No. 101300-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

BETTE BENNETT
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA.
Defendant-Appellee.

DEFENDANT-APPELLEE'S ANSWERING BRIEF

NICHOLAS W. BROWN
United States Attorney

TEAL LUTHY MILLER
KRISTEN R. VOGEL
Assistant United States Attorneys
Office of the United States Attorney
Western District of Washington
700 Stewart Street, Suite 5220
Seattle, Washington 98108

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

State Statutes

Federal Statutes and Regulations

Other Authorities

INTRODUCTION

Petitioner Bette Bennett asks this Court to hold that she has a constitutional right to an unlimited discovery rule—that is, the rule that a cause of action for medical malpractice does not accrue until the plaintiff learns of the mechanism of her injury. This Court should decline that ahistorical request.

During the territorial period, at statehood, and for the 80 years that followed, a claim for personal injury accrued under Washington law at the date of the injury. In 1969, this Court departed from the injury-based accrual rule and adopted the discovery rule for the first time.

A decade later, the Washington legislature enacted a statute of repose for injuries resulting from healthcare or related services. That statute limited the discovery rule by setting an eight-year outer limit on the time that can pass before a plaintiff sues a healthcare provider for injuries resulting from her care.

In 1998, this Court concluded that the statute of repose violated the privileges and immunities clause of the Washington

Constitution because the legislative record showed that the statute would not promote the legislative purpose of reducing the cost of medical-malpractice insurance. After holding that the statute was not rationally related to that purpose, the Court briefly considered whether the statute might be justified by the separate purpose of eliminating stale claims. While it held that the purpose of limiting stale claims was "legitimate," it found that the statute did not adequately serve that purpose, either, because the legislative record before the Court at that time showed that the number of stale claims was small.

In response, the Washington legislature took up this Court's invitation to consider the purpose of eliminating stale claims. The legislature found that the statute would "provide protection against claims, however few, that are stale, based on untrustworthy evidence, or that place undue burdens on defendants." The legislature also found 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."

Dismissing those findings as "legislative handwaving" (Br. 26), Bennett argues that this Court should declare that the new statute violates the privileges and immunities clause because it is just like the old one. She is mistaken. First, intervening decisions by this Court have changed the analysis that applies to privileges-and-immunities-clause claims, and a key new rule means that Bennett's argument must fail. Under that new rule, a statute does not implicate the Washington-specific protections of the privileges and immunities clause unless the statute intrudes on a fundamental right of states citizenship. And the Court's analysis of how to identify and frame fundamental rights makes clear that this statute does not: the right to pursue common-law causes of action in court is fundamental, but the modern discovery rule is not a component of that right. The modern discovery rule is thus not "fundamental" in the relevant sense. And the legislature's findings provide a rational basis for the

statute of repose, which is all that is required when the right at issue is not fundamental.

Second, even if the discovery rule is a component of the fundamental right to pursue common-law claims in court, this Court should still conclude that the statute of repose does not violate the privileges and immunities clause. The legislature's findings do not just satisfy the rational-basis test, they provide new, reasonable grounds for the statute of repose. The legislature's findings make clear that it balanced the individual interest in the discovery rule and the public interest in repose—an interest that recognizes that the passage of time invariably diminishes memory and the availability and quality of other evidence. Striking a balance between these interests by setting an outer limit on the discovery rule is a classically legislative function, and the repose provision effects the legislative purpose by barring claims brought more than eight years after an injury.

Bennett's contention that the statute of repose violates the open-courts provision of the Washington Constitution is

similarly unpersuasive. Whether the open-courts provision guarantees a right to a remedy is uncertain. But even if it does, the discovery rule is not a component of the common-law right to sue for personal injuries, so the statute of repose does not deny the right to sue and instead reflects an appropriate exercise of the legislature's power to set limits on legal remedies.

CERTIFIED QUESTIONS

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

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

STATEMENT OF THE CASE

I. Statutory background

A. Washington's statute of repose for medical-malpractice actions

In Washington, tort claims against healthcare providers are subject to both a statute of limitations and a statute of repose, both of which appear in RCW 4.16.350(3).

Under the statute of limitations, claims alleging healthcare injury "shall be commenced within three years of the act or omission alleged to have caused the injury or condition, or one year of the time the patient or his or her representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later." RCW 4.16.350(3).

The statute of repose establishes an outer limit on liability that applies without regard to the date on which the plaintiff discovers the cause of her injury. It provides that "in no event shall an action be commenced more than eight years after [the challenged] act or omission." RCW 4.16.350(3). The repose provision includes an exception for fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic or diagnostic purpose or effect. *Id*. And it is subject to tolling during minority. *See Schroeder* v. *Weighall*, 179 Wn.2d 566, 579, 316 P.3d 482 (2014) (invalidating a statute

that eliminated tolling during minority for medical-malpractice claims).

In 1998, this Court held that an earlier version of the statute of repose for medical-malpractice claims violated the Washington Constitution because the legislative record did not show that the statute was rationally related to the legislative purpose of avoiding a medical-malpractice insurance crisis. *DeYoung* v. *Providence Med. Ctr.*, 136 Wn.2d 136, 147–149, 960 P.2d 919 (1998).

In 2006, the Washington legislature made new statutory findings and reenacted the statute of repose. *See* Laws of 2006, Ch. 8, § 301 (codified at RCW 4.16.350 (note)); *Unruh* v. *Cacchiotti*, 172 Wn.2d 98, 115–118, 118 n.15, 257 P.3d 631 (2011). In so doing, the legislature identified a statutory purpose that the *DeYoung* Court considered only in passing. The legislature found that "[w]hether 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." RCW 4.16.350 (note). Quoting *DeYoung*, it emphasized 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." *Id*. And it further found 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." *Id*.

B. The Federal Tort Claims Act

The Federal Tort Claims Act waives the sovereign immunity of the United States for claims for money damages "for injury or loss of property, or personal injury or death" caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment. 28 U.S.C. § 1346(b)(1); *see also* § 2680 (setting out exceptions to the waiver of immunity for certain torts).

To sue under the FTCA, a plaintiff must present her claim for damages in writing to the appropriate Federal agency within

two years after the claim accrues. 28 U.S.C. § 2401(b). If the agency denies her claim, a plaintiff has six months to file suit. *Id*.

While the FTCA includes these federal statutory time limits for presenting an administrative claim and bringing suit, liability under the Act is otherwise governed by the law of the state where the act or omission occurred. 28 U.S.C. § 1346(b)(1). The United States is liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674.

II. Bennett sues in 2019 based on an allegation that she was injured a decade earlier

In 2009, Bette Bennett had sinus surgery at Naval Hospital Bremerton. CP 11. After the surgery, she had significant bleeding from her nose and returned to the emergency room. CP 11. The on-call ear, nose, and throat doctor removed splints that Bennett's surgeon had placed in her nose and inserted "nasal packing." CP 11. Bennett claims that she "heard a noise that sounded like cracking, felt acute pain, and passed out." CP 11. She was hospitalized and had a second nasal surgery. CP 11.

Bennett alleges that in the years that followed the nasal-pack insertion, she had migraines, malaise, memory loss, and other neurocognitive impairments. CP 12. She saw several specialists to treat her symptoms. CP 12. In 2017, she saw a neuropsychologist, who concluded that she had a traumatic brain injury that was caused by the nasal-pack insertion. CP 12.

In 2018—nine years after the nasal-pack insertion—Bennett filed an administrative claim with the Navy. *See* 28 U.S.C. § 2675(a); CP 15. Her administrative claim sought damages for treatment "falling below the standard of care, including but not limited to negligently inserting nasal pack and failing to diagnose and treat brain injury." CP 15. Although she admits that she "heard a noise that sounded like cracking, felt acute pain, and passed out" when the nasal packing was inserted (CP 11), she asserted that her claim did not accrue until she was diagnosed with a brain injury in 2017; in the space on the administrative claim form for the "date of accident," Bennett wrote: "DOI: 5/29/09, Accrual Date: 14 Aug 2017." CP 15.

The Navy's regulations on administrative claims for personal injury require claimants to provide a report by a physician on the injury, the treatment sought, the prognosis, any period of disability, and lost earning capacity. 32 C.F.R. § 750.27(a)(2)(i). Bennett did not attach a physician report to her administrative claim. CP 15.

Although Bennett's claim failed to satisfy this requirement, the Navy investigated it. CP 17. After investigating, the Navy denied Bennett's claim, concluding that "the applicable standard of care was met by each of [Bennett's] Navy health care providers." CP 17. Bennett then sued the United States, asserting that her claim for injury accrued when she was diagnosed with a traumatic brain injury in August 2017. CP 12.

III. The United States asserts that Bennett's action is barred by Washington's statute of repose for medical-malpractice claims

The United States moved to dismiss Bennett's FTCA action as barred by Washington's statute of repose for claims arising out of healthcare injuries. CP 19. The motion to dismiss

explained that because the last act or omission that Bennett challenged took place in 2009, RCW 4.16.350's eight-year repose period ended in 2017, before she presented her administrative claim to the Navy. [1] CP 28.

In response, Bennett argued that the FTCA's statute of limitations preempted the repose provision in RCW 4.16.350 and that the repose provision violated the privileges and immunities clause and the open-courts provision of the Washington Constitution. CP 33, 39.

The district court for the Western District of Washington certified to this Court both questions of Washington law raised

---

[1] Bennett's allegation that her claim accrued in 2017 has been accepted as true for the purpose of litigating the motion to dismiss on statute-of-repose grounds. But the United States' answer to Bennett's complaint asserted the FTCA's statute of limitations as a defense (CP 105), and the United States has not conceded that Bennett's claim did not accrue until 2017. Under the FTCA's statute of limitations, a medical-malpractice claim accrues when the plaintiff knows both the existence and the cause of her injury, and not at a later time when she also knows that the act inflicting the injury may constitute medical malpractice. *See Kubrick* v. *United States*, 444 U.S. 111, 119–22 (1979).

by Bennett's response. CP 6 (docket entry 26). This Court declined to answer the certified questions, noting that Bennett had also argued that the FTCA preempts the statute of repose and that "[i]t does not appear from the record provided that the district court has ruled on the preemption question." CP 114.

The district court then took up the United States' motion to dismiss again. This time, it held that the FTCA's statute of limitations preempted Washington's statute of repose. CP 89.

On interlocutory appeal, the United States Court of Appeals for the Ninth Circuit reversed. *Bennett* v. *United States*, 44 F.4th 929, 933 (9th Cir. 2022). It first explained that a statute of limitations is distinct from a statute of repose: "a statute of limitation ordinarily creates a time limit for suing in a civil case, based on the date when the claim accrued" while a statute of repose "'puts an outer limit on the right to bring a civil action" based on "the date of the last culpable act or omission of the defendant.'" *Id.* at 935 (quoting *CTS Corp.* v. *Waldburger*, 573 U.S. 1, 8 (2014)).

In light of that distinction, the Ninth Circuit held that Washington's repose provision does not conflict with the FTCA's statute of limitations. *Bennett*, 44 F.4th at 936. It explained that once the repose period ended in February 2017, Bennett "'literally ha[d] *no* cause of action'" under Washington law. *Id.* (quoting *CTS Corp*., 573 U.S. at 16) (emphasis in original)). Because the United States is liable under the FTCA in the same manner as a private person under state law and the repose provision would bar Bennett's claim against a private person, the Ninth Circuit held that the repose provision would bar Bennett's suit, assuming the provision survived Bennett's constitutional challenge. *Bennett*, 44 F.4th at 936.

On remand, the district court certified to this Court the same two questions on the constitutionality of RCW 4.16.350. This Court accepted certification in September 2022.

SUMMARY OF ARGUMENT

A law is subject to review for "reasonable grounds" under Washington's privileges and immunities clause only if it infringes on a fundamental right of state citizenship. Framed correctly, the right that Bennett is claiming is not fundamental in that sense.

Bennet claims a right to sue for personal injury tied to the date on which she *discovered* her injury rather than the date on which her injury occurred nine years earlier, and she claims that no time limit may be applied to the discovery-based accrual rule she favors. But that argument ignores the history of rights of repose and rules governing the accrual of personal-injury claims.

Common-law claims for personal injury were subject to limitations periods that functioned like present-day statutes of repose, not present-day statutes of limitations. From Washington's founding period and through the first half of the twentieth century, the right to sue for personal injury was understood to accrue on the date of the injury, not the date of

discovery. In other words, it is the discovery rule, not the statute of repose, that altered the common-law right to pursue personal-injury claims. The discovery rule postdates by more than half a century the adoption of the privileges and immunities clause, and it is thus not a component of the fundamental right to pursue common-law claims in court.

Because there is no fundamental right to an unlimited discovery rule, the federal rational-basis standard applies to Bennett's challenge, not heightened "reasonable grounds" review. The statute of repose satisfies rational-basis review. The legislature's findings make clear that it struck a careful balance between the benefits of the discovery rule and its most extreme effects. The statute of repose provides plaintiffs with a significant period to discover the cause of a healthcare injury while putting an outer limit on that period because of the special difficulties associated with defending stale claims and the public interest in repose.

Even if Bennett is correct that Washington's medical-malpractice statute of repose infringes a fundamental right, her challenge should still fail. The legislative findings do not just reflect a rational basis for the statute of repose, they reflect that the statute is supported by reasonable grounds. Echoing the *DeYoung* Court, the legislature found 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." RCW 4.16.350 (note). Compelling defendants to answer stale claims is a substantial wrong because memories fade, records are lost, employees quit, retire, or die, and institutions close. Medicine's constantly evolving standards of care mean that defending stale medical-malpractice claims poses special challenges. And courts have recognized for centuries that the state has an interest in rules of repose, which encourage plaintiffs to diligently pursue their rights and avoid requiring courts to hear disputes based on old or incomplete evidence.

Also, the legislature did not *eliminate* the discovery rule; it *tempered* the most extreme effects of that rule by putting an outer limit on it, subject to exceptions that were well established at common law. In so doing, it reasonably balanced "the interests of injured plaintiffs and the health care industry." *Id*.

Finally, the statute of repose does not deny Bennett any right to a remedy she may have under the Constitution's open-courts provision. The statute of repose does not deny her the right to sue for personal injury. It just requires her to sue within eight years of her injury. Because the discovery rule is a modern, extensive departure from the common-law rule and because the remedy for medical malpractice has been subject to rights of repose since the remedy's inception, time limits on the discovery rule do not violate the open-courts provision.

STANDARD OF REVIEW

This Court reviews do novo a claim that a statute violates the state constitution. *Ass'n of Wash. Spirits & Wine Distribs.* v. *Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 350, 340 P.3d 849 (2015). It "presume[s] that statutes are constitutional and place[s] the burden to show unconstitutionality" on the challenger. *Id.* (internal quotation marks and citation omitted).

ARGUMENT

I. The statute of repose does not violate the privileges and immunities clause

Washington's eight-year statute of repose for medical-malpractice actions does not violate the privileges and immunities clause of the Washington Constitution, art. I, § 12. The statute of repose does not grant a privilege or immunity; it deprives no one of a fundamental right, and it serves the rational purpose of putting an outer limit on the modern discovery rule for medical-malpractice claims. And even if the repose provision does grant a privilege or immunity, the legislature's express adoption of the purpose of barring stale medical-malpractice

claims "however few" provides reasonable grounds for the statute.

A. The statute of repose is not a privilege or immunity

This Court's recent decisions construing the privileges and immunities clause require careful framing and analysis of the right allegedly at issue. Bennett has missed or misapplied that key first step. Framed correctly, her claim is that the statute of repose violates a supposed fundamental right to an unlimited discovery rule—that is, the modern rule that a claim does not accrue until the plaintiff discovers that her injury was caused by medical negligence—as a component of the right to pursue common-law claims in court. Her claimed right to the discovery rule unlimited by time lacks support in the history of tort law, which has recognized rules of repose for centuries.

1. *Grant County II* caused a sea change in this Court's understanding of the privileges and immunities clause

The privileges and immunities clause 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." Wash. Const., art. I, § 12.

For the second half of the twentieth century, this Court treated that clause as "substantially similar to the federal equal protection clause," while recognizing the possibility that it required a separate analysis. *Grant Cnty. Fire Protection Dist. No. 5* v. *City of Moses Lake*, 150 Wn.2d 791, 805, 83 P.3d 419 (2004) (*Grant County II*). In doing so, it sometimes applied a form of rational-basis review that seemed more demanding than the federal rational-basis standard. *Compare*, *e.g.*, *Cotten* v. *Wilson*, 27 Wn.2d 314, 320 178 P.2d 287 (1947) (law that

applied a "gross negligence" standard to certain public carriers transporting defense workers to and from defense plants during WWII was not rationally related to the goal of alleviating a shortage of defense-worker transportation), *and FCC* v. *Beach Communications, Inc.,* 508 U.S. 307, 315 (1993) (rational-basis review allows the government to justify a law with "rational speculation unsupported by evidence or empirical data").

But no more. In 2004, this Court adopted a new approach to the privileges and immunities clause in *Grant County II,* 150 Wn.2d at 811. *See also Grant Cnty. Fire Protection Dist. No. 5* v. *City of Moses Lake*, 145 Wn.2d 702, 42 P.3d 394 (2002) (vacated in part on rehearing by *Grant County II).* The *Grant County* cases established that the privileges and immunities clause "can in certain circumstances support an analysis independent of that of the Fourteenth Amendment." *Ockletree* v. *Franciscan Health Sys.*, 179 Wn.2d 769, 776, 317 P.3d 1008

(2014). Washington-specific analysis applies when the law under review infringes a fundamental right of state citizenship. *Id*.

The *Grant County II* Court applied the factors first set out in *State* v. *Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986), to the privileges and immunities clause and concluded that the clause "requires an independent constitutional analysis from the equal protection clause of the United States Constitution." *Grant County II*, 150 Wn.2d at 811. Among the *Gunwall* factors this Court found significant were the history of the privileges and immunities clause, which reflects that the framer were concerned with preventing economic favoritism. *Id*. at 808–810; *see also Ockletree*, 179 Wn.2d at 775 ("the purpose of article I, section 12 is to limit the sort of favoritism that ran rampant during the territorial period").[2]

---

[2] During early statehood, this Court repeatedly struck down as violating the privileges and immunities clause legislation that exhibited economic favoritism toward a particular group within an industry. Michael Bindas et al., *The Washington Supreme Court and the State Constitution: A 2010*
(continued . . .)

Under the independent analysis that this Court set out in *Grant County II* and has refined in the years since, the Court evaluates a claim that a law violates the privileges and immunities clause in two steps.

First, the Court asks whether the law "confer[s] a privilege to a class of citizens." *Grant County II*, 150 Wn.2d at 812.

Second, if it does confer a privilege, the Court asks whether the challenger has shown that the legislature lacked "reasonable grounds" for enacting it. *Martinez-Cuevas* v. *DeRuyter Bros. Dairy, Inc.*, 196 Wn.2d 506, 519, 475 P.3d 164 (2020). When no privilege is at issue, the independent state analysis of the privileges and immunities claims does not apply,

---

Assessment, 46 Gonz. L. Rev. 1, 25 (2011) (citing, among others, decisions striking down laws that prohibited the peddling of fruit and vegetables except for farmers peddling their own produce; required a license for cigar sales by vending machines but not cigar sales by merchants; required a solicitation license for paid charity fundraisers but exempted a particular community fund; and forced non-resident, but not resident, photographers to obtain a license to conduct business in a city).

and the provision is reviewed for a rational basis. *Vetenbergs* v. *City of Seattle*, 163 Wn.2d 92, 104, 178 P.3d 960 (2008).

Bennett's claim cannot survive *Grant County II*'s first step.

> 2. Under step one of *Grant County II*, only rights that were recognized as fundamental to state citizenship when the constitution was adopted are fundamental

The first step in the analytical framework of *Grant County II* has real teeth: "not every statute authorizing a particular class to do or obtain something involves a 'privilege' subject to article 1, section 12." *Grant County II*, 150 Wn.2d at 812. And a "privilege is not necessarily created every time a statute allows a particular group to do something." *Am. Legion Post No. 149* v. *Wash. State Dep't of Health*, 164 Wn.2d 570, 606–07, 192 P.3d 306 (2008).

Instead, the phrase *privileges and immunities* "'pertain[s] alone to those fundamental rights which belong to the citizens of

the state by reason of such citizenship'"—the right "'to acquire and hold property, and to protect and defend the same in the law; the rights to the usual remedies to collect debts, and to enforce other personal rights; and the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from.'" *Grant County II*, 150 Wn.2d at 813 (quoting *State* v. *Vance*, 29 Wash. 435, 458, 70 P. 34 (1902)).

A law violates the privileges and immunities clause "'only where specific restrictions upon the power of the legislature can be pointed out, and the case shown to come within them.'" *Ockletree*, 179 Wn.2d at 778 (quoting *Vance*, 29 Wash. at 459). A "'general theory that the statute conflicts with a spirit supposed to pervade the constitution, but not expressed in words'" does not suffice. *Id*. (quoting *Vance*, 29 Wash. at 459). And as a general matter, "rights left to the discretion of the legislature have not been considered fundamental." *Martinez-Cuevas*, 196 Wn.2d at 519.

Since *Grant County II* announced this new test, this Court has rejected claims that a law infringed a fundamental right in at least seven cases.

- In *Grant County II* itself, the Court held that statutory authorization to commence annexation proceedings by petition does not involve a fundamental right. 150 Wn.2d at 813. Because the power of annexation is "entirely that of the legislature," citizens have no right either to seek or prevent annexation. *Id*. at 814.

- In *Vetenbergs* v. *City of Seattle*, 163 Wn.2d 92, 178 P.3d 960 (2008), this Court rejected the petitioners' argument that the city of Seattle's grant of an exclusive contract to two waste disposal businesses violated the petitioners' fundamental right to "hold specific private employment." *Id*. at 103.

- In *Am. Legion Post No. 149,* 164 Wn.2d at 607, this Court rejected the petitioners' challenge to a law that prohibited smoking in most places of employment: "[s]moking inside a place of employment is not a fundamental right of citizenship, and, therefore, is not a privilege." *Id*. at 608.

- In *Madison* v. *State*, 161 Wn.2d 85, 96, 163 P.3d 757 (2007), this Court concluded that while the right to vote is fundamental, it is protected by the privileges and immunities clause "only in relation to individuals who currently possess the

fundamental right to vote," which does not include felons.

- In *Andersen* v. *King Cnty.*, 158 Wn.2d 1, 30, 138 P.3d 963 (2006), *abrogated by Obergefell* v. *Hodges*, 576 U.S. 644 (2015), this Court held that the fundamental right to marry did not include the right to same-sex marriage.

- In *Ockletree*, this Court rejected the argument that "the right to work free from discrimination is a privilege of citizenship." 179 Wn.2d at 777 (internal quotation marks omitted). The right to protection from discrimination in employment is "an important right, but not a fundamental one" because it was created by the legislature and thus is "not a privilege in the state constitutional sense." *Id*. at 781. So too, the religious exemption to the law against employment discrimination does not violate the right to "carry on business" within the state because it does not "offend the anticompetitive concerns underlying" the privileges and immunities clause. *Id*. at 781–82.

- In *Ass'n of Wash. Spirits and Wine Distributors* v. *Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 340 P.3d 849 (2015), this Court rejected the argument that the liquor board's distribution licensing fee structure implicated petitioners' fundamental right to "carry on business." *Id*. at 360.

In contrast, only three privileges and immunities clause claims have survived this Court's application of the first step of the *Grant County II* analysis.

First, in *Schroeder* v. *Weighall*, 179 Wn.2d 566, 573, 579, 316 P.3d 482 (2014), this Court held that a law eliminating tolling during minority for medical-malpractice claims implicated the fundamental right to pursue a common-law cause of action in court.

Second, in *Martinez-Cuevas,* 196 Wn.2d at 520, 522, this Court held that a law exempting agricultural workers from overtime pay implicated the fundamental right "of Washington workers to health and safety protection" found in article II, section 35 of the Constitution.

And third, in *Woods* v. *Seattle's Union Gospel Mission*, 197 Wn.2d 231, 244, 481 P.3d 1060 (2021), this Court held that the right to marry whomever one chooses and the right to sexual orientation were both fundamental.

Taken together, these post-*Grant County II* cases show that analyzing a petitioner's claim that a law infringes a fundamental right requires careful framing of that right and close review of its constitutional footing.

a. The right that Bennett claims here is a right to an unlimited discovery rule

Correctly framed, the right that Bennett is asserting is the specific right to the discovery rule unlimited by time, not the more general right to pursue common-law causes of action.

Bennett's argument—that the statute of repose interferes with her fundamental right "to pursue a common law cause of action" (Br. 17)—frames the right at issue too broadly. The legislature has not eliminated the right to pursue a common-law cause of action. It has *limited* the right to pursue a common-law cause of action by placing an outer limit on the right to sue that is tied to the date of injury instead of the date of discovery. In other words, it has placed an outer limit on the modern discovery rule.

In considering the contention that a right is fundamental under *Grant County II*, this Court has repeatedly confronted similar efforts by petitioners to frame the right at issue broadly to try to show that a fundamental right was at issue. In *Vetenbergs*, for example, the petitioners claimed that the law they challenged interfered with the right to hold private employment, but this Court observed that petitioners had "misframe[d] the issue"; rather than a right to hold "specific private employment," the petitioners sought the "right to provide [solid waste collection] service." 163 Wn.2d at 103. In *Am. Legion Post No. 149*, the petitioners argued that a law regulating smoking in places of employment interfered with the right to "'remove to and carry on business therein'" identified as fundamental in *Vance.* 164 Wn.2d at 607 (quoting *Vance*, 29 Wash. at 458). This Court again rejected that framing, explaining that the law did not "prevent any entity from engaging in business." 164 Wn.2d at 325–326. And in *Ass'n of Wash. Spirits,* 182 Wn.2d at 361–62, the petitioners argued similarly that a

liquor distribution licensing scheme interfered with the right to "carry on business," but this Court rejected that framing as "overbroad," explaining that "we have rejected arguments that the right to carry on business is infringed by regulations that infringe only on narrower privileges."

Like the petitioners' framing in those cases, Bennett's framing of the right at issue as the right to pursue a common-law case of action is "overbroad." *Ass'n of Wash. Spirits*, 182 Wn. 2d at 362. Correctly framed, the right she asserts is an unlimited right to pursue common law causes of action tied to the date on which she discovered her injury. But Bennett has not shown and cannot show that she has a fundamental right to an unlimited discovery rule.

b. The common-law right to sue for personal injury did not include the discovery rule

Rules limiting the time for bringing a legal claim have existed in the common law since well before Washington's founding period. *See* W. Blackstone, 3 Commentaries on the

Laws of England 307 (1769) (describing limitations on various common law causes of action); *Developments in the Law: Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1178 (1950) [hereinafter *Statutes of Limitations*] (describing common-law rules of repose tied to fixed historical events (in real property) or the death of the plaintiff (for personal actions)); *Wood* v. *Carpenter,* 101 U.S. 135, 139 (1879) ("Statutes of limitations . . . are found and approved in all systems of enlightened jurisprudence."); *McElmoyle, for Use of Bailey* v. *Cohen*, 38 U.S. 312, 327 (1839) ("the common law raises the presumption of the payment of a judgment after the lapse of twenty years"). The interest in repose is not just private; English courts of equity applied the Latin maxim "*interest republicae ut sit finis litium*" ("it concerns the state that there be an end of lawsuits") in "many" cases. Gail L. Heriot, *A Study in the Choice of Form: Statutes of Limitation and the Doctrine of Laches*, 1992 B.Y.U. L. Rev. 917, 927 (1992) [hereinafter *Study in the Choice of Forms*].

The Limitation Act of 1623, *An Act for Limitation of Actions, and for Avoiding of Suits in Law*, 1623, 21 Jam., ch. 16 (Eng.), "mark[ed] the beginning of the modern law of limitations on personal actions in the common law." *Statutes of Limitations*, 63 Harv. L. Rev. at 1178; *see also* Harry B. Littell, *A Comparison of the Statutes of Limitation*, 21 Ind. L.J. 23, 23 (1945) (noting that from the Limitation Act of 1623 to modern times, limitation periods have existed in England and the United States). The Act provided specific periods of time for bringing many causes of action, including six years for an action on the case. *Study in the Choice of Forms*, 1992 B.Y.U. L. Rev. at 926.

The Limitations Act "was adopted in most of the American colonies before the Revolution, and has since been the foundation of nearly all of the like legislation in this country." *Wood*, 101 U.S. at 139; *see also* Thomas E. Atkinson, *Some Procedural Aspects of the Statute of Limitations*, 27 Colum. L. Rev. 157, 157–76 (1927) (observing that most American statutes

of limitations were patterned after the Limitation Act); *Study in the Choice of Forms*, 1992 B.Y.U. L. Rev. at 925.

These early limits on common-law rights to sue were tied to the date of injury, not the date on which the plaintiff discovered the mechanism of injury. *See* 3 Blackstone 307 (tying limitations period to when the "offence [was] committed" or the "injury was committed"). The Limitation Act "explicitly tolled [its] limitation periods for infancy, insanity, imprisonment, coverture, and absence from the realm, *but was silent concerning ignorance*." *Study in the Choice of Forms*, 1992 B.Y.U. L. Rev. at 925 (emphasis added); *see also* Restatement (First) of Torts § 899 (1939) ("A battery or a cause of action for negligently harming a person or a thing is complete upon physical contact even though there is no observable damage at the time of contact."). "Under the early interpretation of the English statutes of limitations, knowledge by the injured person of the existence of the tort was immaterial." Restatement (Second) of Torts § 899 (1979).

Personal-injury claims in Washington followed the same pattern. The right to sue for personal injury in Washington was limited by principles of repose at the right's inception. *See* Code of 1881, § 28 (providing that an action for an "injury to the person" must be "commenced" within three years); *Morgan* v. *Morgan*, 10 Wash. 99, 104, 38 P. 1054 (1894) (quoting *Wood* for the proposition that statutes of limitations "are vital to the welfare of society, and are favored in the law. They are found and approved in all systems of enlightened jurisprudence").

The Washington common-law right to sue for personal injury also ran from the date of injury, not the date of discovery. In 1914, for example, this Court observed that "like any other action founded upon a breach of duty imposed either by law or contract, the action arises out of the breach, and the statute of limitations begins to run from the time of the breach and not from the time of its discovery." *Cornell* v. *Edsen*, 78 Wash. 662, 665, 139 P. 602 (1914), *abrogated by statute as reflected in Peters* v. *Simmons*, 87 Wn.2d 400, 552 P.2d 1053 (1976); *see also McCoy*

v. *Stevens*, 182 Wash. 55, 58, 44 P.2d 797 (1935) (applying date-of-injury accrual rule to claim for medical malpractice), *abrogated by Samuelson* v. *Freeman*, 75 Wn.2d 894, 454 P.2d 406 (1969).

Through the end of the 1960s, this rule in malpractice cases was "that the cause of action accrues at the time of the wrongful act that caused the injury." *Lindquist* v. *Mullen*, 45 Wn.2d 675, 676, 277 P.2d 724 (1954), *overruled by Ruth* v. *Dight*, 75 Wn.2d 660, 453 P.2d 631 (1969).

Not until 1969 did this Court alter the date-of-injury accrual rule. *Ruth*, 75 Wn.2d at 667; *see also DeYoung*, 136 Wn.2d at 143 (discussing development of discovery rule in Washington law). In *Ruth*, this Court adopted the discovery rule for the first time, holding that the statutory period for bringing a claim did not begin to run on a claim that a surgeon left a sponge in a patient until the patient discovered, or in the exercise of reasonable care should have discovered, the mistake. 75 Wn.2d at 667–68. Washington courts subsequently extended the

discovery rule to other medical-malpractice actions. *Janisch* v. *Mullins*, 1 Wn. App. 393, 461 P.2d 895, 899 (1969), *dismissed,* 78 Wn.2d 997 (1970); s*ee also* Restatement (Second) of Torts § 899, comment e (1979) (describing "a wave of recent decisions . . . holding that the statute [of limitations] must be construed as not intended to start to run until the plaintiff has in fact discovered the fact that he has suffered injury or by the exercise of reasonable diligence should have discovered it"). In Washington as elsewhere, the discovery rule was an "extensive departure from the earlier rule." *Id*.; *see also Gunnier* v. *Yakima Heart Center*, 134 Wn.2d 854, 860, 953 P.2d 1162 (1998) (the evolution of the discovery rule in Washington shows that the "Legislature intended to depart from common law notions of accrual").

Nothing in this Court's decisions adopting the discovery rule suggests that the discovery rule is a component of the common-law right to sue for personal injuries. *Ruth* contains no suggestion that the discovery rule was a component of the

common-law right to pursue personal-injury claims; instead, the *Ruth* Court recognized that limits on rules of accrual are an appropriate area of legislative action. 75 Wn.2d at 666 ("We do not doubt that the legislature possesses the constitutional power to strike the balance one way or the other and by establishing a clear line of demarcation to fix a time certain beyond which no remedy will be available."). And as shown, the suggestion that the discovery rule was a component of the common-law cause of action for personal injuries would be ahistorical—from the start, the common-law cause of action was subject to rules of repose that began to run on the date of injury. As this Court recognized in *DeYoung*, 136 Wn.2d at 143, the common-law rule was that "a cause of action could accrue and the statute of limitations expire without a patient knowing of injury."

Early statutes of limitations functioned more like modern statutes of repose than modern statutes of limitations. *Cf. Wash. State Major League Baseball Stadium Pub. Facilities Dist.* v. *Huber, Hunt & Nichols-Kiewit Const. Co.*, 176 Wn.2d 502, 510–

511, 296 P.3d 821 (2013) (describing difference between modern statutes of repose and statutes of limitations). The early statutes of limitations were substantive limits on the core-common law right. And the early statutes of limitations did not just limit the core common-law right to sue to a specific time period, they tied accrual to the date of injury. For both reasons, these early limits on the right to sue were akin to a substantive rule of repose under present-day understanding. Indeed, modern "substantive" statutes of repose are a reaction to the discovery rule that reimpose principles of repose that are themselves founded in the common law.

In accordance with these principles, several state supreme courts have held that the common-law right to sue for personal injuries does not include a right to an unlimited discovery rule. In *Hill* v. *Fitzgerald,* 304 Md. 689, 700–05, 501 A.2d 27 (1985), for example, the Maryland Supreme Court concluded that because the right to sue for medical malpractice in Maryland ran from the date of injury and was subject to a statute of limitations

when the right was created, a statute of repose did not violate Maryland's right to a remedy. *See also Mega* v. *Holy Cross Hosp.*, 111 Ill. 2d 416, 423, 490 N.E.2d 665 (1986) (concluding that the discovery rule is not guaranteed by the state constitution's right to sue); *Landgraff* v. *Wagner*, 26 Ariz. App. 49, 54, 546 P.2d 26 (1976) (same). This Court should follow these decisions.

At bottom, Bennett's claim is like the petitioner's claim in *Ockletree*. In *Ockletree*, this Court explained that the right to work free from discrimination is "an important right, but not a fundamental one" because it was created by the legislature and thus is "not a privilege in the state constitutional sense." 179 Wn.2d. at 781. By analogy, the right to the discovery rule might be "important," but it arose out of this Court's interpretation of a statute and represents an extensive departure from the common law, so it is not a privilege in the state constitutional sense.

As the discovery rule postdates by more than half a century the adoption of the privileges and immunities clause, Washington's statute of repose cannot be understood to infringe the fundamental right to sue on the ground that it limits the discovery rule. Concluding that the right that Bennett claims is fundamental would thus diverge from *Grant County II* and stare decisis principles. *State* v. *Barber*, 170 Wn.2d 854, 863, 248 P.3d 494 (2011) (this Court "endeavor[s] to honor the principle of stare decisis.").

c. *Schroeder* does not show that the common-law right to pursue a cause of action includes an unlimited discovery rule

In *DeYoung*, this Court concluded that a predecessor version of the statute of repose at issue was invalid under the privileges and immunities clause. 136 Wn.2d at 150. But *DeYoung* predated *Grant County II*, and the *DeYoung* Court recognized that the common-law right to sue for personal injuries did not include the discovery rule. 136 Wn.2d at 143 ("Preexisting state law indicates that there is no bar to absolutely

foreclosing a cause of action where one has been injured by medical malpractice."). So *DeYoung* does not show that medical-malpractice plaintiffs have a fundamental right to the discovery rule. Bennett implicitly recognizes this; she bases her argument that she has a fundamental right to the discovery rule on *Schroeder*, not on *DeYoung*. Br. 17–18. But contrary to Bennett's argument, the conclusion that the discovery rule is not a component of the fundamental right to sue is consistent with *Schroeder*.

As Bennett notes, this Court stated in *Schroeder* that the right to pursue common-law causes of action in court is fundamental. 179 Wn.2d at 572–74. But *Schroeder* did not consider or hold that the right to pursue common-law actions in court includes a right to an unlimited discovery rule.

The specific right at issue in *Schroeder* was the right to tolling of a statute of limitations during minority. 179 Wn.2d at 573. And unlike the discovery rule, exceptions to tolling for minority *were* part of the common-law cause of action for

personal injuries. *See* Code of 1881, § 37 ("If a person entitled to bring an action mentioned in this chapter . . . be at the time the cause of action accrued either under the age of twenty-one years, or insane . . . the time of such disability shall not be part of the time limited for the commencement of action."); *Study in the Choice of Forms*, 1992 B.Y.U. L. Rev. at 925 (explaining that the Limitation Act of 1623 "explicitly tolled [its] limitation periods for infancy, insanity, imprisonment, coverture, and absence from the realm, but was silent concerning ignorance.").

That difference in the historical pedigree of the right to tolling and the discovery rule means that the conclusion that the former is fundamental does not suggest that the latter is, too. Instead, the fundamental right to sue includes rights to tolling that were established at the founding but does not include a right to the discovery rule, which was not.

Also, while *Schroeder* spoke broadly of a fundamental right to pursue common-law actions in court, its reference to a right to sue "derive[d] from the common law," 179 Wn.2d at 573,

means that it understood the fundamental right to pursue common-law causes of action to be subject to limitations—including rules of repose—that limited the common-law right. *Schroeder* did not suggest that all limits on the right to pursue common-law actions in court grant a privilege or immunity.

Instead, the right to pursue common-law claims in court recognized as fundamental in *Schroeder* is best understood as limited to the right to pursue a claim as that right existed when the privileges and immunities clause was adopted. To accept Bennett's reading of *Schroeder* would constitutionalize whole swaths of tort law and rules of procedure. *Schoeder* does not go so far. And it does not show that Bennett has a fundamental right to an unlimited discovery-based accrual rule for her claim.

Finally, Bennett is likewise mistaken (Br. 18) that the statute of repose draws an impermissible distinction between injured patients who discover the cause of their injury within eight years and those who do not. A privilege or immunity of this type "normally relates to an exemption from a regulatory law that

has the effect of benefiting certain businesses at the expense of others." *Am. Legion Post No. 149*, 164 Wn.2d at 607. No such privilege is at issue here. The statute of repose exempts no one from suit. All healthcare practitioners are subject to the discovery rule for an eight-year period beginning on the date of the allegedly negligent treatment. The statute of repose just "effect[s] a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.'" *CTS Corp*., 573 U.S. at 8 (internal quotation marks and citation omitted).

The statute also treats all prospective medical-malpractice plaintiffs the same. Bennett's argument depends on treating as a disfavored "class" a group whose only commonality is that they are seeking to bring a claim more than eight years after they were injured. "People whose claims are barred by this statute" is not a

meaningful, and certainly not a disfavored, class.[3] *Cf. DeYoung*, 136 Wn.2d at 145–146.

For all these reasons, this Court should hold that there is no privilege or immunity at issue here.

3. The statute of repose is rationally related to the legislature's purpose of eliminating "even one" stale claim

When there is "no privilege or immunity involved, this leaves only the question of whether the challenged statute violates the equal protection clause of the federal constitution."

---

[3] Bennett does not argue that the statute of repose violates the privileges and immunities clause because it is subject to an exception for claims of fraud, intentional concealment, and the leaving behind of foreign objects during surgery, *see* RCW 4.16.350(3), or because it is subject under *Schroeder* to tolling during minority. Her failure to make these arguments in her opening brief forfeits them. *Brown* v. *Vail*, 169 Wn.2d 318, 336 n.11, 237 P.3d 263 (2010). These arguments lack merit in any event. The exceptions apply equally to all medical-malpractice plaintiffs and defendants. Both the exceptions and the tolling rule track the common law. And it would make little sense to conclude that tolling is compelled by the privileges and immunities clause but also that the statute violates the privileges and immunities clause because it is subject to tolling.

Ockletree, 179 Wn.2d at 776 n.4. Here, the statute of repose satisfies federal rational-basis review.

When it reenacted the statute of repose, the legislature found that an eight-year period of repose struck an appropriate balance between the "needs of injured plaintiffs and the health care industry." RCW 4.16.350 (note). It found that the eight-year period would protect against claims that "are stale, based on untrustworthy evidence, or that place undue burdens on defendants," and 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." *Id*. These findings establish a rational relationship between the statute and its purpose.

DeYoung concluded that the old statute of repose was not rationally related to the purpose of reducing medical-malpractice insurance rates because the legislative record contained evidence that the "eight-year repose provision could not rationally be thought to have any chance of actuarially stabilizing the

insurance industry." 136 Wn.2d at 148. It also concluded in passing that the separate goal of "repose for defendants and barring stale claims which are more difficult to establish because evidence may be lost or gone" was "legitimate" but that the "miniscule number of claims subject to the repose provision renders the relationship of the classification too attenuated to that goal." *Id.* at 150.

But *DeYoung* does not control here. While *DeYoung* briefly considered the goal of eliminating stale claims, it did so in the absence of the legislative finding that "even one" stale claim should be avoided.

The old statute was not supported by the findings that support the new statute, including the findings "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." RCW 4.16.350 (note). The goal of eliminating "even one" stale claim and limiting the burdens placed on defendants by the discovery rule is a legitimate

legislative purpose, *DeYoung*, 136 Wn.2d at 150, and the statute of repose serves that purpose even if the number of affected claims is small.[4] *See Fields* v. *Legacy Health Sys.*, 413 F.3d 943, 956 (9th Cir. 2005) ("Oregon's statutes of limitations and repose . . . are rationally related to the legitimate legislative goals of avoiding stale claims."). Indeed, the United States Supreme Court long ago recognized that rules of repose are rationally related to the purpose identified by the legislature: "While time is constantly destroying the evidence of rights, [statutes of limitations] supply its place by a presumption which renders

---

[4] The number of claims barred by the current statute of repose is uncertain—the relatively small number of reported cases might reflect that potential plaintiffs have been deterred from filing by the statute of repose, that defendant have refrained from asserting the statute of repose in light of *DeYoung*, or that cases have been filed but then dismissed without reported decision. But the *DeYoung* Court's prediction based on the old legislative record that the number of such claims is "miniscule" seems overstated. This Court has heard at least three cases for injuries more than eight years old since *DeYoung* (*Unruh*, *Schroeder*, and *Gunnier*). And at least 23 state statutes of repose have been challenged in reported decisions, which suggests that claims that are potentially subject to their limits are not rare. *See note* 10, *infra*.

proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together." *Wood*, 101 U.S. at 139.

Medical malpractice is not the only area in which Washington law provides a statute of repose, so the legislature has not singled out healthcare practitioners for special treatment.[5] But even if it had, there are sound reasons to believe that stale medical-malpractice claims pose special difficulties. Medical care is highly regulated and has quickly evolving standards of care, so the need for repose might rationally be thought to be particularly acute in the medical field.

Because Bennett has not identified a fundamental right impacted by the statute of repose, and because the statute of

---

[5] For example, the Washington Product Liability Act restricts liability to the "useful safe life" of the product. RCW 7.72.060. Washington law also provides a six-year statute of repose for claims arising from the construction of improvements upon real property. RCW 4.16.300, 4.16.310. And it bars claims against a dissolved corporation that are brought more than three years after dissolution. RCW 23B.14.340.

repose satisfies the federal standard for rational-basis review, this Court should answer the first question certified by the federal district court "no."

B. Even if the statute of repose infringes a fundamental right, it should survive review because it is supported by reasonable grounds

Under *Grant County II*, a law that infringes a fundamental right must be based on reasonable grounds. *Martinez-Cuevas*, 196 Wn.2d at 519. Review for reasonable grounds considers the language of the law at issue and the general legal context, including whether the legislature was balancing competing rights. *See Woods*, 197 Wn.2d at 244–45 (looking to language of the Washington Law against Discrimination to determine legislative purpose and assessing reasonable grounds in light of the conflict between the fundamental right to marry and to sexual orientation on the one hand and religious freedom on the other); *Schroeder*, 179 Wn.2d at 574 ("the court will scrutinize the legislative distinction to determine whether it *in fact* serves the legislature's stated goal").

As just explained, the legislature made findings in support of the reenacted statute of repose. It found that the statute would "provide protection against claims, however few, that are stale, based on untrustworthy evidence, or that place undue burdens on defendants." RCW 4.16.350 (note). "In accordance with the court's opinion in *DeYoung*," it found 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" and also 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." *Id*.

These findings take up this Court's invitation in *DeYoung* to make clear that the statute of repose is intended to limit the most extreme effects of the discovery rule. The legislature echoed the *DeYoung* Court's observation that "compelling a defendant to answer a stale claim is a substantial wrong, and setting an outer limit to operation of the discovery rule is an appropriate aim." 136 Wn.2d at 150 (internal citation omitted).

But while the *DeYoung* Court concluded that "the miniscule number of claims subject to the repose provision renders the relationship of the classification too attenuated to that goal," *id*. at 150, the legislature made clear in response that it believed that stale claims should be barred even if the number of stale claims is small ("however few").

The legislature adopted the *DeYoung* Court's statement that setting an outer limit on the discovery rule is an appropriate aim, and it made clear that it intended to bar stale claims generally without regard to how frequently they occur because even one stale claim is a substantial wrong. *Schroeder*, 179 Wn.2d at 576 (suggesting that a repose provision that applies to "stale claims generally" serves the legitimate legislative purpose of preventing defendants from answering stale claims). The statute of repose "in fact" serves the purpose of barring stale claims "however few." And the legislature carefully tempered the harshest effects of the rule with exceptions recognized at common law (and thus themselves based on reasonable grounds).

Setting a time limit for the discovery rule is an appropriate area for legislative action. *Gunnier*, 134 Wn.2d at 861 (explaining that the *Ruth* Court had authority to "create" a three-year discovery rule because the legislature had not "definitively addressed" situations in which an injured person does not learn of the mechanism of injury until years later). While the conflicting rights at issue in *Woods*—the right to marry and to sexual orientation on the one hand and religious freedom on the other –were surely weightier than either any private right to an unlimited discovery rule or the public interest in repose, whether reasonable grounds support the statute of repose should take account of the fact that the legislature was balancing conflicting rights here just as it did in *Woods*. *See Lummi Indian Nation* v. *State*, 170 Wn.2d 247, 262, 241 P.3d 1220 (2010) (courts "must exercise care not to invade the prerogatives of the legislative branch") (citation omitted).

The legislature's judgment that a rule balancing these conflicting rights was warranted is supported by centuries of

understanding. Blackstone identified the "use" of time limits on the right to sue as preventing "those innumerable injuries which might ensue, if a man were allowed to bring an action for any injury committed at any distance in time." W. Blackstone, 3 *Commentaries on the Laws of England* 307 (1769). And the Supreme Court observed in 1839 that "the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every nation, in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction." *Cohen*, 38 U.S. at 327; *see also CTS Corp.*, 573 U.S. at 10 ("A statute of repose is a judgment that defendants should be free from liability after the legislatively determined period of time") (quotation marks omitted)). More recently, this Court recognized these same principles, rejecting an open-courts provision challenge to the construction statute of repose and recognizing that statutes of repose "prevent plaintiffs from bringing stale claims when evidence might have been lost or witnesses might no longer be available." *1519-1525 Lakeview*

Blvd. Condo. Ass'n v. *Apartment Sales Corp.*, 144 Wn.2d 570, 578, 29 P.3d 1249 (2001).

The legislature's judgment that stale claims should be barred has particular force for medical-malpractice claims, even if the number of stale medical-malpractice claims is small (though as explained in footnote 4, *supra*, the number is not actually so small). The standard of care is often disputed in medical-malpractice claims, and standards evolve rapidly. So too, evidence may be particularly hard to come by because of unavailable witnesses, faded memories, lost or destroyed records, and institutions that no longer exist.

The legislative history of the reenactment—which the Washington Attorney General has compiled and plans to submit with an amicus brief—shows that these concerns animated the legislature. It also shows that the reenacted statute of repose was part of a larger compromise negotiated by then-Governor Gregoire and agreed to by the Washington State Medical Association, the Washington State Trial Lawyers Association,

and Physicians Insurance. *See*, *e.g.*, *Testimony in Support of SHB 2292*, Randy Revelle, Washington State Hospital Association Senior Vice President (February 20, 2006).

The legislature's judgment that the discovery rule should be balanced by some outer limit on the right to sue aligns with the judgment of many other state legislatures. Statutes of repose for medical-malpractice actions are commonplace.[6] And the eight-year period provided under Washington's statute of repose for medical-malpractice claims is significantly longer than that in many other states, which are as short as three years.[7]

---

[6] *Validity of Medical Malpractice Statutes of Repose*, 5 A.L.R.6th 133, § 2 (Originally published in 2005) (reporting that thirty-two states have enacted statutes of repose specific to medical-malpractice claims).

[7] *See* Conn. Gen. Stat. § 52–584 (three years); La. Rev. Stat. § 9:5628(a) (three years); Nev. Rev. Stat. § 41A.097(2) (three years); Ala. Code § 6–5–482 (four years); Fla. Stat. § 95.11(4)(b) (four years); 735 Ill. Comp. Stat. 5/13–212(a) (four years); Kan. Stat. § 60–513(c) (four years); Md. Code, Cts. & Jud. Proc. § 5–109(a)(1) (five years); Mont. Code § 27–2–205(1) (five years); Ore. Rev. Stat. § 12.110(4) (five years); Hawaii Rev. Stat. § 657–7.3 (six years); Mich. Comp. Laws § 600.5838a(2) (six years); N.D. Cent. Code § 28–01–18(3) (six years).

For all these reasons, this Court should conclude that the legislature identified reasonable grounds for imposing a generally applicable outer limit on medical-malpractice claims. Avoiding even a small number of stale claims ("even one") is a reasonable ground for a generally applicable outer limit on liability. *Cf. Schroeder*, 179 Wn.2d at 575–576 (recognizing that preventing stale claims is a legitimate legislative goal). The statute will have its intended effect, and the judgment that the collective benefits of a definitive cut-off are more important than a few plaintiffs' right to sue more than eight years after alleged malpractice provides is an appropriate area of legislative policy making. Finally, the exceptions that the legislature provided for fraud, intentional deception, and foreign objects make the statute more reasonable, not less, because they limit the harshest consequences of the rule.

If it concludes that Bennett is correct that the statute of repose infringes a fundamental right, this Court should thus hold

that the statute of repose is supported by reasonable grounds and does not violate the privileges and immunities clause.

II. The statute of repose does not violate Washington's open-courts provision

Article I, section 10 of the Washington Constitution provides that "justice in all cases shall be administered openly, and without unnecessary delay." Bennett argues that the statute of repose violates this open-courts provision by extinguishing a cause of action before it accrues. She is again mistaken.

This Court has never held that article I, section 10 confers an individual right to a remedy.[8] In *1519-1525 Lakeview Blvd. Condominium Ass'n*, 144 Wn.2d at 581–82, this Court noted that the question was undecided and declined "to determine whether a right to a remedy is contained in article I, section 10 of the state constitution." The Court rejected the petitioners' claim that the construction statute of repose denied them the right to open

[8] Whether some other provision of the Washington Constitution guarantees Bennett a right to access courts is beyond the questions certified by the district court.

courts given the legislature's broad power 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.'" *Id*. at 582 (citation omitted).

In *Putman* v. *Wenatchee Valley Medical Center*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009), this Court held that the "people have a right of access to courts." But the majority opinion did not locate that right in article I, section 10. *Putman*'s alternative holding on access to courts thus does not establish that the open-courts provision provides a right to a remedy in court.

Even supposing that *Putman* discerned an individual right to a remedy in article I, section 10, it does not follow that article I, section 10 limits the legislature's long-recognized authority to set limits on the right to sue, at least as long as those limits do not eliminate a core component of the common-law right. *Putman* did not overrule *Lakeview Blvd. Condominium Ass'n* or express doubt that the legislature may put time limits on causes of action without violating the open-courts provision.

The *Putman* Court considered the constitutionality of a law requiring a plaintiff in a medical-malpractice suit to submit a "certificate of merit" with the pleadings. 166 Wn.2d at 982–83. The Court explained that "[t]he certificate of merit requirement essentially requires plaintiffs to submit evidence supporting their claims before they even have an opportunity to conduct discovery and obtain such evidence." *Id.* at 983. Noting that the "right of access to courts 'includes the right of discovery authorized by the civil rules,'" *id.* at 979 (quoting *John Doe* v. *Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991)), the *Putman* Court held that the certificate of merit requirement was impermissible because it completely cut off the right to pursue discovery. *Putman*, 166 Wn.2d at 985.

But *Putman* does not suggest that the statute of repose denies anyone the right to access the courts. A right to civil discovery is different from a right to the discovery rule. The statute of repose does not cut off the plaintiff's ability to get into

court. It extinguishes the right to sue *only after eight years have passed*, limiting the effect of the modern discovery rule.

That limitation does not infringe open-courts principles. As the Appellate Court of Connecticut concluded in rejecting an open-courts challenge to a medical-malpractice statute of limitations tied to the date of injury, the "plaintiff is not deprived entirely of his right to redress. His right to redress is limited to a specified period of time . . . [the statute] restricts the right to bring an action for medical negligence only to the extent that it restricts the time for bringing the action, which we conclude is reasonable." *Golden* v. *Johnson Mem'l Hosp., Inc.*, 66 Conn. App. 518, 537–38, 785 A.2d 234 (2001).

The Maryland Supreme Court has also rejected an open-courts claim like Bennett's. It explained that "those who in 1867 framed" the "right to a remedy" in the Maryland Declaration of Rights "could not have intended that a five-year limitation period within which to bring a tort action would violate" that right. *Hill*, 304 Md. at 704–05. It reached that conclusion because a "statute

of limitations was [already] in effect" when the Declaration of Rights was adopted, and the statute "provided in virtually all tort and contract actions that suit must be commenced within three years" from accrual, which "ran from the date of the alleged wrong and not from the time the wrong was discovered." *Id.* at 704. The Arizona Court of Appeals likewise concluded that the right to a remedy does not include the right to the discovery rule: "We are referred to no case which holds that subjective awareness of the claim is something which necessarily flows from the constitutional language [guaranteeing a remedy] and we decline to attribute this meaning to it." *Landgraff* v. *Wagner*, 26 Ariz.App. 49, 54, 546 P.2d 26 (1976).

These decisions reflect the majority view that medical malpractice statutes of repose do not violate state constitutional open-courts or right-to-remedy provisions. *See Ruther* v. *Kaiser*, 134 Ohio St. 3d 408, 417, 983 N.E.2d 291 (2012) (observing that "at least 16 statutes of repose have been upheld as constitutional

against challenges similar to that of the open-courts or right-to-remedy provisions").[9]

---

[9] Including open-courts, right-to-remedy, and equal protection challenges, the number of decisions upholding medical malpractice statutes of repose is higher than sixteen. *See Ambers-Phillips* v. *SSM DePaul Health Ctr.*, 459 S.W.3d 901, 912–13 (Mo. 2015); *Methodist Healthcare Sys. of San Antonio, Ltd., L.L.P*. v. *Rankin*, 53 Tex. Sup Ct. J. 455, 307 S.W.3d 283 (2010); *Christiansen* v. *Providence Health Sys. of Or. Corp*., 344 Or. 445, 449–456, 184 P.3d 1121 (2008); *Hoffner* v. *Johnson*, 2003 ND 79, ¶ 23, 660 N.W.2d 909, 917 (2003); *Sills* v. *Oakland Gen. Hosp.,* 220 Mich.App. 303, 559 N.W.2d 348, 353 (1996); *Cummings* v. *X–Ray Assocs. of New Mexico, P.C.,* 121 N.M. 821, 918 P.2d 1321, 1331–33 (1996); *Choroszy* v. *Tso*, 647 A.2d 803, 807 (Me. 1994); *Schendt* v. *Dewey,* 246 Neb. 573, 520 N.W.2d 541, 547 (1994); *Craven* v. *Lowndes County Hosp. Auth.,* 263 Ga. 657, 437 S.E.2d 308, 309–10 (1993); *Kush* v. *Lloyd,* 616 So.2d 415, 419–22 (Fla. 1992); *Hawley* v. *Green,* 117 Idaho 498, 788 P.2d 1321, 1323–24 (1990); *Burris* v. *Ikard,* 798 S.W.2d 246, 249–50 (Tenn. Ct. App. 1990); *Stein* v. *Katz*, 213 Conn. 282, 286, 567 A.2d 1183 (1989); *Mega* v. *Holy Cross Hosp*., 111 Ill.2d 416, 422–423, 490 N.E.2d 665 (1986); *Barlow* v. *Humana, Inc.,* 495 So.2d 1048 (Ala. 1986); *Crier* v. *Whitecloud,* 496 So.2d 305, 309–10 (La. 1986); *Brubaker* v. *Cavanaugh,* 741 F.2d 318, 321–22 (10th Cir. 1984) (applying Kansas statute); *Jewson v. Mayo Clinic,* 691 F.2d 405, 411 (8th Cir. 1982) (applying Minnesota statute); *Dunn* v. *St. Francis Hosp., Inc.,* 401 A.2d 77, 80–81 (Del. 1979); *Harrison* v. *Schrader,* 569 S.W.2d 822, 827–28 (Tenn. 1978); *Barke* v. *Maeyens,* 176 Or. App. 471, 31 P.3d 1133, 1136–39 (2001); *Plummer* v. *Gillieson,* 44 Mass. App. Ct. 578, 692 N.E.2d 528, (continued . . .)

Bennett tries but fails to show (Br. 33) that the prevailing view among courts is that medical malpractice statutes of repose violate state open-courts provisions rights. Three of the cases she cites have been overruled. *See Nelson* v. *Kruzem*, 678 S.W.2d 918, 921–24 (Tex. 1984), *overruled by Methodist Healthcare Sys. of San Antonio, Ltd.,* v. *Rankin*, 307 S.W.3d 283, 292 (Tex. 2010); *Hardy* v. *VerMeulen*, 512 N.E.2d 626, 628–30 (Ohio 1987), *overruled by Ruther* v. *Kaiser*, 134 Ohio St.3d 408, 415, 983 N.E.2d 291 (2012); *Est. of Makos* v. *Wisc. Masons Health Care Fund,* 564 N.W.2d 662 (Wis. 1977)*, overruled by Aicher ex rel. LaBarge* v. *Wisconsin Patients Comp. Fund*, 237 Wis. 2d 99, 105, 613 N.W.2d 849 (2000).

The other decision Bennett cites, *McCollum* v. *Sisters of Charity of Nazareth Health Corp.*, 799 S.W.2d 15, 18 (Ky. 1990), does strike down a statute of repose on open-courts grounds. But the Kentucky Supreme Court did not consider the

---

532 (1998); *Owen* v. *Wilson*, 260 Ark. Supr. 21, 537 S.W.2d 543 (1976).

accrual rules that applied when the Kentucky constitution was adopted (*i.e.*, whether the discovery rule is part of Kentucky's common law) or whether the common-law right of action was subject to rules of repose. *See also Yanakpos* v. *UPMC*, 655 Pa. 615, 218 A.3d 1214 (2019) (concluding that medical-malpractice statute of repose violated the Pennsylvania Constitution's right to a remedy because it would not further the stated goal of reducing medical-malpractice premiums). This view is the minority view in an extremely lopsided split. This Court should not follow it. It should answer the second certified question "no."

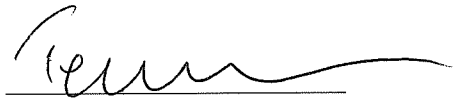
CONCLUSION

This Court should hold that the repose provision of RCW 4.16.350 does not violate the privileges and immunities clause of the Washington State Constitution, art. I, § 12 and does not unconstitutionally restrict a plaintiff's right to access the court in violation of the Washington State Constitution, art. I, § 10.

Respectfully submitted,

NICHOLAS W. BROWN
United States Attorney
Western District of Washington

KRISTEN R. VOGEL
Assistant United States Attorney



TEAL LUTHY MILLER
Appellate Chief
Office of the United States Attorney
Western District of Washington
700 Stewart Street, Suite 5220
Seattle, Washington 98101
Telephone: (206) 553-7970

December 21, 2022

CERTIFICATE OF COMPLIANCE

As required by RAP 18.17(c), I certify that this document contains 11,774 words, excluding the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, and signature blocks.

s/ Teal Luthy Miller_____
TEAL LUTHY MILLER

CERTIFICATE OF SERVICE

I certify that on December 21, 2022, I electronically filed the foregoing document with the Washington State's Appellate Court Portal. Service will be accomplished through that system for the following listed active participants in this case:

Darrin E. Bailey
Bailey Onsager
600 University St., Ste. 1020
Seattle, WA 98101
dbailey@baileyonsager.com

s/ Teal Luthy Miller_____
TEAL LUTHY MILLER

UNITED STATES ATTORNEY'S OFFICE

December 21, 2022 - 5:57 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,300-1
Appellate Court Case Title:	Bette Bennett v. United States

The following documents have been uploaded:

- 1013001_Briefs_20221221163147SC098615_1334.pdf
  This File Contains:
  Briefs - Appellee
  The Original File Name was Bennett answering brief.pdf

A copy of the uploaded files will be sent to:

- dbailey@baileyonsager.com
- kristen.vogel@usdoj.gov

Comments:

Sender Name: Teal Miller - Email: teal.miller@usdoj.gov
Address:
700 STEWART ST STE 5220
SEATTLE, WA, 98101-4438
Phone: 206-553-2465

Note: The Filing Id is 20221221163147SC098615