Robert B. Mitchell
Senior Of Counsel
Rob.Mitchell@klgates.com

T + 1 206 370 7640
F +1 206 623 7022

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The Honorable Rob Nosse, Chair
House Committee on Behavioral Health
and Health Care
Submitted via OLIS

Re: Support for House Bill 3324

Dear Chair Nosse, Vice-Chair Nelson, Vice-Chair Javadi, and members of the committee:

My name is Robert Mitchell, and I am Senior Of Counsel at the law firm of K&L Gates. I had hoped to speak to you yesterday on behalf of Providence. I am sorry that a technical glitch prevented me from being seen or heard. Thank you for the opportunity to present my testimony in writing.

My colleagues and I represented Providence before the Oregon Supreme Court in a case called *Providence Health System – Oregon v. Brown*, 372 Or. 225 (2024). It is the Court's decision in that case that has led to HB 3324. Providence supports the concept underlying HB 3324 but believes that the original bill language should be tweaked. Providence supports an amendment to HB 3324 that I understand is in process. We ask you to adopt that amendment and then approve the bill.

Let me begin by describing the problem that HB 3324 aims to fix. As you know, hospitals, doctors, and other healthcare providers are already subject to liability if they negligently prescribe, or fail to prescribe, medications to patients. Malpractice is the standard that applies in such cases.

The question that the *Brown* case presented was whether it is appropriate to use the standard of strict liability in determining whether a hospital is liable for harm allegedly caused by a medication prescribed for a patient. The Supreme Court said yes: a hospital that administers a

prescribed medication to an ER patient may be held strictly liable, even though a decision not to give a medication, or to delay giving the medication, is judged by malpractice standards.

No other state in the country uses strict liability in evaluating decisions made by healthcare providers. That's because strict liability doesn't fit the circumstances of medical diagnosis and treatment. A hospital is not in the business of selling drugs. Rather, it provides healthcare services.

When, in years past, it looked as though healthcare providers might be named in product-liability cases, the Legislature acted swiftly to exempt them from the Oregon strict-liability statute. That happened with breast implants in the early 1990s and physicians more recently.

HB 3324 seeks to extend the same protection to healthcare facilities that physicians now enjoy under Oregon law. That's very important. But there are two problems with the bill language. One is that physician-run clinics may be left out. The second, and (in my view) larger, problem is that the phrase "medical procedure" is too limited to use in the context of a hospital or clinic. Does a nurse's giving a pill to a patient in accordance with a doctor's order count as part of a medical procedure? I don't know. I foresee endless litigation over what the phrase "medical procedure" covers and what it excludes. And that would not be good for Oregon healthcare.

The proposed amendment fixes this problem by using the phrase, "healthcare services," in place of "medical procedure." "Healthcare services" reflects the appropriate scope of this measure insofar as hospitals and clinics are concerned. SB 1173 also uses the phrase, "healthcare services," so the proposed amendment will bring the two bills into alignment.

As amended, this bill will say that, for purposes of strict liability, healthcare facilities and physician clinics are not manufacturers, distributors, sellers, or lessors of products that they give to patients unless those facilities or clinics were involved in the design or manufacture of the product. I believe that this bill, as it is proposed to be amended, is necessary and that it uses the appropriate standard to guide courts in future cases.

Thank you very much.

Very truly yours,

Robert B. Mitchell
Senior Of Counsel

RBM