Washington may have been captured by OIC's proposed definition of TPAs. However, as discussed above, OIC's attempts to define TPAs, much less obtain legislative authorization to regulate TPAs, failed. Thus, Aliera's acts of collecting contributions from Trinity members do not transform it into an unauthorized insurer subject to OIC's jurisdiction.

In sum, because Trinity's HCSM product is not insurance and OIC failed to obtain legislative authority to make a determination otherwise, everything Aliera did with respect to Trinity is exempt from enforcement. Because OIC's allegations all rest on an incorrect legal conclusion that Trinity is subject to OIC's enforcement powers, all of OIC's allegations fail as a matter of law.

C. OIC lacks jurisdiction or legal authority to determine that Trinity is not a HCSM, and therefore cannot order Aliera to cease and desist as a matter of law.

1. OIC is an agency with limited express authority.

In general, OIC has only "the authority expressly conferred upon him or her by or reasonably implied from the provisions" of the insurance code. RCW 48.02.060(1). Even in the agency's interpretation of the statutes it administers, though, OIC's interpretation will only be "upheld if it reflects a plausible construction of the statute's language and is not contrary to legislative intent." *Premera v. Kreidler*, 133 Wn. App. 23, 37, 131 P.3d 930 (2006). In other words, while OIC's interpretation of insurance statutes and rules may receive deference in appropriate situations, OIC "cannot bind the courts." *Credit General Insurance Co. v. Zewdu*, 82 Wn. App. 620, 627, 919 P.2d 93 (1996); *Premera*, 133 Wn. App. at 37.

Deference to an agency is always "inappropriate where the agency's interpretation conflicts with a statutory mandate." *Dep't of Labor & Indus. v. Granger*, 159 Wn.2d 752, 764, 153 P.3d 839 (2007). Deference is also inappropriate when an agency's determination is based on facts and issues that are outside the heart of the agency's expertise. *See Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 396, 932 P.2d 139 (1997) (explaining that deference to the Department

of Ecology's decision regarding the public's interest in certain water permits was appropriate because it was based on "factual matters which are complex, technical, and close to the heart of the agency's expertise").

In short, OIC is an agency of limited jurisdiction, charged with enforcing the provisions of the insurance code. Any determinations OIC makes outside of this authority are not binding, and any determinations within this authority must not be upheld if contrary to legislative intent.

2. OIC has no authority to issue binding orders based on its interpretation of federal law.

As noted previously, the Washington legislature explicitly excluded HCSMs from the definition of insurance in RCW 48.43.009. The legislature did not confer any authority on OIC regarding the definition of HCSM. Rather, the legislature delegated its authority to define HCSM by adopting the federal ACA's definition of the term. OIC has no authority to make determinations regarding federal law.

A "state agency's determination of procedural and substantive compliance with federal law is not entitled to the deference of a federal agency." *AMISUB (PSL), Inc. v. Colo. Dep't of Soc. Servs.*, 879 F.2d 789, 795 (10th Cir. 1989) (reviewing de novo the state of Colorado's Medicaid plan for consistency with the Federal Medicaid Act and relevant federal regulations) (internal citations omitted). Furthermore, while state agencies may occasionally receive some deference (though not the more deferential federal agency standard), that deference is limited to situations where the state agency has "expertise and Congress likely intended to draw on that expertise when permitting delegation to a state agency." *Grand Canyon Trust v. Energy Fuels Res. (U.S.A.)*, 269 F. Supp. 3d 1173, 1196 (D. Utah 2017). For example, in *Ariz. v. City of Tucson*, 761 F.3d 1005, 1014-15 (9th Cir. 2014), a state agency was owed "some deference" regarding *environmental issues* in a CERCLA consent decree because the agency had *environmental expertise*. However, even in that case the state agency received no deference concerning its *interpretation of CERCLA, a federal statute*, because the state agency was *not charged with enforcing the statute*. *Ariz.*, 761 F.3d at 1014-15.

OIC is not charged with generally enforcing the ACA. Rather, OIC is charged with

enforcing the provisions of Washington's Insurance Code. RCW 48.02.060(1)-(2). Accordingly, OIC should receive no deference in its determination of procedural or substantive compliance with the ACA's definition of HCSM. That definition is a federal law, wholly outside of OIC's enforcement powers.

Moreover, OIC has no expertise in tax law. The individual mandate penalty, before it was removed from the ACA, was "characterized as a tax." *Nat'l Fed'n of Indep. Bus. V. Sebelius*, 567 U.S. 519, 574 (2012). As explained above, the exemption for, and definition of, HCSM, is inextricably linked to the individual mandate penalty. Thus, any determination regarding whether an entity is an HCSM is a determination that Congress likely intended be made by those with an expertise in federal tax law.

Finally, there is no indication that Congress intended to draw on OIC's expertise when it comes to the matter of HCSMs. Indeed, the definition is applicable to individuals in every state, and it would be absurd for agencies in each state to be expected to uniquely interpret the definition.

In sum, because the definition of HCSM turns on a federal statute OIC has no authority to interpret or otherwise issue determinations on, OIC has no authority to determine that Trinity is not an HCSM. As all of the allegations in OIC's cease and desist order are based upon OIC's determination that Trinity is not an HCSM, the Cease and Desist order must be dismissed and declared unenforceable as a matter of law.

3. OIC cannot determine that Trinity is not a HCSM because doing so requires determinations involving core U.S. Constitutional rights.

In addition to the fact that OIC has no authority to interpret or make determinations regarding the federal definition of HCSM, OIC also cannot do so because it would require OIC to interpret and determine issues involving core individual rights enumerated in the U.S. Constitution. OIC lacks any authority to issue a binding decision on such issues, and OIC's charges against Aliera unavoidably implicate these issues. Accordingly, OIC's charges must be dismissed.

In its order, OIC summarily concludes that the ACA definition of HCSM requires that

"[a] HCSM must * * * have been in operation and continuously sharing member health care costs since at least December 31, 1999."[42] OIC then uses its interpretation of this aspect the federal definition to conclude that Trinity (and, by business affiliation, Aliera) is not a HCSM. To disqualify Trinity for its failure to satisfy the 1999 requirement, where Trinity otherwise possesses all material qualities of an HCSM, would mean denying exempt status on the basis of a cutoff date that is (a) unrelated to the function of HCSMs in state marketplaces that Congress recognized and (b) engineered to favor evangelical sharing ministries to the exclusion of other faith-based sharing groups. In other words, in attempting to disqualify Trinity from the definition of HCSM, OIC (a) ignores Congress' statutory mandate and (b) interprets federal law so that it effects discrimination against U.S. citizens on the basis of their religious affiliation.

OIC's interpretation of the 1999 requirement to disqualify certain HCSMs from existing, at all, entirely ignores the main function that Congress recognized HCSMs could provide: an effective alternative to insurance. OIC's interpretation, which in any case receives little to no deference, should be entirely discounted because of its failure to take into account Congress' clear intent to allow HCSMs to enter state marketplaces.

In enacting the ACA, Congress recognized HCSMs as an alternative to health insurance,[43] and acknowledged the function that HCSMs could play in state marketplaces. The ministries, which were relatively small at the time, received a religious exemption from the individual mandate because HCSM representatives persuaded legislators with "more than just an argument based on freedom of religion."[44] Rather, the representatives argued that HCSMs could be effective by serving as an alternative or supplement to traditional health insurance. In other words, HCSM subscribers received a religious exemption from ACA's individual mandate because HCSM members choose to share other members' medical expenses.[45] Since Congress

[42] Smith Decl. Ex. 1, p. 2 ⁋ 3.
[43] Peter J. Pitts, *Health Sharing, A Viable Option for Health Care*, WASHINGTONTIMES.COM (Jan 8, 2019), *available at* https://www.washingtontimes.com/news/2019/jan/8/health-sharing-a-viable-option-for-health-care/.
[44] Steve Twedt, *Health Care Overhaul Law Exempts Sharing Ministries*, PITTSBURGH POST-GAZETTE (July 3, 2012), *available at* http:///www.post-gazette.com/stories/news/health/health-care-overhaul-law-exempts-sharing-ministries-269561/?p=0.
[45] *Id.* (emphasis added)*; see also* James. R. Salzmann, *Statutory Millennialism: Establishment and Free Exercise Concerns Arising from the Health Care Sharing Ministry Exemption's 1999 Cutoff Date*, S. CAL. L. REV. 304, 304 (2018) ([T]he individual mandate requir[ed] that

recognized HCSMs in the ACA, there has been an increased interest in membership.[46] The historical context and legislative history of HCSMs makes clear that the purpose behind the ACA's recognition of these entities was to formally recognize these ministries as viable alternatives to traditional insurance.

OIC's determinations regarding the ACA definition is also problematic because it interprets a federal law to require religious discrimination. In interpreting the 1999 cut-off date, OIC effectively bans Americans from participating in HCSMs offered by any faith groups beyond five ministries—each one explicitly Christian in its tenets and joining requirements—as these were the only HCSMs "officially" recognized in 1999. As various commentaries have observed, the effect of a strict cutoff date is to enshrine in law an accommodation for only Medi-Share, Samaritan Ministries, Christian Healthcare Ministries, Liberty HealthShare, and Altrua HealthShare.[47] Thus, the cutoff not only restricts competition and limits the eligibility of additional Christian sharing ministries officially "founded" after the cut-off date, but it also excludes whole cloth any other denomination or non-Christian religion from offering HCSM products.[48] This type of exclusion surely implicates, and likely violates, the free exercise clause and Establishment Clause enshrined in the U.S. Constitution. OIC simply lacks the authority, expertise, or even jurisdiction to determine these types of important constitutional issues.

In *Larson v. Valente, supra,* the United States Supreme Court considered whether a Minnesota law demanding that a religious charitable organization demonstrate that fifty percent or more of its charitable contributions come from "members or affiliated organizations" unconstitutional. 456 U.S. at 231-32. In finding the law unconstitutional, the Supreme Court ruled:

> The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another. Before the Revolution,

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taxpayers either carry insurance or pay for their failure to do so.).

[46] Interest in Samaritan Ministries Increases Following SCOTUS Decision on Health Care Law, PRWEB.COM (July 5, 2012), *available at* http://www.prweb.com/releases/samaritanministries/07/prweb9668682.htm; *see also* Christine A. Scheller, *'Obamacare' Prevails: Supreme Court Upholds Healthcare Law*, URBAN FAITH (June 28, 2012), *available at* http://www.urbanfaith.com/2012/06/obamacare-prevails-supreme-court-upholds-healthcare-law.html/.

[47] *Id*. at 305, 312.

[48] *Id*. at 312-315

> religious establishments were common throughout the Colonies. But the Revolutionary generation emphatically disclaimed the European Legacy, and applied the logic of secular liberty to the condition of religion and churches. . . . The force of this reasoning led to the abolition of most denominational establishments at the state level by the 1780s, and led ultimately to the inclusion of the Establishment Clause in [the United States Constitution's] First Amendment in 1791.

Id. at 244-45 (citation and internal quotations omitted).

These constitutional demands arise from evils Americans sought to blunt when charting a new constitutional course. As the United States Supreme Court further recognized:

> A large portion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions generated in large part by established sects determined to maintain their absolute political and religious supremacy.

Everson v. Bd. of Educ., 330 U.S. 1, 8-9 (1947). As one noted author has observed with regard to the pre-constitutional history of the United States:

> Most colonies were established to promote particular religious denominations—with brutal results. The martyrs of religious freedom in America include: the Quakers hung from trees in the Boston Commons; the Baptist minister in Virginia, imprisoned for preaching without a license, who stood powerless as a heckler urinated in his face through a jailhouse window; and the Catholics who fought in the Continental Army even though some Revolutionary leaders considered them in league with Satan. Eventually, homegrown persecution helped discredit the idea that government should promote particular religions.[49]

The framework of the state and federal constitutions adopted to address the destructive history of sectarianism envisioned religious proliferation as the remedy and so enacted constitutional law to create an environment of non-discrimination.[50] Throughout the country,

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[49] *See* Steven Waldman, FOUNDING FAITH at xii (2008). The English legacy of religious persecution through the 17th century traveled with the colonists to America, where, for the century leading to and through the development of state constitutions, including New Hampshire's, extreme religious persecution against minority religious sects included the banishment of Quakers and Baptists from colonies as disparately situated as Massachusetts and Virginia. *See* Michael W. McConnel, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1423 ("Massachusetts, the most rigorous of the New England Congregationalist establishments actively persecuted dissenters….[M]inisters sent to serve the small Puritan community in Virginia were expelled, as was the Catholic Lord Baltimore…The authorities blocked Presbyterians' ability to breach at every turn, and the Baptists were 'reviled' and 'met with violence.'") (citations and footnotes omitted).

[50] *See id.* at 151 ("The Madisonian contribution, familiar to us from *The Federalist* Nos. 10 and 51, is to understand factions, including religious factions, as a source of peace and stability."); *see also* John Witte Jr., *One Public Religion, Many Private Religions, John Adams and the 1780 Massachusetts Constitution in* THE FOUNDERS ON GOD AND GOVERNMENT at (2004 Dreisbach, et al. eds.) ("On the other hand, Adams argued, every state and society had to respect and protect a plurality of forms of religious exercise and association, whose rights could be limited only by

ratification-era lawmakers stamped out the disease of sectarianism under the state and federal constitutions through provisions that required the state and federal governments to be neutral toward competing religions and competing sects. *Everson v. Bd. of Educ.*, 330 U.S. at 11-12 (describing the development of the Virginia constitution's neutrality demands as well as the drafting of the Establishment Clause).

The effects were impressive:

> By the time of the Revolution, religious minorities were in the majority. Before 1690, 90 percent of churches were affiliated with the dominant sects—Congregationalists or Anglicanism. By 1770, only 35 percent were. First, the Great Awakening had fueled growth in dissenting sects; then immigration brought a new wave of souls. From 1776 to 1820, roughly 250,000 people arrived, bringing a wide range of religious practices. Scottish and Scots-Irish Presbyterians poured in, often carrying an antagonism toward Britain. . . . German-speaking immigrants—Lutherans, Reformed, Mennonites, Moravians, Baptists, and Catholics—concentrated in Pennsylvania, Maryland, West Virginia, North Carolina and New York. Catholics, Methodists, and Jews settled in Savannah, Philadelphia, Charleston, and other cities. French Protestants called Huguenots congregated in Boston, New York and South Carolina. . . . They brought different theologies. . . . Some denominations shared theology but disagreed about church governance. These denominations would invariably splinter and, crucially, because of the ready availability of new frontier land, they would press westward rather than staying in a community to fight the control of the majority faith.[51]

The constitutional requirement that states remain neutral toward religious practices and religions in this environment of religious proliferation has stood the test of time. *See Board of Education, Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 696 (1994) ("A proper respect for both the Free Exercise and the Establishment Clause compels the State to pursue a course of 'neutrality' toward religion, . . . favoring neither one religion over others nor religious adherents collectively over nonadherents.") (citations and internal quotations omitted).

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the parallel rights of juxtaposed religions, the concerns for public peace and security, and the duties of public religion.").

[51] Waldman, supra, at 43-44 (footnotes omitted); *see also* Gordon Wood, EMPIRE OF LIBERTY at 580-81 (2009) ("The older state churches with Old World connections—Anglican, Congregational, and Presbyterian—were supplanted by new and in some cases unheard-of religious denominations and sects. . . . By 1790…religious orthodoxy had dropped below 25 percent [as compared to 1760], and it continued to shrink in the succeeding decades.").

Here, the OIC seeks to enforce a law that would prefer one set of religious sects to another without any justification. The only justifications for this distinction must be grounded in prejudicial views about later-day religions which would violate the state and federal constitutional demands of neutrality. *Cf.* James Madison, *Detached Memorandum* (ca. 1820) ("[The United States] have the noble merit of first unshackling the conscience from persecuting laws, and of establishing among religious sects a legal equality.").[52] Such justifications would be counter the demonstrable benefits of state neutrality with respect to the competing claims and demands of the multiplicity of religious sects and denominations in the United States.[53] Such a determination cannot withstand strict scrutiny and is invalid under federal constitutional law. *Espinoza v. Montana Dep't of Rev.*, 140 S.Ct. 2246, 2256-57 (2020).

The OIC's action also exceeds its legal capacities, permitting insurance regulators to draw determinations regarding the religious bona fides of private actors without any demonstrated expertise or legal authority to draw conclusions regarding such matters. Determinations of this sort also violate the federal constitution. *See Larson, supra*, 456 U.S. at 242 ("[A] considerable burden is on the state, in questioning a claim of a religious nature."); *see also United States v. Seeger,* 380 U.S. 163, 188 (1964) (*Douglas,* J. concurring) (law defining the nature of religion according to one set of definitions adopted by one religion would prefer "some religions over others—an invidious discrimination that would run afoul" of equal protection guarantees). Indeed, as the United States Supreme Court held in *United States v. Ballard*, 322 U.S. 78, 86-87 (1944):

> Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed

[52] Excerpted from McConnell, Garvey, Berg, *supra*, at 69.
[53] *See* Wood, *supra*, at 613 ("Not only did the new religious sects and movements Christianized American popular culture and bring many people together and prepare them for nineteenth-century middle-class respectability, but they also helped to legitimize the freedom and individualism of people to make morally possible their commercial participation in an impersonal marketplace.").

> that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations.

OIC's determination regarding Trinity requires that OIC decide whether Trinity's members share an adequate set of ethical or religious beliefs so as to qualify under OIC's interpretation of the term HCSM. Like the 1999 requirement, this determination falls outside of OIC's authority and expertise. Determining whether a group of individuals shares an adequate set of ethical or religious beliefs has nothing to do with the regulation of insurance. OIC cannot determine this issue, and even if it could, it cannot make the determination in a way that violates U.S. citizens' constitutional rights.

In sum, OIC simply lacks the authority to determine whether Trinity is an HCSM. Congress has explicitly allowed HCSMs to exist in state marketplaces, and OIC cannot flout that intent. And, OIC cannot make determinations that involve intricate and important constitutional issues. Because all of OIC's charges against Aliera depend on its determination that Trinity is not a HCSM, none of the charges are based on any lawful authority. Accordingly, all of OIC's charges must be dismissed as a matter of law.

4. OIC's application of its interpretation of HCSM to Aliera violates due process.

As explained above, OIC has no authority to interpret or apply the definition of HCSM to Trinity or Aliera. Moreover, even if OIC had authority to interpret the term HCSM, it must do so based on requirements or standards expressly enacted into law, or promulgated through agency rulemaking. As OIC has failed to do so, it cannot apply its interpretation to issue its order and fine against Aliera, as doing so violates due process.

As a state agency, OIC may adopt rules (without prior adjudicative hearings), but rules must be adopted, amended, and repealed consistently with Part III of the Washington APA. Most essential, notice of any proposed rule is generally required so that those potentially affected by the new rule have an opportunity for "some input" in developing agency policies affecting them. *See e.g. Hillis v. Department of Ecology*, 131 Wn.2d 373, 399, 932 P.2d 139 (1997). Indeed, the "purpose of rule-making procedures is to ensure that members of the public can participate

meaningfully in the development of agency policies which affect them. *Simpson Tacoma Kraft Co. v. Department of Ecology*, 119 Wn.2d 640, 649, 835 P.2d 1030 (1992). Thus, a rule is not effective unless the agency acts in substantial compliance with the rulemaking process and gives 20 days' notice in the Washington State Register of its intention to adopt the rule. RCW 34.05.345, RCW 34.05.375.

This "notice" is required because the state APA rests on the due process provisions of the 5th and 14th Amendments to the United States Constitution, as well as Article I, Section 3 of the Washington State constitution.[54] Those foundational provisions in the American system of government ensure that states do not deprive a person of protected rights without appropriate procedural safeguards—they must be "preceded by notice and opportunity for hearing appropriate to the nature of the case." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). Application of requirements that have not been promulgated through a rulemaking process—that includes adequate notice—violates due process.

In its order in this case, OIC is applying requirements for HCSMs and their business administrators that have not been promulgated through a rulemaking process. The legislature did not authorize OIC to apply these requirements. Moreover, OIC has not given those potentially affected by its new requirements an adequate opportunity to participate meaningfully in a rule that not only affects them, but actually determines whether or not they can exist, at all, in Washington state.

To begin with, OIC is applying new requirements for HCSMs to assert that they are excluded from the insurance code and regulations. Then, OIC is applying a multitude of additional requirements relating to advertising and marketing of HCSM products—none of which Aliera, Trinity, nor any other HCSM plan administrator had prior notice of. In short, OIC's application of its new requirements for HCSMs wholly violates the core tenets of due process. Accordingly, OIC cannot enforce any of the terms of its cease and desist order because

[54] The Washington state due process clause provides no greater protection than the Federal provision. *Sherman v. State*, 128 Wn.2d 164, 905 P.2d 355 (1995).

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to do so would violate Aliera's federal and state constitutional rights.

Additionally, even if OIC's new requirements did not violate due process (which they do), the requirements have not been specified in a state statute or in an administrative rule. Such requirements have no greater authority than mere "agency guidance," which is unenforceable. Accordingly, OIC's application of its guidance to Aliera cannot be enforced.

D. Even If OIC Has Jurisdiction Over Aliera, Aliera Did Not Misrepresent Trinity Products

Even assuming OIC has jurisdiction over Aliera to issue any kind of order affecting Aliera's administration of Trinity's HCSM product, OIC has not alleged any "misrepresentations" sufficient to survive a motion for summary judgment.

1. Aliera did not misrepresent Trinity's Statement of Faith.

OIC has alleged that Aliera misrepresented Trinity's statement of faith to prospective members because Aliera did not sufficiently emphasize what OIC has determined to be Protestant Christian elements in Trinity's bylaws. However, there is no legal requirement that the statement of faith presented to prospective members mirror the HCSM's bylaws. Rather the only requirement is that members "share a common set of ethical or religious beliefs." 26 U.S.C. § 5000A(d)(2)(B)(ii)(II); *see also* RCW 48.43.009. Trinity has determined that the statement of faith presented by Aliera is sufficiently aligned with Trinity's religious and ethical beliefs—a religious determination that Trinity is uniquely and solely qualified to make.

Nonetheless, to support its allegations against Aliera, OIC has engaged in extensive analysis of Trinity's religious beliefs. In so doing, OIC has violated the First Amendment's establishment clause and protection of freedom of religion. It is not appropriate, and indeed unconstitutional, for OIC to render judgment about the nature or substance of the religious beliefs of Trinity or its members. *See e.g., Natal v. Christian & Missionary All.*, 878 F.2d 1575, 1576 (1st Cir. 1989). Yet in its Final Investigative Report, OIC engages in detailed analysis of the religious beliefs and traditions underlying Trinity's formation. This is precisely the type of government entanglement in religion that the Constitution prohibits.

2. Aliera's training and marketing materials do not violate the Insurance Code.

Aliera has been careful to explicitly state that Trinity's HCSM products are not insurance, which is noted in OIC's own investigative report. Moreover, OIC's criticisms are unfair and unfounded. For instance, OIC takes issue with Aliera's use of the term "health care" when discussing Trinity. But Trinity is a *health care* sharing ministry—surely it is not misleading to use a term contained within the statutorily defined title of the entity. Similarly, OIC alleges that it is misleading to brand Trinity as an "alternative to traditional insurance." Yet this makes clear that Trinity is not insurance, but rather an *alternative*, explicitly drawing the distinction between HCSM and insurance products. Indeed, HCSMs were intended to be exactly that: alternatives to ACA-approved insurance plans that provide an exemption from the now-defunct individual mandate. Yet OIC unfairly contends that this accurate description is deceptive and misleading.

Moreover, the provisions of the insurance code upon which OIC relies do not encompass marketing and training materials directed to agents. Rather, to be covered by the statute, "advertisements" must be directed at the public:

> An advertisement for the purpose of these rules shall include:
>
> (a) Printed and published material, audio visual material, and descriptive literature of an insurer used in *direct mail, newspapers, magazines, radio scripts, television scripts, billboards, and similar displays*; and
>
> (b) Descriptive literature and sales aids of all kinds issued by an insurer, or insurance producer *for presentation to members of the insurance buying public*, including but not limited to circulars, leaflets, booklets, depictions, illustrations, and form letters; and
>
> (c) Prepared sales talks, presentations, and material *for use by insurance producers*.

WAC 284-50-030(1) (emphasis added). As this definition makes clear, advertisements within the meaning the statute are only those directed *to prospective buyers*. Advertisements do not include training materials *directed to agents.* Yet thee materials OIC relies upon are web-based advertisements to recruit prospective agents, video seminars to train prospective agents, and other unspecified training materials to prospective agents. In other words, the materials OIC cites do not fall into any of these categories. Accordingly, OIC's allegations arising from such materials fail as a matter of law.

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In sum, none of the alleged misrepresentations alleged in OIC contain any facts that are sufficient to present a genuine issue of material fact. Accordingly, the charges related to misrepresentation, deceit, or false advertising must be dismissed as a matter of law.

VI. CONCLUSION

For the reasons outlined above, Aliera respectfully requests that the entire cease and desist order be vacated and the fine OIC seeks to impose, be declared unenforceable as a matter of law.

DATED this 18th day of September, 2020.

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CERTIFICATE OF SERVICE

I certify that I served the foregoing Aliera Companies, Inc.'s Motion For Summary Judgment on the following attorneys by the method indicated below on the 18th day of September, 2020:

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