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,

Respondents.

PETITIONER'S OPENING BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION 6
II. CERTIFIED QUESTIONS 8
A. Does RCW 4.16.350 violate the privileges and immunities clause of the Washington State Constitution, Article I, § 12? 8
B. Does RCW 4.16.350 unconstitutionally restrict a plaintiff's right to access the court in violation of the Washington State Constitution, Article I, § 10? 8
III. STATEMENT OF THE CASE 8
A. Factual Background 8
B. Presentation of Federal Tort Claim 10
C. Procedural Posture 11
IV. SUMMARY OF ARGUMENT 12
V. ARGUMENT 15
A. Standard of Review. 15
B. RCW 4.16.350 Violates Article I, § 12 of the Washington State Constitution. 15
1. RCW 4.16.350 grants an immunity under Article I, § 12. 17
2. There is no reasonable ground for limiting medical negligence defendants' liability to eight years. 19
C. RCW 4.16.350 Unconstitutionally Restricts Ms. Bennett's Right to Access Courts in Violation of Washington State Constitution, Article I, § 10? 29
VI. CONCLUSION 38

TABLE OF AUTHORITIES

Cases

Carr v. Broward County, 541 So.2d 92 (Fla. 1989)..... 35

Daggs v. Seattle, 110 Wash.2d 49 (1988) 33

De*Young v. Providence Medical Center*,136 Wash.2d 136 (1998) 7, 8, 13, 14, 19, 20, 21, 22, 23, 24, 25, 26, 27, 35

Estate of Makos v. Wis. Masons Health Care, 564 N.W.2d 662 (Wis 1977) 34

Grant County Fire Protection District No. 5 v. City of Moses Lake, 145 Wash.2d 702, 731 (2004)..... 16

Grant County Fire Protection District No. 5 v. City of Moses Lake, 150 Wash.2d 791 (2004)..... 16

Hall v. Niemer, 97 Wash.2d 574, 581 (1982)..... 32

Hardy v. VerMeulen, 512 N.E.2d 626, 628-30 (Ohio 1987), *cert. denied*, 484 U.S. 1066 (1988) 33

McCollum v. Sisters of Charity, 799 S.W.2d 15, 18-19 (Ky. 1990) 33

Nelson v. Kruzem, 678 S.W.2d 918 (Tex. 1984)..... 33

Putman v. Wenatchee Valley Medical Center, PS, 166 W2d 974 (2009).....15, 26, 29, 30, 31

Ruth v. Dight, 75 Wn.2d 660 (1969) 37

Schroeder v. Steven Weighall, M.D., & Columbia Basin Imaging, P.C., 179 Wn.2d 566 (2014).....13, 16, 17, 18, 19, 20, 26, 27

Sofie v. Fibreboard Corp., 112 Wn.2d 636 (1989) 28

Woods v. Seattle's Union Gospel Mission, 197 Wn.2d 231 (2021)17

Washington Constitution

Article I, § 10.....6, 8, 14, 29, 37

Article I, § 11..... 37

Article I, § 12.....6, 8, 12, 14, 15, 16, 17, 18, 28, 37

Article I, § 3..... 37

Statutes

Laws of 2006, ch. 8, § 301..... 25

Laws of 2006, ch. 8, § 302..... 24

RCW 4.16.190(2)..... 18, 20

RCW 4.16.350 .....17, 18, 20, 24, 25, 26, 28, 29, 34, 35, 38

RCW 4.16.350(3).....6, 7, 8, 12, 13, 14, 18, 28, 38

Other Authorities

Congressional Budget Office, *Economic Implications of Rising Health Care Costs*, 27 (1992)..... 28

Joni Hersch & W. Kip Viscusi, *Tort Liability Litigation Costs for Commercial Claims*, 9 American L. & Econ. Rev. 330, 331 & 343 (2007) 28

Office of Technology Assessment, *Impact of Legal Reforms on Medical Malpractice Costs* 5 (1993) 28

Randolph I. Gordon and Brook Assefa, *A Tale of Two Initiatives: Where Propaganda Meets Fact in the Debate Over America's Health Care*, 4 Seattle J. for Soc. Just. 693 (Spring/Summer 2006) 27

William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, § 17 of the Tennessee Constitution*, 27 U. of Mem. L. Rev. 333 (1997) 34

I. INTRODUCTION

The issue before the Court is whether Washington's 8-year medical negligence statute of repose, RCW 4.16.350(3), violates Article I, § 12 (privileges and immunities) and Article I, § 10 (access to courts) of the Washington State Constitution.

In May 2009 Bette Bennett suffered a skull fracture and brain injury when a physician at Bremerton Navy Hospital inserted nasal packing into her nose to stop a nose bleed. Unaware of the injury, Bennett began experiencing a complex constellation of symptoms for which her doctors had no diagnosis until December 2017 when a physician discovered the injury. Because Bennett's claim did not accrue within eight years of the alleged negligence, RCW 4.16.350(3) bars her claim.

Importantly, this Court has already found that RCW 4.16.350(3) violates Article I, § 12. D*eYoung v. Providence Medical Center*,136 Wash.2d 136, 141, 960 P.2d 919

(1998). Concluding that RCW 4.16.350(3) was unconstitutional, the *DeYoung Court* held that the Legislature's justification for the repose period – lowering insurance costs and preventing stale claims – were unsupported and too attenuated to pass even the highly deferential rational basis test.

Nevertheless, in a flurry of medical negligence legislation in 2006, the State Legislature re-enacted RCW 4.16.350(3). Notably, the Legislature did not change the wording of the statute, nor did it provide legislative findings supported by facts, studies, or other evidence. Indeed, the only thing that has changed since *DeYoung* is that courts now use the less deferential reasonable ground test for privileges and immunities challenges. Because the "new" RCW 4.16.350(3) suffers the same constitutional infirmities as the "old" RCW 4.16.350(3), the repose provision again cannot survive the rational basis test, let alone the reasonable grounds test required here.

The *DeYoung Court* did not rule on DeYoung's access to courts argument. Should this Court find that RCW 4.16.350(3) is sufficiently supported "in fact and not theory" to pass constitutional muster under the privileges and immunities clause, the repose provision remains unconstitutional because it acts as an absolute bar when injuries do not accrue within it, thereby violating her right to access courts.

II. CERTIFIED QUESTIONS

A. Does RCW 4.16.350 violate the privileges and immunities clause of the Washington State Constitution, Article I, § 12?

B. Does RCW 4.16.350 unconstitutionally restrict a plaintiff's right to access the court in violation of the Washington State Constitution, Article I, § 10?

III. STATEMENT OF THE CASE

A. Factual Background

Petitioner Bette Bennett is the civilian wife of a Navy service member who had a history of chronic sinusitis and

underwent sinus surgery at Naval Hospital Bremerton ("NHB") on May 18, 2009. ER-46. Following surgery, Doyle splints were placed to keep her airway open. *Id*. On May 25, 2009, Bennett experienced significant bleeding from her nose and was taken to the NHB emergency room by ambulance. *Id*. The on-call ENT physician, Dr. Kristina Hart, removed the Doyle splints and inserted nasal packing into her nasal cavity. *Id*. When Dr. Hart inserted the nasal packaging, Bennett heard a noise that sounded like cracking, felt acute pain, and passed out. *Id*. Dr. Hart then rushed Bennett to the Operating Room to control her ongoing nose bleed under anesthesia. *Id*. Charting notes that Bette had lost approximately 700-800 ml of blood at this point. *Id*. Bennett was discharged from the hospital and returned on May 29, 2009 to have the packing removed form her nasal cavity. ER-47.

Bennett subsequently developed symptoms including migraines, malaise, light sensitivity, memory loss,

and other neurocognitive impairment. *Id*. She saw a series of neurologists and other specialists who were unable to diagnose the cause of her symptoms and that it was not until August 2017 that she was treated by a neuropsychologist who found that she suffered deficits consistent with a traumatic brain injury. *Id*. She was then referred to the University of Washington Medical Center to see a specialist in brain injuries where she was diagnosed in December 2017 with a traumatic brain injury to her prefrontal cortex caused by the nasal pack insertion in 2009. *Id*.

B. Presentation of Federal Tort Claim

On August 3, 2018, Bennett presented a federal tort claim with the Department of Navy, Office of the Judge Advocate General, Tort Claims Unit Norfolk in Norfolk, Virginia. ER-4, ER-45, ER-50. The Department of the Navy denied her tort claim on October 23, 2019 and informed her that she had six months to file suit. ER-52.

On April 22, 2020, less than six months later, Bennett filed her complaint alleging that the Government, through the actions of personnel at NHB, negligently inserted the nasal pack and failed to diagnose and treat her brain injury in violation of the Federal Tort Claims Act. ER-44-53, ER-54.

C. Procedural Posture

On July 13, 2020, the Government filed a motion to dismiss for lack of subject matter jurisdiction arguing that Washington's statute of repose, RCW 4.16.350, barred Bennett's claims. ER-5. On August 3, 2020, Bennett responded that RCW 4.16.350 violated Washington's constitution, and otherwise did not apply to, and was preempted by, the FTCA. *Id*.

On October 1, 2020 the district court certified two questions to the Washington Supreme Court to resolve the state constitutionality of RCW 4.16.350. ER-28. The Washington Supreme Court declined the request to answer the certified questions until the district court ruled

first on whether the FTCA preempted RCW 4.16.350. ER-5, ER-26. On June 8, 2021, the district court denied the government's motion to dismiss, holding that

> Applying the statute of repose here would be in clear conflict with federal law; accordingly, the Court concludes that the FTCA statute of limitations preempts Washington's statute of repose.
>
> As such, Bennett's suit was timely filed, and the Government's motion to dismiss is DENIED.

ER-12.

On August 11, 2022 the Ninth Circuit reversed and remanded, and on September 19, 2022 the district court re-certified the original state constitutional questions to this Court.

IV. SUMMARY OF ARGUMENT

RCW 4.16.350(3) violates Article I, § 12 because it grants an immunity (and burdens a privilege) without reasonable grounds.

In determining whether a law violates the immunities and privileges clause, courts apply a two-pronged test: 1) does the law grant an immunity implicating a fundamental right and 2) if so, is there reasonable ground for the immunity? *Schroeder v. Steven Weighall, M.D., & Columbia Basin Imaging, P.C.*, 179 Wn.2d 566, 316 P.3d 482, 486 (2014). RCW 4.16.350(3) burdens the fundamental right to pursue a common law cause of action by barring certain plaintiffs (those whose claims do not accrue within eight years) from bringing suit against certain defendants (medical providers). Because RCW 4.16.350(3) grants an immunity implicating a fundamental right, it satisfies the first prong.

Under the second prong, the Court uses the reasonable ground standard to determine whether the law "*in fact* serves the legislature's stated goal." *Schroeder*, 316 P.3d at 486. In *DeYoung*, this Court applied the more deferential rational basis standard to the identically worded

predecessor of RCW 4.16.350(3) and found the repose provision violated Article I, § 12. In re-enacting RCW 4.16.350(3), the State Legislature failed to cure any of the defects found by the *DeYoung Court*. Because RCW 4.16.350(3) suffers the same defects as its predecessor – and because courts now use the reasonable ground standard – the repose period cannot survive constitutional scrutiny.

Last, even if the Legislature had been able to factually support its stated purpose for enacting RCW 4.16.350(3), the repose period violates Bennett's constitutional right to access the courts. Article I, § 10 provides substantive protection for an individual's access to courts, and under access to courts principles the Legislature may not impose insurmountable obstacles to an individual's pursuit of a common law tort. By setting an inflexible time in which medical negligence claims must be

brought, the repose period operates as an absolute bar for individuals whose injuries do not accrue within this period.

V. ARGUMENT

A. Standard of Review.

This Court may determine a question of law certified by a federal court if the question is one of state law that has "not been clearly determined and does not involve a question determined by reference to the United States Constitution." RAP 16.16(a). Courts review the constitutionality of a statute de novo. *Putman v. Wenatchee Valley Medical Center, PS*, 166 Wash.2d 974, 978 (Wash. 2009).

B. RCW 4.16.350 Violates Article I, § 12 of the Washington State Constitution.

Article I, § 12 of the Washington Constitution provides that "[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same

terms shall not equally belong to all citizens, or corporations." Washington's privileges and immunities clause is more protective than the federal equal protection clause, and applies any time a law implicates a privilege or immunity relating to the "'fundamental rights'" of state citizenship. *Schroeder*, 179 Wn.2d 566, *citing Grant County Fire Protection District No. 5 v. City of Moses Lake,* 150 Wash.2d 791, 812, 83 P.3d 419 (2004) (*Grant County II*). This Court has further recognized Article I, § 12's "particular concern" with special interest legislation that confers a benefit on a privileged or influential minority. *Grant County II*, 150 Wash.2d at 805; *see also Grant County Fire Protection District No. 5 v. City of Moses Lake,* 145 Wash.2d 702, 731, 42 P.3d 419 (2004) (*Grant County I*).

In determining whether a challenged law violates the immunities and privileges clause, Washington courts apply a two-pronged test: 1) whether the law grants a privilege or

immunity implicating a fundamental right and 2) if so, whether the distinction is based on reasonable grounds. *Woods v. Seattle's Union Gospel Mission*, 197 Wn.2d 231, 481 P.3d 1060, 1065 (2021), *citing Schroeder*, 316 P.3d at 486.

1. RCW 4.16.350 grants an immunity under Article I, § 12.

The ability to pursue a common law cause of action is a fundamental right under the Washington Constitution. *Schroeder*, 316 P.3d at 486. Therefore, any "law limiting the pursuit of common law claims against certain defendants therefore grants those defendants an article I, § 12 'immunity.'" *Schroeder*, 316 P.3d at 486.

In *Schroeder*, the plaintiff challenged the constitutionality of RCW 4.16.190(2), a statute that eliminated the tolling of the statute of limitations for minors in the context of medical malpractice claims. The Court recognized that pursuing a medical negligence claim is a

fundamental right of citizenship and found that the challenged statute conferred a benefit because it limited the ability of certain plaintiffs to bring medical malpractice claims. *Schroeder*, 316 P.3d at 486 (likening RCW 4.16.190(2) to the statute of repose being challenged in the case at bar). Finding the first prong of the privileges and immunities test satisfied, the Court then looked at whether the law satisfied the reasonable ground test. *Id*.

Here, RCW 4.16.350 immunizes medical providers from suits pursued by certain plaintiffs. Specifically, the law extinguishes a plaintiff's right to sue a medical provider if the plaintiff fails to discover that the provider harmed them within eight years. RCW 4.16.350(3). Because a plaintiff's right to sue is a fundamental right, RCW 4.16.350(3) "grants an immunity (and burdens a privilege) triggering the reasonable ground test under Article I, § 12." *Schroeder*, 316 P.3d at 486. Therefore, the first prong is satisfied.

2. There is no reasonable ground for limiting medical negligence defendants' liability to eight years.

Under prong two, the reasonable ground test, courts must scrutinize the law "to determine whether it *in fact* serves the legislature's stated goal." *Schroeder*, 316 P.3d at 486 (*emphasis in original*). This test does not permit the court to "hypothesize facts"; rather, the Court must find that the challenged statute is "justified in fact as well as theory." *Schroeder*, 316 P.3d at 486-87 (*emphasis added*) (distinguishing reasonable grounds from the far more deferential rational basis review the Court used in pre-*Grant County* cases).

In applying the reasonable ground test, the Court in *Schroeder* looked to its decision in *DeYoung* for guidance:

> This court addressed a statute similar to RCW 4.16.190(2) in *DeYoung v. Providence Medical Center,*136 Wash.2d 136, 141, 960 P.2d 919 (1998), where we held that an eight-year statute of repose applicable to medical malpractice claims violated article I, § 12. In the pre- *Grant County* cases we applied rational

> basis review and found that the statute of repose could not survive even that most deferential form of scrutiny. *DeYoung,*136 Wash.2d at 149, 960 P.2d 919. While we recognized that addressing escalating insurance rates was a legitimate legislative goal, we also found clear evidence in the legislative record that the challenged statute would not advance that goal in any appreciable way. *Id.* at 149–50, 960 P.2d 919.

Schroeder, 316 P.3d at 486-87 (*emphasis added*). The Court concluded that "[n]either the respondents nor the legislative record provides any factual support for the theory that RCW 4.16.190(2) will reduce insurance premiums." *Id*. Accordingly, the Court found that the claims limiting provision in RCW 4.16.190(2) violated the privileges and immunities clause of the state constitution.

Similar to the plaintiff in *Schroeder* – and *exactly like* the plaintiff in *DeYoung* – Bennett challenges the constitutionality of the repose period contained in RCW 4.16.350. Importantly, this Court has already reviewed a previous – *and identically worded* – version of this statute

and found that it violated the privilege and immunities clause. *DeYoung*, 136 Wn.2d 136, 141. In *DeYoung*, the plaintiff appealed the trial court's dismissal of her claims for failing to commence suit within the eight-year repose period, arguing that the repose provision violated the privileges and immunities clause and also denied her access to the courts.

Because *DeYoung* predated the *Grant County* cases, this Court reviewed the repose provision under the highly deferential *rational basis* standard. *DeYoung,* 136 Wn.2d at 148 (noting rational basis may be satisfied by "speculation unsupported by evidence or empirical data"). The defense argued that the Legislature's desire to protect against both a perceived medical malpractice insurance crisis and the vagaries of stale claims provided a sufficiently rational basis for the statute of repose. This Court disagreed.

First, the *DeYoung Court* addressed the Legislature's concerns about medical malpractice insurance. The Court reviewed the substantial materials that were before the Legislature when it had passed the statute of repose, including surveys of insurance claims and indemnities paid. *Id*. at 148-149. Noting the extremely small number of claims reported more than eight years after an incident of alleged malpractice – and their *de minimis* impact on insurance rates – the Court concluded that the "eight-year repose provision could not rationally be thought" of as having any real impact on malpractice insurance:

> A repose provision affecting so few claims and involving such a small amount of what insurers were paying could not possibly have any meaningful impact on the medical malpractice insurance industry, much less when only claims of the type subject to Washington's eight-year repose provision are considered. The eight-year statute of repose could not avert or resolve a malpractice insurance crisis.

DeYoung, at 149. The Court further reasoned that

> "[T]he relationship of a classification to its goal must not be so attenuated as to render the distinction arbitrary or irrational. (*internal string citations omitted*). The relationship between the goal of alleviating any medical insurance crisis and the class of persons affected by the eight-year statute of repose is too attenuated to survive rational basis scrutiny.

Id. at 149.

Next, the *DeYoung Court* looked at whether the repose provision rationally furthered the Legislature's goal of "repose for defendants and the barring of stale claims." *Id*. at 150. Although the Court agreed the Legislature's goal was legitimate, it found there was no rational basis for the repose period where "the minuscule number of claims subject to the repose provision renders the relationship of the classification too attenuated to that goal." *Id.* at 150. Accordingly, the Court held that the repose provision in

RCW 4.16.350 violated the privileges and immunities clause of the state constitution.[1]

Nevertheless, in 2006 the state legislature re-enacted RCW 4.16.350. The Legislature *did not change a single word in the previous statute, nor did it introduce any supporting facts into the record*. Rather, it simply appended the following language under its Purpose section:

> The purpose of this § and § 302, chapter 8, Laws of 2006 is to respond to the court's decision in *DeYoung v. Providence Medical Center*, 136 Wn.2d 136 (1998), by expressly stating the legislature's rationale for the eight-year statute of repose in RCW 4.16.350.
>
> The legislature recognizes that the eight-year statute of repose alone may not solve the crisis in the medical insurance industry. However, to the extent that the eight-year statute of repose has an effect on medical malpractice insurance, that effect will tend to reduce rather than increase the cost of malpractice insurance.

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[1] The *DeYoung Court* did not reach the plaintiff's access to courts argument, having decided the case on the plaintiff's privileges and immunities challenge. *Id*. at 150.

> Whether or not the statute of repose has the actual effect of reducing insurance costs, the legislature finds it will provide protection against claims, however few, that are stale, based on untrustworthy evidence, or that place undue burdens on defendants.
>
> In accordance with the court's opinion in *DeYoung*, the legislature further finds that compelling even one defendant to answer a stale claim is a substantial wrong, and setting an outer limit to the operation of the discovery rule is an appropriate aim.
>
> The legislature further finds that an eight-year statute of repose is a reasonable time period in light of the need to balance the interests of injured plaintiffs and the health care industry.
>
> The legislature intends to reenact RCW 4.16.350 with respect to the eight-year statute of repose and specifically set forth for the court the legislature's legitimate rationale for adopting the eight-year statute of repose. The legislature further intends that the eight-year statute of repose reenacted by § 302, chapter 8, Laws of 2006 be applied to actions commenced on or after June 7, 2006.

Laws of 2006, ch. 8, § 301 and 302 (SSHB 2292).

The question now is whether this re-animated repose provision that could not survive the rational basis test in

DeYoung can survive the heightened reasonable ground test.

On its face, the rationale provided by the 2006 Legislature fails to address any of the constitutional defects found by this Court in *DeYoung* and frankly amounts to nothing more than Legislative handwaving. [2] The Legislature added nothing new to the statute, nor did it cite any new evidence showing that the repose period "*in fact* serves the legislature's goal." *Schroeder*, 316 P.3d at 486-87 (finding the Legislative purpose – identical to the RCW 4.16.350 Purpose cited above – not instructive).

Indeed, in its Purpose section, *supra*, the Legislature concedes it doesn't know if the law will have "the actual effect of reducing insurance costs" but hypothesizes that

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[2] Tellingly, this Court has already found several of these hastily passed and unsupported statutes unconstitutional. *See, e.g., Schroeder, supra* (non-tolling of statute of limitations for minors); *Putman*, 166 2d 974 (certificate of merit requirement); *Waples v. Yi.* 169 Wn.2d 152,161, 234 P.3d 187 (2010)(90-day notice to sue).

its "effect will tend to reduce rather than increase" those costs. Likewise, the Legislature declares that "compelling even one defendant to answer a stale claim is a substantial wrong" is "in accordance with the court's opinion in *DeYoung*," but neglects to address the *DeYoung Court's* rejection of this same argument because of "the minuscule number of claims subject to the repose provision renders the relationship of the classification too attenuated to that goal." *DeYoung*, 136 Wash.2d at 150.

Here, as in both *DeYoung* and *Schroeder*, neither the defendant nor the Legislature has provided "any factual support for the theory" that the repose period will reduce insurance premiums. [3] Simply restating the rationale

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[3] To the contrary, beyond the legislative materials reviewed by the *DeYoung Court*, objective statistical research refutes the myth that a statute of repose will tend to reduce the cost of malpractice insurance and protect against meritless claims. *See, e.g.*, Randolph I. Gordon and Brook Assefa, *A Tale of Two Initiatives: Where Propaganda Meets Fact in the Debate Over America's Health Care*, 4 Seattle J. for Soc. Just. 693 (Spring/Summer 2006); Congressional Budget Office, *Economic Implications of*

already rejected by this Court does not convert an unconstitutional statute into a constitutional one.[4]

In order to uphold RCW 4.16.350(3), this Court must find that the law is "justified in fact as well as theory." Because no such justification exists, the repose provision cannot survive the rational basis test, let alone the reasonable grounds test required here. Accordingly, the court should find that the repose period contained in RCW 4.16.350 violates Article I, § 12.

Rising Health Care Costs, 27 (1992); Office of Technology Assessment, *Impact of Legal Reforms on Medical Malpractice Costs* 5 (1993); Joni Hersch & W. Kip Viscusi, *Tort Liability Litigation Costs for Commercial Claims*, 9 American L. & Econ. Rev. 330, 331 & 343 (2007).

[4]In substituting its own legal conclusions for the Court's, the Legislature's action also raises separation of powers concerns: "[A]ny determination calling for a legal conclusion is constitutionally within the province of the judiciary, not the Legislature. Any legislative attempt to mandate legal conclusions would violate the separation of powers." *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 654,771 P.2d 711 (1989). However, Petitioner concedes this issue was not certified and is therefore beyond the reach of this Court.

C. RCW 4.16.350 Unconstitutionally Restricts Ms. Bennett's Right to Access Courts in Violation of Washington State Constitution, Article I, § 10?

Individuals in Washington have a constitutionally protected right to access the courts. *See* Article 1, § 10; *Putman*, 166 Wash.2d at 979. The right of access is ensconced in the state constitution:

> **Administration of Justice: Justice in all cases shall be administered openly, and without unnecessary delay.**

Article I, § 10. The wording of this Article is traceable to Chapter 40 of the Magna Carta, which Lord Coke interpreted as providing a remedy guarantee. *See* Charles K. Wiggins, Bryan P. Harnetiaux & Robert H. Whaley, *Washington's 1986 Tort Legislation and the State Constitution: Testing the Limits*, 22 Gonz. L. Rev. 193, 212-14 (1986/87) and David Shuman, *Oregon's Remedy Guarantee: Article I, § 10 of the Oregon Constitution*, 65 Or. L. Rev. 35, 37-41 (1986). In striking down a different medical negligence statute, the Washington State

Supreme Court explained the fundamental nature of the right of access to courts:

> "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. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 (1803). The people have a right of access to courts; indeed, it is "the bedrock foundation upon which rest all the people's rights and obligations." *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991).

Putman, 166 Wn.2d at 979.

Washington courts have long protected individual rights by way of civil remedy. *See, e.g., State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902); *Hunter v. North Mason School Distr.*, 85 Wash.2d 810, 814, 539 P.2d 845 (1975); *see also Kluger v. White*, 281 So.2d 1 (Fla. 1973) (providing a rigorous analytical framework for protection of common law rights and remedies based upon access to courts). However, it was not until *Putman* that this Court

gave full voice to the State Constitution's right of open access to courts. *Cf. In re Marriage of King*, 162 Wn.2d 378, 388, 174 P.3d 659 (2007)(noting that it had previously applied the constitutional principle of open access to courts in the context of a right to a remedy for a wrong suffered); *Lakeview Blvd. Condominium Ass'n v. Apartment Sales Corp.*, 144 Wash.2d 570, 29 P.3d 1249 (2001)(acknowledging that whether the open courts clause provided a right to a remedy remained unresolved).

In *Putman*, this Court considered the constitutionality of a statute requiring a plaintiff in a medical malpractice suit to submit a "certificate of merit" with the pleadings. The Court found that securing a certificate of merit prior to discovery may not be possible, and that such a requirement therefore impermissibly "violates the plaintiff's right of access to courts." *Putman*, 166 Wn.2d at 979. The Court further explained that "[i]t is the duty of the courts to administer justice by protecting the legal rights and

enforcing the legal obligations of the people." *Id*. (*internal citations omitted*). Accordingly, this Court held that the statute violated the plaintiff's right to access to courts. *Id*.[5]

Here, the eight-year repose period infringes upon a plaintiff's right to access the courts because it has the effect of extinguishing a cause of action before it even accrues. As such, it places an impossible burden on certain plaintiffs' ability to bring a cause of action by requiring that it be brought either before it arises or becomes known to the plaintiff.

The Washington Supreme Court has recognized, in an equal protection context, the unconstitutionality of procedural impediments that "substantially undermine the possibility of obtaining tort relief." *See Hall v. Niemer*, 97 Wn.2d 574, 581, 649 P.2d 98 (1982) (noting that

[5] The Court also held the statute violated the separation of powers. *Id*. at 980 (holding certificate of merit requirement conflicts with CR 11 and CR 8).

"reasonable procedural burdens may be placed on governmental tort victims as long as such burdens are not substantial and do not constitute a real impediment to relief for governmental tort victims"); *Daggs v. Seattle*, 110 Wn.2d 49, 750 P.2d 626 (1988) ("[s]o long as the procedural burdens of filing claims with the government are reasonable, the claim laws are valid"). Courts in other jurisdictions, using a similar approach, have struck down medical negligence repose statutes using access to courts analysis, concluding that such statutes place an impossible burden on an individual's right to bring a claim for medical negligence. *See, e.g., McCollum v. Sisters of Charity*, 799 S.W.2d 15, 18-19 (Ky. 1990)(Kentucky medical negligence repose period unconstitutional on its face); *Hardy v. VerMeulen*, 512 N.E.2d 626, 628-30 (Ohio 1987), *cert. denied*, 484 U.S. 1066 (1988)(Ohio medical negligence repose period unconstitutional); *Nelson v. Kruzem*, 678 S.W.2d 918, 921-24 (Tex. 1984)(Texas medical

negligence repose period unconstitutional because it cut off a cause of action before the plaintiff knew of the wrong's existence); *Estate of Makos v. Wis. Masons Health Care*, 564 N.W.2d 662 (Wis 1977)(Wisconsin medical negligence repose period unconstitutional); see also William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, § 17 of the Tennessee Constitution*, 27 U. of Mem. L. Rev. 333 (1997) (collecting cases pro and con).

The repose period within RCW 4.16.350 contains the same flaws found in these foreign provisions. By setting an inflexible time in which medical negligence claims must be brought, it leaves no remedy for individuals whose injuries do not arise or are unknown within this period. For these individuals, the repose period operates as an absolute bar to pursuing a cause of action.

Here, Bennett's claim did not accrue until December 2017 when her doctors diagnosed her with brain injury

secondary to the nasal pack insertion in May 2009. ER-47. However, by then the repose period had already expired and Bennett's right to access the courts extinguished. For plaintiffs suffering such an injury, access to courts is an impossibility.

It bears noting that at least one state justified a medical repose period after conducting an access to courts scrutiny. *See Carr v. Broward County*, 541 So.2d 92 (Fla. 1989). In a 4-3 opinion, the Florida Supreme Court used an "overpowering public necessity" analysis and found that the perceived medical malpractice crisis constituted an overpowering public necessity. *Id*. at 94-95.

However, in re-enacting RCW 4.16.350, the Washington Legislature did not cite – and reality does not reflect – such an *overpowering public necessity*. Indeed, there was not enough evidence to satisfy the rational basis standard in *DeYoung*, let alone the reasonable grounds basis. *Supra*. Considering the state Legislature's scant

record and failure to do anything more than pay lip service to the constitutional defects found by this Court in *DeYoung*, the Legislature has not shown an "overpowering public necessity" sufficient to overcome an otherwise innocent or diligent individual's substantive right to access the courts.

Finally, under access to courts analysis it is not necessary to consider what motivated the Legislature to craft this particular repose period. Indeed, Bennett respectfully submits that no public necessity can justify foreclosing a cause of action for medical negligence claimants before the injury is either sustained or reasonably capable of being discovered. That would be antithetical to "concepts of fundamental fairness and the common law's purpose to provide a remedy for every genuine wrong…" which the Washington Supreme Court has recognized as applying "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." *Ruth v. Dight*, 75 Wash.2d 660, 665, 453 P.2d 631 (1969).

Article I, § 10 and related provisions [6] provide substantive protection for an individual's right to access to courts. Notwithstanding the Legislature's concerns when it crafted RCW 4.16.350(3) (*i.e.*, insurance rates, etc), the Legislature left intact the individual's substantive right to bring a medical negligence claim. *See* RCW 7.70.010 *et seq*. Having done this, it is constitutionally without authority, under access to courts principles, to impose an insurmountable obstacle to an individual's pursuit of this recognized cause of action.

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[6] Article I, § 10 is surrounded by other provisions intended to provide substantive protection for the individual against government infringement. *See, e.g.*, Article I, § 11, Article I, § 3 (due process); Article I, § 12 (privileges and immunities).

VI. 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 1st day of November, 2022.

Counsel certifies under RAP 18.17
that this brief contains 4,983 words.

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I declare under penalty of perjury under the laws of the State of Washington that on this 1st day of November, 2022, 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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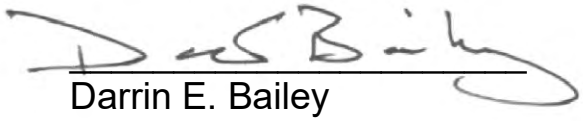

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