No. 101300-1

SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON
IN

BETTE BENNETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S BRIEF IN RESPONSE TO AMICI CURIAE PLANNED PARENTHOOD, CEDAR RIVER CLINICS, WASHINGTON STATE MEDICAL ASSOCIATION-WASHINGTON STATE HOSPITAL ASSOCIATION, AND STATE OF WASHINGTON

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I. INTRODUCTION

Pursuant to RAP 10.3(f) and the Court's April 19, 2023 letter, Petitioner Bette Bennett submits this consolidated answer to the amici curiae supporting Respondent United States of America (USA). Specifically, this answer responds to the amicus briefs, in the order they were filed with this Court, of (1) Planned Parenthood; (2) Cedar River Clinics; (3) Washington State Medical Association-Washington State Hospital Association; and (4) the State of Washington.

II. ARGUMENT

A. Planned Parenthood Great Northwest

PPGNW joins and reiterates the briefing of "Health Care Amici" regarding Bennett's Art. 1, sec. 12 and Art. 1, sec. 10 challenges to Washington's medical negligence statute of repose. Amicus Curiae PPGNW Br. at 5.

Outside the constitutional issues already briefed, PPGNW's primary concern is that striking down RCW

4.16.350(3) will negatively impact the delivery of women's health services in Washington and neighboring states. Amicus Curiae PPGNW Br. at 13-16. Specifically, PPGNW argues that striking the repose provision will expose medical providers to liability under evolving medical standards, and that such increased exposure will harm their clinics' ability to recruit and retain medical providers. *Id*. PPGNW's concerns are misplaced.

PPNGW describes three medical scenarios where the standard of care has changed with improvements in medicine, and after each asks if the provider rendering medical services that satisfy the older standard of care could later be deemed liable under a newer standard of care. PPNGW Br., p. 14-15. However, Washington's medical negligence statue, RCW 7.70.040, makes it clear that medical providers in Washington are held to the standard of care in place "at that time." RCW 7.70.040(1)(a). Accordingly, the providers in PPNGW's

scenarios could not be deemed liable if they satisfied the standard of care applicable *at the time* they rendered their services. PPNGW's related assertions that they will be unable to recruit or retain providers in the absence of a repose period is unsupported by any evidence, and seemingly inconsistent with history in this state.

Bennet recognizes the nationwide impact that *Dobbs v. Jackson Women's Health Organization* has had on the delivery of reproductive health care services to women, but that issue goes beyond the Constitutional challenges before the Court in this matter. Bennett respectfully submits that striking the statute of repose will not harm the women of our state; indeed, we believe the opposite to be true.

B. Cedar River Clinics

Cedar River Clinics joins PPGNW's amicus brief and adopts its "concerns about the serious risks posed to reproductive and sexual health care providers if the Court

strikes the statute of repose on medical negligence claims." Cedar River Clinics Amicus brief, pp. 4-5. Specifically, Cedar River Clinics notes its concern that eliminating the medical statute of repose will harm recruitment and retention of health care providers. However, like PPGNW, Cedar River Clinics does not offer any evidence supporting this contention.

C. Washington State Medical Association and Washington State Hospital Association ("Health Care Amici")

The Health Care Amici adopt Respondent USA's arguments regarding the Privileges and Immunities Clause of Art. 1, § 12, but do not add to that analysis. Instead, Health Care Amici presents argument on separation of powers and access to courts.

1. Striking the medical stature of repose does not violate separation of powers principles.

Health Care Amici's lead argument is that this Court must defer to the Legislature under separation of powers

principles because the Legislature exercised its policy-setting responsibilities when it enacted the medical statute of repose. Br. of Amici Curiae Health Care Amici at 4, 11, 19. As an initial matter, the Respondent USA did not raise a separation of powers argument in its brief, and Bennett respectfully requests that the Court not base its decision on any arguments raised solely by amici curiae. See *Schroeder v. Steven Weighall, M.D., & Columbia Basin Imaging, P.C.*, 179 Wn.2d 566, 316 P.3d 482, 491-492 (2014) (J.M. Johnson, J, dissenting)(approving majority's refusal to consider amicus curiae WSAJF's art. I, § 10 argument), *citing* RAP 12.1(a); *Salstrom's Vehicles, Inc. v. Dep't of Motor Vehicles*, 87 Wash.2d 686, 690, 555 P.2d 1361 (1976).

Regardless, this Court does not violate separation of powers by reviewing statutes that on their face grant a privilege or immunity implicating a fundamental right. *See, e.g., DeYoung v. Providence Medical Center*,136 Wash.2d

136 (1998); *Schroeder*, 316 P.3d 482. RCW 4.16.350(3) expressly limits the ability of certain plaintiff patients to bring claims against their medical providers. Because the statute grants an immunity to medical providers and burdens their patients' fundamental right to bring a medical negligence action against them, the statute triggers art. I, § 12's protections against favoritism. *Schroeder*, 316 P.3d at 486 (holding any "law limiting the pursuit of common law claims against certain defendants therefore grants those defendants an article I, § 12 'immunity.'"). Therefore, it is appropriate for this Court to determine whether RCW 4.16.350(3) meets constitutional muster.

Health Care Amici (and Amicus Curiae State of Washington) emphasize the roles of the various "stakeholders" (i.e., special interest groups including medical providers, insurers, and lawyers) who sponsored and helped push through the 2006 medical liability reforms. Yet it's special interest legislation like this that art. I, § 12 is

supposed to protect against. *Grant County II*, 150 Wash.2d at 805 (recognizing art. I, § 12's "particular concern" with special interest legislation that confers a benefit on a privileged or influential minority.); *see also Ockletree v. Franciscan Health Sys., Corp.*, 179 Wash.2d 769, 317 P.3d 1009, 1013 (2014)("Article I, section 12 was intended to prevent favoritism and special treatment for a few, to the disadvantage of others."). As Amicus Curiae WSAJ point out,

> The text of art. I, § 12 itself reveals its primary concern, which is to prevent laws that grant citizens privileges and immunities which "upon the same terms shall not equally belong to all citizens."

Amicus Curiae WSAJ Br. at 21. The collaboration and compromises of special interest groups cannot be used to justify legislation that selectively grants benefits to certain defendants.

Health Care Amici also reiterate Respondent USA's argument that at statehood statutes of limitations served as

statutes of repose (inferring that fundamental rights can only be understood in the context of the statutory law applicable at statehood). Amici Curiae Health Care Amici Br. at 18 citing Resp. Br. at 32-42; see also Resp. Br. at 15. However, viewing evolving notions of fundamental rights through the prism of territorial statutes would frustrate art. I, § 12's goal of "ensur[ing] equal access to legal processes in the exercise of common rights." Amicus Curiae WSAJ Br. at 21, *citing Madison*, 161 Wn.2d at 95 n.7; see also Pet. Br. at 14-15.

Finally, Bennett does not dispute the Legislature's interest in setting time limitations on potential claims. Indeed, caselaw and practice have long reflected the Legislature's role in doing just that. See, e.g., *Fowler v. Guerin*, 200 Wn.2d 110, 515 P.3d 502 (2022); *Schroeder v. Weighall,* 179 Wn.2d 566, 316 P.3d 482 (2014); *DeYoung v. Providence Med. Ctr.,* 136 Wn.2d 136, 960 P.2d 919 (1998). However, when the Legislature does set

such limitations – particularly on the exercise of fundamental rights – it must do so in a way that withstands constitutional scrutiny. With regards to the statute of repose at issue in this case, the Legislature did not.

2. Washington's open courts principles prohibit the Legislature from enacting insurmountable obstacles in the pursuit of fundamental rights.

The Washington Constitution's access to courts and privileges and immunities clauses work together to ensure equal access to the courts and to the law. WA Const. art. I, §§ 10, 12. Bennett recognizes that the Legislature can under its police power abolish a cause of action. *See, e.g., Shea v. Olson,* 185 Wash. 143, 53 P.2d 615 (1936).[1] However, when the Legislature leaves the substantive right to bring a cause of action intact, limitations imposed on that

[1] Health Care Amici erroneously state that the *Shea Court* "expressly considered the scope of Art I, § 10". Amicus Curiae Health Care Amici Br. at 23. The *Shea Court* did not consider Art I, § 10 in its decision.

right are subject to art. I, §§ 10 and 12 review by this Court. *E.g., Schroeder*, 79 Wn.2d 566; see also Petitioner's Op. Br. at 37. This is particularly true when the cause of action involves a fundamental right, where the need for Constitutional scrutiny is greatest. *See DeYoung*, 136 Wash.2d 136 (1998).

In *Putman*, this court recognized the basic principles underlying access to courts. *Putman v. Wenatchee Valley Medical Center, PS*, 166 W2d 974, 979 (2009) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."). Similar principles were emphasized by this Court in *Ruth* when it fashioned the discovery rule for medical negligence claims. *Ruth*, 75 Wash.2d at 665 ("when, from the circumstances of the wrong, the injured party would not in the usual course of events know he had been injured until long after the statute of limitations had cut off his legal remedies."); *cf. Estate of Peterson*, 102 Wn.

App. 456, 462 (Div. II, 2000)(refusing to extend discovery rule beyond personal injury actions to will contests). In *Putman*, this Court also recognized that bringing a medical negligence cause of action was a fundamental right. *Putman*, 166 Wash.2d at 982. Taken together, access to courts principles under art I, § 10 prohibit the Legislature from imposing insurmountable obstacles to an individual's pursuit of their fundamental rights.

Here, it is undisputed that Bennett has a fundamental right to pursue a medical negligence cause of action. RCW 4.16.350 foreclosed Bennett's cause of action before it even accrued, placing an impossible burden on her ability to exercise the fundamental right of bringing a medical negligence claim.[2] Washington access to courts principles protect fundamental rights in such situations.

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[2] Health Care Amici direct the Court's attention to other statutes of repose in Washington. Amicus curiae Health Care Amici Br. at 16. However, these statutes are not before this court, and not suitable for analogy. *See, e.g., DeYoung*, 136 Wn.2d at 150, fn. 4 (warning against

D. State of Washington

Amicus Curiae argues that RCW 4.16.350(3) does not violate the right of access to courts or the privileges and immunities clause.

1. RCW 4.16.350(3) violates access to courts.

The State largely echoes Amici Curiae Health Care Amici's arguments regarding access to courts, addressed above. However, Bennett will address several specific issues raised by the State's brief.

Contrary to the State's assertions, finding that RCW 4.16.350(3) violates art I, § 10 would not invalidate statutes of limitations and statutes of repose. As an initial matter, statutes of limitations are inherently different from statutes

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drawing generalizations between different laws with differing legal bases). Indeed, the first "statute of repose" listed by Health Care Amici, RCW 7.72.060 (product liability) is not a statute of repose at all; rather, RCW 7.72.060 contains a rebuttable presumption that a product's "useful safe life" is 12 years. RCW 7.72.060(2) (noting this presumption may be rebutted by a preponderance of the evidence).

of repose: importantly, they prevent individuals from sleeping on their rights by giving them a date certain to bring their claim. Because prospective claimants are on notice that they have a limited amount of time to bring their claim, they have not been denied access to the courts if they let that deadline expire. The situation is different with statutes of repose, which may foreclose an action before the injury is either sustained or reasonably capable of being discovered. If a statute of repose forecloses an individual's fundamental right to purse an action against a privileged defendant, that statue triggers access to courts principles under art. I, § 10.

It further bears repeating that the Legislature can exercise its police power to abolish a cause of action. *See Shea*, 185 Wn. 143 (1936). As a general proposition, such an exercise does not invoke judicial scrutiny because the court's authority is not invoked in the absence of an action before it. *Shea,* 185 Wn. At 157; *accord Silver v. Silver*,

108 Conn. 371, 143 A. 240, 65 A.L.R. 943, affirmed by the United States Supreme Court in 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221, 65 A.L.R. 939 (1929) ("We need not, therefore, elaborate the rule that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object [citing cases]."). However, judicial scrutiny will be invoked where the Legislature leaves the common law cause of action intact but extinguishes the right of some plaintiffs to bring an action against a favored defendant before the plaintiff's injury is either sustained or reasonably capable of being discovered.

2. RCW 4.16.350(3) violates art. I, § 12.

The State of Washington argues that the medical statute of repose does not confer a privilege or immunity implicating a fundamental right and therefore should only be subject to rational basis review. Amicus Curiae State Br. at 28, *citing Woods v. Seattle's Union Gospel Mission*,

197 Wn.2d 231, 481 P.3d 1060 (2021). However, it is undisputed that Washington citizens have a fundamental right to pursue medical negligence actions (*DeYoung*) *and* that RCW 4.16.350(3) expressly limits the ability of certain plaintiffs to bring claims against medical providers.[3] As a result, RCW 4.16.350(3) grants an immunity to medical providers from certain plaintiffs, and burdens those plaintiffs' fundamental right to bring a medical negligence action. *Schroeder*, 179 Wn.2d at 573 ("A law limiting the pursuit of common law claims against certain defendants therefore grants those defendants an article I, section 12 'immunity.'"). Because RCW 4.16.350(3) burdens the privilege of state citizenship to bring a cause of action for medical negligence, the statute triggers art. I, § 12 scrutiny

[3] Indeed, Respondent USA concedes that the repose period "limits the right to pursue a common-law cause of action" and that it "extinguishes the right to sue." Respondent's Br. at 30, 63

and must satisfy reasonable ground analysis. *See Schroeder, supra*.

Regardless, the State argues that RCW 4.16.350(3) satisfies both the rational basis and reasonable grounds given the Legislature's "new and express findings." Specifically, the State highlights the Legislature's findings regarding protection against stale claims, setting an outer limit to discovery, and viewing eight years as a reasonable time that balances the interests of plaintiffs and the health care industry. Br. at 14. However, these "new" findings merely restate what the *DeYoung Court* already recognized and indicated was insufficient under rational basis review. *See DeYoung*, 136 Wn.2d at 150; Petitioner's Op. Br. at 25-26; *see also* Amicus Curiae WSAJ Br. at 24-25.

These factually unsupported findings do not survive the rational basis test in *DeYoung*, let alone the fact-driven

reasonable grounds under *Schroeder* that apply in this matter.

Most importantly, the State (and other amici curiae) fail to factually support why medical providers should be favored over other defendants (and patients disfavored over other plaintiffs). Again, "article I, § 12 was intended to prevent favoritism and special treatment for a few, to the disadvantage of others." *Ockletree*, 317 P.3d at 1013. RCW 4.16.350(3) addresses only medical negligence defendants and not stale claims generally. In *Schroeder*, this Court recognized that a statute "not addressed to stale claims generally," cannot stand for the proposition that "compelling even one defendant to answer a stale claim is a substantial wrong". *Schroeder*, 179 Wn.2d at 576; see also Petitioner's Reply Br. at 22; Amicus Curiae WSAJ Br. at 26. Neither the State, other amici, nor Respondent USA have offered reasonable grounds supporting the class distinctions found in RCW 4.16.350(3).

III. CONCLUSION

For these reasons, Petitioner Bennett respectfully requests that the Court find RCW 4.16.350(3) unconstitutional, and return the case to the United States District Court, Western District Of Washington for trial on the merits.

Respectfully submitted this 12th day of May, 2023.

Counsel certifies under RAP 18.17
that this brief contains 3,086 words.

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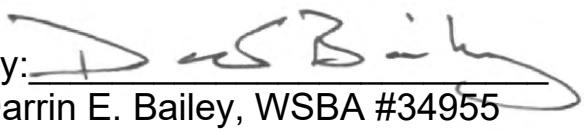

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I declare under penalty of perjury under the laws of the State of Washington that on this 12th day of May, 2023, I served a true and correct copy of the document to which this Certificate of Service is attached, on the following in the manner indicated:

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