No. 101300-1

SUPREME COURT OF THE STATE OF WASHINGTON

BETTE BENNETT,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF *AMICUS CURIAE* PLANNED PARENTHOOD GREAT NORTHWEST, HAWAI`I, ALASKA, INDIANA, KENTUCKY - Corrected

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A. IDENTITY AND INTEREST OF *AMICUS CURIAE*

Planned Parenthood Great Northwest, Hawai`i, Alaska, Indiana, Kentucky ("Planned Parenthood Great Northwest" or "PPGNW") submits this brief of amicus curiae in support of the Defendant United States. Amicus believes the Court should answer in the negative the U.S. District Court's certified questions of whether the medical negligence statute of repose, RCW 4.16.350, violates the Washington Constitution's privileges and immunities or open courts clauses.

The statute properly balances the interests of injured plaintiffs and the health care industry in providing finality and an outer limit to the discovery rule, as testified to the Legislature by the president of WSTLA in 2006, and thus protects the public interest by ensuring the availability of professional health services and thus promoting the public welfare, consistent with this Court's decisions.

PPGNW is a not-for-profit corporation organized under the laws of the State of Washington, and a multi-state affiliate

operating 35 health centers across Alaska, Hawai`i, Idaho, Indiana, Kentucky, and Washington. *See* Declaration of Kristine Smith ("Smith Decl.") at ¶2. Its mission is to advocate, educate and provide health care to support sexual health and wellness for all. *Id.*

PPGNW's mission includes striving to provide accessible care – whether in its health centers or via direct-to-patient telehealth. *Id*. at ¶3. PPGNW offers a wide range of reproductive and sexual health services including well person examinations, birth control, testing and treatment for sexually transmitted infections, cancer screening, vasectomies and pregnancy testing. .

The skilled and dedicated health care professionals in PPGNW's clinics offer high-quality, affordable sexual and reproductive health care in settings that protect the dignity, privacy, and rights of every person who comes through their doors. *Id*. at ¶4. PPGNW's health care services include birth control options, emergency contraception, wellness exams,

breast exams, cervical cancer screenings, pap tests, abortion care, STI testing and treatment, and menopause management, amongst other services. *Id.*

PPGNW's health centers are an important point of access for marginalized communities and individuals of lower socioeconomic status. *Id*. at ¶5. Per its chief operating officer, in 2022, its clinicians met with patients for a total of 174,140 appointments – 29,388 of these were for contraception, 9,838 were patients seen through telehealth, and 16,595 received abortion-related care. *Id*. 40% of its patients identified as non-white, and 41% of the patients earned under 100% of the federal poverty level. *Id*. In Washington, the appointments totaled 81,597. *Id*. In Idaho, the appointments totaled 9,442. *Id*.

PPGNW knows, and wants the Court to know, that it is critical to the continued provision of high quality, full range of women's health services to protect the finality of the statute of limitations and statute of repose for medical negligence. *Id*. at

¶6. One reason is because the field of medicine is constantly changing and, as a result, the recommendations we have today for the best evidence-based care is often different from what it will be several years down the road. *Id*. Moreover, the need for finality is practical – even the most dedicated practitioners will not remain in states where their potential risk for providing care never ends. *Id*. at ¶7. They cannot assume that risk, for their own and their families' sakes. *Id*.

B. STATEMENT OF THE CASE

Amicus Planned Parenthood Great Northwest adopts the statement of the case as set out by Defendant United States and the Health Care Amici, Washington State Medical Association ("WSMA") and Washington State Hospital Association ("WSHA").

C. ISSUE OF CONCERN TO *AMICUS* PLANNED PARENTHOOD GREAT NORTHWEST

Planned Parenthood Great Northwest wants to be sure the Court is aware the statute of repose protects a recognized public interest and promotes the public welfare by showing the

practical and policy reasons why a statute of repose is important to maintain the availability of full and complete health services in Washington State. *Id*. at ¶8. This pertains especially to reproductive health services for women in light of the changed legal landscape after *Roe v. Wade* was overruled. *Id*. Many states, particularly Idaho, have made enormous efforts to ban abortion within their boundaries. *Id*. Idaho legislators have even sought to allow pursuit of practitioners in other states who treat Idaho citizens. *Id*. Amicus Planned Parenthood Great Northwest has already seen these measures and similar proposed measures by the Idaho legislature have a chilling effect on care given to Idahoans by Washington licensed physicians. *Id*.

D. DISCUSSION

Amicus Planned Parenthood Great Northwest joins in and adopts the legal arguments of the Health Care Amici, WSMA and WSHA, and adds the following legal summary relevant to its position.

1. The 8-year medical-negligence statute of repose is a policy choice of the Legislature which does not violate the privileges and immunities clause of Art. 1, sec. 12 of the Washington Constitution, nor the open courts clause in Art. 1, sec. 10, but instead allows for finality for claims, a longer period of finality than existed under the common law at statehood in 1889.

As noted in the Health Care Amici's brief, a statute of repose puts an "outer limit" on the right to bring a claim. *CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014); *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 149-150, 960 P.2d 919 (1998). That time limit is measured from the date of the defendant's last culpable act or omission— not from the date on which the claim accrues. *Id.*

Statutes of repose reflect a policy decision that a "defendant should be free from liability after the legislatively determined period of time" and is "an absolute bar on a defendant's temporal liability". *Waldburger*, 573 U.S. at 9, 8; *accord, Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 176 Wn.2d 502, 511, 296 P.3d 821 (2013). A statute of repose

terminates a claim after a specified time, even if the injury has not yet occurred. *Id.* *See Gevaart v. Metco Construction, Inc.*, 111 Wn.2d 499, 502, 760 P.2d 348 (1988) (a statute of repose limits the discovery rule and absolutely bars claims that have not accrued the specified time period).

No less than statutes of limitations, statutes of repose serve legitimate purposes: they guard against untrustworthy evidence and stale claims and prevent undue burdens on defendants. *1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp.*, 144 Wn.2d 570, 578, 29 P.3d 1249 (2001); *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991). *See Fowler v. Guerin*, 200 Wn.2d 110, 118-119, ¶13, 515 P.3d 502 (2022) (recognizing the salutary policies served by statutes of limitations, which are a legislative prerogative).

The Washington Legislature has enacted numerous statutes of repose in myriad contexts. *See, e.g.*, RCW 7.72.060 (products liability); RCW 19.105.400 (contracts under the Camping Resorts Act); RCW 4.16.310 (real property

improvements & construction defects); RCW 23B.14.340 (actions against a dissolved corporation); RCW 4.16.060 (irrigation district bonds); RCW 4.16.050 (irrigation or drainage district warrant).

The Court upheld the construction defect statute of repose against an equal protection challenge in *1519-1525 Lakeview Blvd Condo. Ass'n v. Apartment Sales Corp.,* 144 Wn.2d 570, 29 P.3d 1249 (2001). While side-stepping the open courts challenge, the Court specifically adopted the Oregon Supreme Court's position that the legislature is charged with "limiting the availability of causes of action by the use of statutes of limitation so long as it is done for the purpose of protecting a recognized public interest", and the Missouri Supreme Court's holding that its open courts provision does not require that "a plaintiff can always to court and obtain a judgment on the claim asserted."

Id.[1] This makes sense, because otherwise, not only would all statutes of repose have to fall under Plaintiff's theory, but statutes of limitations also would have to fall.

As the WSMA-WSHA amicus brief states:

> The legislature invoked the bases *DeYoung* held were proper…
>
> The Legislature's specific findings with respect to the re-enacted RCW 4.16.350(3) state:
>
> > Whether or not the statute of repose has the actual effect of reducing insurance costs, the legislature finds it will provide protection against

---

[1] We adopt the view of the Supreme Court of Oregon that "[**i]t has always been considered a proper function of legislatures to limit the availability of causes of action by the use of statutes of limitation so long as it is done for the purpose of protecting a recognized public interest**." *Josephs v. Burns*, 260 Or. 493, 503, 491 P.2d 203 (1971), *abrogated on other grounds by Smothers v. Gresham Transfer, Inc.*, 332 Or. 83, 23 P.3d 333 (2001). Similarly, the Supreme Court of Missouri has concluded that its open courts provision does not require "that a plaintiff can always go to court and obtain a judgment on the claim asserted." *Blaske*, 821 S.W.2d at 832. Because **we recognize that the legislature has broad police power to pass laws tending to promote the public welfare**, we decline at this time to determine whether article I, section 10 of the state constitution guarantees a right to a remedy.

1519-1525 Lakeview Blvd., 144 Wn.2d at 582 (emphasis added).

> 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***.

Laws 2006 c 8 § 301 (emphasis added).

Brief of Health Care Amici WSMA & WSHA at 7-8. These legislative findings of intent are wholly consistent with the principles stated in *Lakeview Blvd. Condo Ass'n,* and also are supported by the finality principles re-stated so recently in *Fowler, infra,* in the context of denying expansion of equitable tolling principles.

For purposes of this *amicus* submission, Planned Parenthood Great Northwest follows the principles recognized in the *Lakeview Blvd. Condo. Ass'n.* decision and explains the practical reasons why the legislature's 2006 policy decision

protects a recognized public interest and promotes the public welfare in light of the concerted efforts of the stakeholders, who agreed on the legislative package that included the generous the 8-year statute of repose.

2. The statute of repose, agreed to by all stakeholders, protects a recognized public interest and promotes the public welfare by ensuring finality for health care practitioners and thus continued availability of quality, professional health care, particularly in smaller women's health clinics.

The purpose of the 8-year statute of repose as part of the negotiated comprehensive health care liability legislation of 2006 was to ensure that all Washington citizens could obtain the full range of health care services while providing for finality of claims. It expressly balanced the interests of injured plaintiffs with the health care industry while ensuring the availability of health care services. The public testimony of the stakeholders, exemplified by the spokesperson for injured plaintiffs (Mr. Budlong of the state trial lawyers' group WSTLA, quoted in the WSMA-WSHA amicus brief) amply

shows the legislation was made with the intent of protecting the public interest and promoting the public welfare in a careful balance of interests, in the terms of the *Lakeview Blvd.* decision.

This is a policy decision the Legislature is entitled to make. If the Legislature is foreclosed from making that decision based on Plaintiff's constitutional theories, then it also is foreclosed from passing any statute of limitation. But, just last fall the Court reaffirmed the Legislature's right to adopt statutes of limitations which "reflect the importance of finality and settled expectations in our civil justice system." *Fowler v. Guerin*, 200 Wn.2d 110, 118 ¶13, 515 P.3d 502 (2022) (rejecting a loosening of the standards for equitable tolling of statutes of limitation). The Court recognized that finality rules are the province of the legislature.

As detailed in PPGNW's accompanying motion for permission to file this brief with supporting declarations, Kristine Smith, the Area Service Director for PPGNW, is responsible for abortion navigation for all six states PPGNW

serves, including Washington. *See* Smith Decl. She relates via the motion and declaration that this entails assisting patients to find abortion appointments and to overcome logistical hurdles to accessing care. *Id*. She further affirmed that what constitutes the standard of medical treatment is constantly changing, as detailed by Planned Parenthood Great Northwest's chief medical officer, Dr. Deborah Nucatola. *Id.*; *see also* Declaration of Dr. Deborah Nucatola ("Nucatola Decl.")

1. **Cervical cancer screening**. Per PPGNW's chief medical officer, the recommended age to start cervical cancer screening has changed from 18 to 21 to now 25. *See* Nucatola Decl. at ¶2. "The reason for this is that we know now that most cervical abnormalities are the result of infection with human papillomavirus, and infection that most young, healthy patients will clear with time. So why screen them and do a lot of diagnostic tests with potential risks when we know they will likely go away with time?" *Id*. If the Court removes the limits on the discovery rule from the statute of repose, does this now

mean that someone can sue for complications of a colposcopy that was performed as a result of an abnormal pap smear done before they were 25 but today would never have been indicated in the first place?

2. **STI testing and treatment**. Dr. Nucatola also relates that, when she was a resident if someone had trichomonas, "we told them they likely got it from having sex recently. We now know the organism can live latently in the body for years before being detected. So now we tell patients they could have gotten the infection at any time from their sexual debut onward." *Id*. at ¶3. How many divorces happened because a patient tested positive and was convinced that their spouse was having sex with someone else to acquire that infection? Can they still sue when the injury is diagnosed so long after the testing, when it was done under the standard of care at the time?

3. **Breast cancer screening.** Dr. Nucatola relates that, "as we gain knowledge in the field, we recommend that

some patients be screened earlier or differently than others because they are at higher risk. But before we knew this, everyone got the same screening recommendations." *Id*. at ¶4. This raises the question: Could someone not offered screening sooner because of identified risk factors now sue because they were just screened using standard guidelines of the past?

In short, the elimination of the statute of repose would hurt Planned Parenthood Great Northwest's ability to offer vital reproductive and sexual health services in Washington State. *Id*. at ¶6.

The Court should also consider the obstacles imposed on women to receiving necessary health care in other states, especially the border state of Idaho, which is impacting the need for continued availability of care in Washington. *See, e.g.,* Gabrielle Gurley, "Idaho's Abortion Fixation Decimates Rural Health Care", The American Prospect (2023), available at https://prospect.org/health/2023-04-06-idahos-abortion-fixation-rural-health-care/ (last visited 4/21/23);

https://idahocapitalsun.com/2023/02/10/i-came-to-provide-care-for-complicated-pregnancies-im-leaving-because-of-idahos-abortion-bans/ (last visited 4/21/23); https://www.seattletimes.com/nation-world/idaho-hospital-to-stop-delivering-babies-partly-due-to-political-climate/ (last visited 4/21/23); https://www.washingtonpost.com/health/2023/04/21/abortion-ban-states-obgyn-residency-applications/ (last visited 4/21/23). *See* Smith Decl. at ¶9.

The finality of the statute of repose matters for purposes of providing care now and in the future. Elimination of the statute of repose on medical negligence claims, and thus removal of the legislatively-determined limits on the discovery rule and ending the finality it provides for potential claims, makes it both more difficult for PPGNW and similarly oriented, small women's health clinics, to recruit qualified practitioners in this critically important area. *Id*. at ¶10. It will also make it difficult to retain those practitioners already engaged in

providing these necessary services. *Id*. As noted *supra*, the field of medicine is constantly changing so that recommendations available today for the best evidence-based care is often different from what it will be several years later.

Finally, the need for finality is practical. Even the most dedicated practitioners will not remain in states where their potential risk for their care never ends. *Id*. at ¶11. They cannot assume that risk, nor should they. *Id*. Indeed, PPGNW is not aware of any other category of worker or profession who has to assume such a risk. *Id*.

E. CONCLUSION

With respect, the Court should answer both of the District Court's questions "No". The medical negligence statute of repose does not violate the Washington Constitution. Instead, it reflects the policy choice of the legislature based on an agreed proposal of all interested stakeholders, policies that provide protections not just for medical practitioners and

facilities, but helps ensure underserved and marginalized patients can continue to receive professional care.

We certify that this document contains 2,774 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 11th day of May, 2023.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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