NO. 93282-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DONALD R. SWANK, individually and as personal representative of the ESTATE OF ANDREW F. SWANK, and PATRICIA A. SWANK, individually,

Plaintiffs-Petitioners,

v.

VALLEY CHRISTIAN SCHOOL, a Washington State non-profit corporation, JIM PURYEAR, individually, and TIMOTHY F. BURNS, M.D., individually,

Defendants-Respondents.

AMICUS BRIEF OF AMERICAN MEDICAL ASSOCIATION, WASHINGTON STATE MEDICAL ASSOCIATION, OREGON MEDICAL ASSOCIATION, IDAHO MEDICAL ASSOCIATION, AND IDAHO ACADEMY OF FAMILY PHYSICIANS

Stephen M. Rummage
Douglas C. Ross
Rebecca J. Francis
Davis Wright Tremaine LLP
Attorneys for Amici

1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
(206) 622-3150 Phone
(206) 757-7700 Fax

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I. INTRODUCTION

Amici are five medical associations (collectively, the "Medical Associations") that focus on promoting the science and art of medicine and improving public health and access to health care across the country and in the Pacific Northwest.[1] The Medical Associations ask the Court to adhere to its decision in *Lewis v. Bours*, 119 Wn.2d 667, 835 P.2d 221 (1992), and hold that—consistent with the nationwide, long-standing majority rule—in cases asserting a claim based on a nonresident physician's medical care, the place where the physician provided that care and exercised her medical judgment is the place of the "injury" for jurisdictional purposes, not the place where the "injuries may manifest themselves." *Id.* at 674. The Medical Associations address two points in this brief:

First, the Court in *Lewis* correctly held that, for purposes of Washington's long-arm statute, RCW 4.28.185(1)(b), "in the case of professional malpractice, a tort is not committed in Washington if the alleged act of malpractice was committed out-of-state even though the injuries may manifest themselves in Washington." 119 Wn.2d at 674. This rule comports with the settled principle that medical services are personal in nature and therefore directed at the individual patient, not the

[1] The five medical associations joining in this brief are the American Medical Association, Washington State Medical Association, Idaho Medical Association, Oregon Medical Association, and Idaho Academy of Family Physicians. The first four amici join this brief on their own behalves and as representatives of the Litigation Center of the AMA and State Medical Society, which is a coalition among the AMA and the medical societies of each state and the District of Columbia.

forum. Sound policy supports this rule. "The scope of medical treatment should be defined by the patient's needs, as diagnosed by the doctor, rather than by geography." *Wright v. Yackley*, 459 F.2d 287, 290 (9th Cir. 1972). The case here involves an Idaho physician who was licensed to practice medicine only in Idaho, provided care in Idaho to an Idaho resident, and then left a follow-up note for the Idaho resident in the physician's office for the Idaho resident's mother, also an Idaho resident, to pick up in Idaho. The facts provide no basis for revisiting this Court's decision in *Lewis* to find jurisdiction over the nonresident physician.

Second, the Swanks ask the Court to create a result-oriented exception to *Lewis* that is analytically indefensible, runs counter to public policy, and offends due process. The Swanks urge the Court to allow Washington courts to exercise jurisdiction over a nonresident physician if the physician knew or should have known the patient would be traveling to Washington, and if Washington law gives the patient a claim based on the physician's provision of care and exercise of medical judgment. But this proposed exception runs counter to the holding in *Lewis* and the principles animating that decision. "[A] state's dominant interest on behalf of its citizens in such a case as this is not that they should be free from injury by out-of-state doctors, but rather that they should be able to secure adequate medical services to meet their needs wherever they may go." *Wright*, 459 F.2d at 291. Equally important, the Swanks' argument would offend due process by making personal jurisdiction depend ***not*** on

the nonresident physician's acts, but instead on the unilateral acts of her patients.

II. ARGUMENT

A. This Court's Decision in *Lewis* Correctly Follows the Majority Rule, and No Basis Exists to Overrule It.

The Swanks argue this Court's binding decision in *Lewis* does not apply because Dr. Burns "*released* [Drew Swank] to play football in Washington, for a Washington school, in order to satisfy a requirement imposed by the Lystedt law," a Washington statute. Swank Supp. Br. (Nov. 18, 2016) at 16 (emphasis in original). But *Lewis* is directly on point. This Court cannot reverse the Court of Appeals without overruling *Lewis*, an outcome that would depart from long-standing Washington law, and from the rule generally applied in cases involving personal jurisdiction over nonresident physicians who provided care in their home states.

1. *Lewis* Correctly Held Washington Lacks Jurisdiction Over a Nonresident Physician Based on a Patient's Injury in Washington.

"Washington courts are authorized to assert personal jurisdiction over nonresident defendants to the extent permitted by the federal due process clause." *Failla v. FixtureOne Corp.*, 181 Wn.2d 642, 649, 336 P.3d 1112 (2014) (citing *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 766-67, 783 P.2d 78 (1989)). "States can exercise jurisdiction without violating due process if the nonresident defendant has certain minimum contacts with the state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* at 649-

50 (citing *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014)). "The central concern of the federal constitutional inquiry is the relationship between the defendant, the forum, and the litigation." *Id.* at 650 (citation omitted).

Washington's long-arm statute therefore subjects a nonresident defendant to jurisdiction in Washington if, among other things, the defendant committed a tort in Washington and the exercise of jurisdiction does "not offend federal and state constitutional principles." *Lewis*, 119 Wn.2d at 670; RCW 4.28.185(1)(b). For jurisdiction to comply with due process, the nonresident defendant must have "purposefully" done "some act ... in the forum state," and "the cause of action must arise from, or be connected with, such act …." *Shute*, 113 Wn.2d at 767 (citation and internal quotation marks omitted). "[T]he constitutional touchstone remains whether the defendant ***purposefully*** established 'minimum contacts' in the forum State." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (emphasis added) (citation omitted).

In *Lewis*, this Court held Washington's long-arm statute, RCW 4.28.185(1)(b), did not reach an Oregon physician in a medical malpractice claim arising from medical care the physician provided to a Washington patient in Oregon. The Oregon physician knew the patient lived in Washington, and "advised plaintiff, while she was in Oregon, to take [her baby] to a doctor in Washington." *Lewis*, 119 Wn.2d at 674. When the patient returned to Washington, her baby manifested severe

injuries. *Id.* at 669. In holding Washington lacked long-arm jurisdiction over the Oregon physician, the Court explained that in medical malpractice claims, because the injury resulted from the physician's exercise of medical judgment, "the injury occurred where the act of malpractice took place, even though the damages were manifested later." *Id.* at 673 (quoting *Hogan v. Johnson*, 39 Wn. App. 96, 100, 692 P.2d 198 (1984)).

Thus, under *Lewis*, Washington's long-arm statute does not reach a nonresident physician based on the physician's provision of care and exercise of medical judgment in his forum state, even when the nonresident physician (a) knows the patient will travel into Washington, as did the Oregon physician in *Lewis*, and (b) recommends a course of action in Washington, as did the Oregon physician in *Lewis*. *See id.* at 673-74.

Lewis controls. In this case, an Idaho physician provided care in Idaho to an Idaho resident (not a Washington resident, as in *Lewis*), and exercised medical judgment in Idaho to write a follow-up note, which he left at his Idaho office for an Idaho resident to pick up. As in *Lewis*, the fact the Idaho patient traveled to Washington and manifested injuries there does not create long-arm jurisdiction over the physician in Washington.

2. *Lewis* Adheres to the Settled Principle that Medical Services Are Personal in Nature, Not Directed at a Forum.

The Court's decision in *Lewis* aligns with long-standing Washington law and the majority rule across the country, both of which

recognize that medical services are personal and therefore different from economic activities directed at a forum's economic market.

The Court in *Lewis* relied on *Hogan*, in which Division I surveyed cases nationwide and held Washington's long-arm statute does not reach a nonresident physician who provided care to a Washington resident in the physician's forum state, California, "merely because it was foreseeable that [the] patient … would later move to Washington." 39 Wn. App. at 102. The court followed decisions from other jurisdictions that focused on "constitutional restrictions and policy considerations." *Id.* at 101 (discussing and quoting *Wright v. Yackley*, 459 F.2d 287, 289-91 (9th Cir. 1972); *Gelineau v. N.Y. Univ. Hosp.*, 375 F. Supp. 661, 667 (D.N.J. 1974)). Quoting *Wright*, for instance, the court in *Hogan* explained:

> In the case of personal services focus must be on the place where the services were rendered, since this is the place of the receiver's (here the patient's) need. ***The need is personal*** and the services rendered are in response to the dimensions of that personal need. ***They are directed to no place but to the needy person herself.*** It is in the very nature of such services that their consequences will be felt wherever the person may choose to go.

Id. at 102 (quoting *Wright*, 459 F.2d at 289-90) (emphasis added). *See also id.* at 101 (quoting *Gelineau*, 375 F. Supp. at 667 ("the services are not directed to impact on any particular place, but are directed to the needy person himself")). "[I]t would be fundamentally unfair to permit a suit in whatever distant jurisdiction the patient may carry the consequences of his treatment …." *Id*. (quoting *Gelineau*, 375 F. Supp. at 667).

Decades ago, this Court recognized this distinction between personal medical services and forum-focused economic activities. In *Grange Insurance Association v. State*, 110 Wn.2d 752, 757 P.2d 933 (1988), the Court explained a medical provider does not "purposely avail[] [him]self of the privilege of conducting activities" in Washington by having provided "medical services" the patient requested while in the provider's home state, before the patient traveled into Washington. *Id.* at 761, 763-64 (no personal jurisdiction over the state of Idaho where Idaho's contacts consisted of an Idaho veterinarian inspecting cattle and signing certificates in Idaho, even though Idaho knew the cattle would be traveling into Washington) (citing *Hogan*, 39 Wn. App. at 102-03; *Simmons v. State*, 670 P.2d 1372, 1379 (Mont. 1983) (Montana lacked personal jurisdiction over state of Oregon based on fact Montana had requested that Oregon perform certain blood sample testing); *Wright*, 459 F.2d at 289).

Other Washington courts have followed suit, likewise emphasizing "there is an important distinction between economic activity focusing on the forum state's economic markets and medical services rendered outside the forum state that do not involve direct patient solicitation." *Bartusch v. Or. State Bd. of Higher Educ.*, 131 Wn. App. 298, 309, 126 P.3d 840 (2006) (no personal jurisdiction over Oregon hospital that treated Washington resident's horse in Oregon based on a referral from a Washington veterinarian).

Under settled Washington law, the place of Dr. Burns's tort (if

any) was not Washington but Idaho, where this Idaho physician treated his Idaho patient and exercised his medical judgment in his initial exam and in writing the follow-up note. The Court here cannot conclude the tort occurred in Washington for purposes of long-arm jurisdiction without departing from settled Washington law and overruling *Lewis*.

3. *Lewis* Follows the Majority Rule.

Nor can the Court adopt the Swanks' position without rejecting the rule that prevails across the country. When this Court unanimously decided *Lewis* in 1992, it cited decisions from other jurisdictions holding that "under the due process clause[,] … residents of one State who travel to another jurisdiction for medical treatment cannot prosecute a malpractice action in their State of residence for injuries arising out of that treatment." *Lewis*, 119 Wn.2d at 672 (quoting *Yates v. Muir*, 492 N.E.2d 1267, 1269 (Ill. 1986)). In support, the Court referred to cases from Washington, Illinois, New Jersey, Missouri, the First Circuit, and the Ninth Circuit.

In the seminal case, *Wright v. Yackley*, cited in *Lewis*, the Ninth Circuit held Idaho could not, consistent with due process, assert personal jurisdiction over a South Dakota physician who provided care to a patient in South Dakota as a result of the fact the patient later moved to Idaho and suffered injury there. 459 F.2d at 288-90. The Ninth Circuit reached this conclusion even though the physician wrote to an Idaho pharmacy to refill a prescription for the drugs that ultimately caused the injury to manifest in

Idaho. *Id.* In particular, the court held it would be "unreasonable"—i.e., would violate fair play and substantial justice—for Idaho to exercise long-arm jurisdiction over the South Dakota physician based on the medical care he provided to an Idaho resident in South Dakota because medical services are "personal services"; instead, the jurisdictional "focus must be on the place where the services are rendered, since this is the place" of the patient's "need." *Id.*[2] "From the very nature of the average doctor's localized practice, there is no systematic or continuing effort on the part of the doctor to provide services which are to be felt in the forum state." *Id.* at 290.

Similarly, in *Prince v. Urban*, 49 Cal. App. 4th 1056 (1996), the California Court of Appeal followed *Wright* and held that California lacked personal jurisdiction over an Illinois physician who provided care to a California resident in Illinois. *Id.* at 1059-60. The Court of Appeal reached that conclusion even though the Illinois physician saw the California patient as a result of a California physician's referral, the physician provided follow-up care by phone in Illinois after the California resident returned home, and the physician ordered prescription refills in

[2] In doing so, the Ninth Circuit refused to follow the Restatement (Second) of Conflict of Laws § 37, on which the Swanks relied below. Swank Br. (Mar. 2, 2015) at 47-48. Indeed, every reported case the Medical Associations can locate addressing Section 37 in the context of personal jurisdiction over a nonresident physician who provided care outside the forum state has found personal jurisdiction lacking. *See, e.g.*, *Wright*, 459 F.2d at 289; *Cook v. G.D. Searle & Co.*, 475 F. Supp. 1166, 1168-69 (S.D. Iowa 1979); *Chittenden Trust Co. v. LaChance*, 464 F. Supp. 446, 449 n.3 (D. Vt. 1978); *Chavez v. State of Ind. for Logansport State Hosp.*, 596 P.2d 698, 700 (Ariz. 1979); *Kailieha v. Hayes*, 536 P.2d 568, 571-73 (Haw. 1975) (majority decision disagreeing with dissent, which dissent relied on § 37); *State ex rel. Sperandio v. Clymer*, 581 S.W.2d 377, 383-84 (Mo. 1979) (*cited in Lewis*, 119 Wn.2d at 672).

California, from Illinois. *Id.* at 1059-60. The court explained:

> [J]ust because there must be some contact or communication across state lines between doctor and patient ***does not mean that the prerequisite minimum contacts necessary for personal jurisdiction are present***. Follow up consultation ancillary to the examination and treatment made by the out-of-state doctor, telephone calls about the status of an out-of-state patient, or arrangements for a patient to continue with medication prescribed by that doctor do not reach the minimum contacts necessary for the satisfaction of due process.

Id. at 1061 (emphasis added).

Numerous courts across the country agree. *See, e.g.*, *Coggeshall v. Reproductive Endocrine Assocs. of Charlotte*, 655 S.E.2d 476, 479 (S.C. 2007) (South Carolina had no personal jurisdiction over North Carolina fertility clinic where only other contact was informational website not directed at any particular forum) (collecting cases from Michigan, Rhode Island, and West Virginia); *Harlow v. Children's Hosp.*, 432 F.3d 50, 63-66, 68-69 (1st Cir. 2005) (Maine had no personal jurisdiction over Massachusetts hospital that provided care in Massachusetts based on referral from Maine, even though, among other things, hospital was paid by the state of Maine, communicated with plaintiff's providers in Maine, and released plaintiff to return to her providers in Maine); *Zavala v. El Paso Cnty. Hosp. Dist.*, 172 P.3d 173, 181-82 (N.M. Ct. App. 2007) (New Mexico could not assert personal jurisdiction over Texas hospital, consistent with due process, even though hospital was a registered New Mexico Medicaid provider; New Mexico also lacked personal jurisdiction

over nonresident physician); *Wolf v. Richmond Cnty. Hosp. Auth.*, 745 F.2d 904, 911 (4th Cir. 1984) (no personal jurisdiction over Georgia hospital authority that provided care in Georgia where only contacts were treating South Carolina patients, receiving payments for those services, and providing laundry services to a county hospital in South Carolina); *Vance v. Molina*, 28 P.3d 570, 573-74 (Okla. 2001) (Oklahoma had no personal jurisdiction over Texas physician where plaintiff sought treatment in Texas, and physician's subsequent discussions with plaintiff after she returned to Oklahoma were "ancillary to the surgeries" performed in Texas); *Mendel v. Williams*, 53 A.3d 810, 823-24, 826-28 (Pa. Super. 2012) (no personal jurisdiction in Pennsylvania over New Jersey physicians where, among other things, physicians did not solicit plaintiff, and only other contacts were affiliations with medical organizations in Pennsylvania and personal travel to Pennsylvania); *Sanders v. Buch*, 938 F. Supp. 532, 536-38 (W.D. Ark. 1996) (Arkansas lacked personal jurisdiction over Texas physician where physician-patient relationship was established in Texas, when plaintiff resided there; physician provided all treatment in Texas; and request and prescription for home health care originated in Texas, even though provided in Arkansas) (quoting *Kennedy v. Freeman*, 919 F.2d 126, 129 (10th Cir. 1990)).[3]

[3] *See also Bennett v. Pratt Reg'l Med. Ctr. Corp.*, 2013 WL 6048916, at *3 (D. Ariz. Nov. 15, 2013) ("[T]he fact that later injury occurred in Arizona is precisely the type of 'random, fortuitous, or attenuated contacts' with Arizona that cannot provide the basis for personal jurisdiction" over Kansas medical providers who provided care in Kansas); *Creech v. Roberts*, 908 F.2d 75, 80 (6th Cir. 1990) (no personal jurisdiction over Oklahoma physician who, among other things, was not licensed in Ohio, did not have office or business in Ohio, and did not treat plaintiff in Ohio); *Brocail v. Anderson*, 132

In short, the great weight of authority holds that the Swanks cannot establish personal jurisdiction in Washington over Dr. Burns. Indeed, the Medical Associations have been unable to find a case even suggesting that a state where the patient did not reside and the physician did not render care may assert jurisdiction over a nonresident physician. Any claim the Swanks had against Dr. Burns needed to be asserted in Idaho.[4]

4. Sound Policy Supports the Court's Rule in *Lewis*.

Important policy concerns underlie the rule this Court adopted in *Lewis*. As the Ninth Circuit in *Wright* explained:

> [T]he idea that tortious rendition of [medical] services is a portable tort which can be deemed to have been committed wherever the consequences foreseeably were felt is wholly inconsistent with the public interest in having services of this sort generally available. ***Medical services in particular should not be proscribed by the doctor's concerns as to where the patient may carry the***

S.W.3d 552, 562 (Tex. App. 2004) (no personal jurisdiction over Michigan physician who was a physician for the Detroit Tigers but did not travel with the team, provided care for plaintiff in Michigan, prescribed physical therapy in Michigan, and did not direct plaintiff to Texas for rehabilitation).

[4] The Medical Associations do not address the details of the parties' dispute over whether Washington has specific or general jurisdiction over Dr. Burns. But the Medical Associations stress that, to the extent the Court engages in these analyses, only Dr. Burns's contacts with Washington are relevant—***not*** the contacts of his medical practice. *See Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014) ("Due process requires that a defendant be haled into court in a forum State based on his ***own*** affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State.") (emphasis added); *Failla*, 181 Wn.2d at 651 ("[A] corporation's actions cannot be simply imputed to a corporate officer or employee for purposes of determining whether there are minimum contacts necessary to establish jurisdiction. [E]ach defendant's contacts with the forum State must be assessed individually.") (quoting *Calder v. Jones*, 465 U.S. 783, 790 (1984)); *Zavala*, 172 P.3d at 184 (court must assess personal jurisdiction over nonresident doctor based on doctor's own contacts with the forum, not hospital's contacts with the forum).

> ***consequences of his treatment*** and in what distant lands he may be called upon to defend it. The traveling public would be ill served were the treatment of local doctors confined to so much aspirin as would get the patient into the next state. ***The scope of medical treatment should be defined by the patient's needs, as diagnosed by the doctor, rather than by geography***.

459 F.2d at 289-90 (emphasis added). A rule allowing physicians to be sued wherever their patients happen to manifest injury would create significant barriers to health care—barriers that outweigh any interest the forum might have in resolving a dispute over medical care rendered in another state by a professional licensed in that other state. "[T]he forum state's natural interest in the protection of its citizens is here countered by an interest in their ***access to medical services wherever needed***." *Id.* at 290-91 (emphasis added). Thus, when it comes to access to health care, courts have long understood that "a state's dominant interest on behalf of its citizens … is not that they should be free from injury by out-of-state doctors, but rather that they should be able to secure adequate medical services to meet their needs wherever they may go." *Id.*

It takes little imagination to envision a clinic adopting a rule that it will not accept out-of-state patients to avoid the prospect of having to defend a lawsuit in another jurisdiction—in direct contravention of the "public policy of ensuring that medical services are fully available to all people." *Grange*, 110 Wn.2d at 763. The Court should reaffirm *Lewis* and continue to protect Washington citizens' access to health care regardless where they may travel, work, or play.

B. The Swanks' Proposed Rule Runs Counter to Precedent, Is Unworkable, and Would Have a Chilling Effect on Access to Health Care.

The Swanks ask this Court to distinguish *Lewis* and assert long-arm jurisdiction over Dr. Burns, a nonresident physician, because (a) he allegedly knew his Idaho patient would be traveling to Washington to play in a football game, and (b) his exercise of medical judgment in Idaho allegedly could give rise to a claim under the Lystedt law, a Washington statute. Swank Supp. Br. (Nov. 18, 2016) at 16. But the Court cannot draw these distinctions without undermining the foundations of *Lewis* and eroding the public policy favoring free availability of medical services.

The fact that Dr. Burns allegedly knew his Idaho patient would return to Washington to play football does not distinguish this case from *Lewis*. In *Lewis*, the physician knew his patient was returning home to Washington after giving birth, and he specifically recommended that the patient "take [her baby] to a doctor in Washington." *Lewis*, 119 Wn.2d at 674. What mattered for jurisdictional purposes was not where the patient would be traveling but where the physician rendered care. *See Wright*, 459 F.2d at 288-90 (jurisdictional "focus must be on the place where the services are rendered"). To paraphrase *Wright*, if Dr. Burns "was guilty of malpractice, it was through acts of diagnosis … performed in" Idaho, not Washington. *Id.*

Allowing the jurisdictional inquiry to focus on where a patient intends to go after treatment would erect barriers to health care of the sort the Court has long sought to avoid. If malpractice were to become a

"portable tort," *Wright*, 459 F.2d at 290, physicians may feel compelled to interrogate patients about their residence and travel plans, and to decide on that basis whether to provide care. For example, a doctor in Oregon (or some more distant state) might decline to treat Washington residents who suffer injuries while on vacation to avoid the prospect of being sued in Washington for complications manifested later in Washington. Or, an Idaho doctor might decline to treat a Washington resident injured while traveling through Idaho on his way home from Montana.

The Swanks' proposed *Lewis* exception would also disrupt continuity of care. An Idaho physician who typically sees his Idaho patient in Idaho must not be dissuaded from answering his Idaho patient's phone call or email, seeking clinical advice, on the basis the Idaho patient called or emailed from another state. Nor should the physician, who could otherwise provide clinical advice, feel compelled to advise his patient to instead see a new physician in the state in which the patient happens to be located when the patient has a need for medical advice or follow-up care. Both of these scenarios disrupt continuity of care and strain the physician-patient relationship, a relationship that can and should be allowed to develop without regard to the political boundaries that are state lines.

These scenarios led this Court, decades ago, to express concern that physicians should not be "worried about having to defend medical malpractice suits in distant states," as that would inhibit the important public policy of ensuring access to care. *Grange*, 110 Wn.2d at 763. The

Court of Appeals in this case therefore properly acknowledged (and furthered) the "national public policy to ensure medical services are available to all people. If physicians have to worry about defending malpractice suits in foreign jurisdictions, this policy might be inhibited." *Swank v. Valley Christian Sch.*, 194 Wn. App. 67, 91, 374 P.3d 245 (2016) (citation omitted).

Further, it would offend due process to make jurisdiction over physicians depend on the unilateral acts of their patients. Under settled constitutional law, "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The due process clause requires that a defendant engage in "purposeful availment" of the benefits of activities in a state, "ensur[ing] that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or third person.'" *Burger King*, 471 U.S. at 475 (citations omitted). Washington therefore cannot exercise long-arm jurisdiction over a nonresident physician based on where his patients choose to travel any more than it can over a foreign manufacturer based on the unilateral activity of consumers. *See State v. LG Elecs., Inc.*, 186 Wn.2d 169, 177, 375 P.3d 1035 (2016) ("A foreign manufacturer or distributor does not purposefully avail itself of a forum … when the unilateral act of a consumer or other third party brings the product into the

forum state.").

Leaving aside that the Swanks' proposed *Lewis* exception would violate public policy and run afoul of the due process clause, it would also create an illogical test, making jurisdiction depend on the nature of the claim asserted. In particular, the Swanks argue *Lewis* should not apply to them because instead of asserting a claim under Washington's medical negligence law, they assert a claim under the Lystedt Act (which, the Medical Associations agree, does not afford a private right of action). *See* Swank Pet. at 18; Swank Supp. Br. at 16.[5] But the nature of the claim the Swanks assert has no bearing on whether their Idaho physician "purposefully" did "some act ... in the forum state," i.e., in Washington, so as to submit him to the jurisdiction of Washington courts. *Shute*, 113 Wn.2d at 766. The answer as to whether Dr. Burns engaged in purposeful activity in Washington will be the same whether the Swanks assert a medical negligence claim or a claim under the Lystedt law (assuming such a claim exists), as both claims necessarily turn on Dr. Burns's exercise of medical judgment in Idaho. Thus, no matter what claim might be asserted, for personal jurisdiction purposes the place of the injury or tort remains Idaho, where Dr. Burns engaged in the conduct that allegedly triggered liability. *See Lewis*, 119 Wn.2d at 673; *Wright*, 459 F.2d at 289-91.

[5] The Medical Associations agree with Dr. Burns that the Lystedt law does not appear to either provide a private right of action or establish a standard of care for a health care provider different from the standard prevailing in the local medical community. *See* RCW 28A.600.190(4). Further, it appears the Swanks alleged Dr. Burns acted negligently. Dr. Burns's Response Br. (May 12, 2015) at 40-41. These issues, however, lie outside the scope of this brief, and have been fully briefed by Dr. Burns.

The effects of Dr. Burns's diagnosis and follow-up care in Idaho would have been the same had Drew Swank traveled to Alaska, Hawaii, Illinois, Texas, or anywhere else to play football, instead of Washington. *Cf. Walden v. Fiore*, 134 S. Ct. 1115, 1125 (2014) (no personal jurisdiction in Nevada over Georgia officer who seized money from plaintiffs in Georgia, before they traveled to Nevada, because they "would have experienced th[e] same lack of access [to the funds] in California, Mississippi, or wherever else they might have traveled and found themselves wanting more money than they had"). That the effects occurred in Washington, which happens to have a statute addressing concussions, is the type of fortuitous contact that cannot support personal jurisdiction over the nonresident physician who provided care to his Idaho patient in Idaho. *See Burger King*, 471 U.S. at 475.

III. CONCLUSION

When Drew Swank died, the Swank family suffered a terrible loss. The Medical Associations represent physicians who strive every day to help patients like Drew, and their families. But accepting the argument the Swanks make here will hurt, not help, the effort to promote effective medical care in our state and across the nation.

The Medical Associations respectfully ask the Court to reject the Swanks' assertion that Washington's long-arm statute applies when a nonresident physician provides care in his home state but his patient travels to Washington and suffers injury there, particularly where, as here,

the patient is also a resident of the physician's home state. If the Court reaches this issue, it should reaffirm the rule it announced in *Lewis*, ensuring that Washington residents will continue to have broad access to health care wherever they need it.

RESPECTFULLY SUBMITTED this 16th day of December, 2016.

Davis Wright Tremaine LLP
Attorneys for Amici Curiae American Medical Association, Washington State Medical Association, Oregon Medical Association, and Idaho Medical Association

By *s/ Rebecca Francis*
Stephen M. Rummage, WSBA #11168
Douglas C. Ross, WSBA # 12811
Rebecca Francis, WSBA # 41196
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
Telephone: 206-622-3150
Fax: 206-757-7700
E-mail: steverummage@dwt.com
E-mail: douglasross@dwt.com
E-mail: rebeccafrancis@dwt.com

CERTIFICATE OF SERVICE

I certify that on December 16, 2016, I served a true and correct copy of the foregoing document on counsel of record via U.S. mail and email addressed as follows:

Attorneys for Petitioners
George M. Ahrend
AHREND LAW FIRM PLLC
100 E. Broadway Avenue
Moses Lake, WA 98837
Email: gahrend@ahrendlaw.com; scanet@ahrendlaw.com

Mark D. Kamitomo
Collin M. Harper
MARKAM GROUP, INC., P.S.
421 W. Riverside Avenue, Suite 1060
Spokane, WA 99201-0406
Email: mark@markamgrp.com; collin@markamgrp.com;
mary@markamgrp.com

Attorneys for Respondent Valley Christian School
William C. Schroeder
Gerald Kobluk
KSB Litigation, P.S.
221 North Wall, Suite 210
Spokane, WA 99201
Email: wcs@ksblit.legal; gkobluk@ksblit.legal

Attorneys for Respondent Jim Puryear
Patrick J. Cronin
WINSTON & CASHATT, LAWYERS
601 W. RIVERSIDE, Suite 1900
Spokane, WA 99201
Email: pjc@winstoncashatt.com

Steven R. Stocker
BOHRNSEN STOCKER SMITH LUCIANI, PLLC
312 W. Sprague Avenue
Spokane, WA 99201
Email: sstocker@bsslslawfirm.com; pyoude@bsslslawfirm.com

Attorneys for Respondent Timothy F. Burns, M.D.
Edward J. Bruya
Eric R. Byrd
BRUYA & ASSOCIATES, P.C.
601 W. Riverside, Suite 1600
Spokane, WA 99201
Email: ed@bruyalawfirm.com; eric@bruyalawfirm.com

Gregory M. Miller
Melissa J. Cunningham
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
Email: miller@carneylaw.com; cunningham@carneylaw.com;
norgaard@carneylaw.com

s/ Rebecca Francis
Rebecca Francis, WSBA # 41196