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

BETTE BENNETT
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA.
Defendant-Appellee.

DEFENDANT-APPELLEE'S RESPONSE TO AMICUS CURIAE BRIEFS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

State Statutes

Constitutional Provisions

Other Authorities

SUMMARY OF ARGUMENT

RCW 4.16.350(3) puts an outer limit on the discovery rule—that is, the rule that the statute of limitations on an action begins to run only when the plaintiff discovers the cause of her injury, even if her discovery comes years after the injury occurred. The statute's repose provision limits the discovery rule to eight years unless the time for suing is tolled by fraud, intentional concealment, or the presence of a foreign body. As the State of Washington's amicus brief explains, that eight-year limit was enacted as part of a package of reforms negotiated by a wide range of stakeholders—including the Washington State Trial Lawyers Association. The legislature enacted that package of reforms to help ensure that Washington has sufficient healthcare providers and to make the civil justice system more understandable, fair, and efficient for all.

Like plaintiff Bette Bennett, the Washington State Association for Justice argues that the repose provision violates Art. I, § 12, the privileges and immunities clause of the State

Constitution. But WSAJ (and Bennett) fail to identify a rule that would show that a plaintiff has a fundamental right to an unlimited discovery rule but not also mean that all restrictions on a cause of action intrude on a fundamental right. Instead, under the rule they both propose, a challenge to any potentially outcome-determinative rule in civil litigation would always trigger the reasonable grounds test from *Grant County Fire Protection District. No. 5* v. *City of Moses Lake*, 150 Wn.2d 791, 812 (2004) (*Grant County II*). That result goes against this Court's post-*Grant County II* decisions, the history of tort law, and a commonsense understanding of what it means for a right to be fundamental. This Court should reject WSAJ's proposal.

This Court should also reject WSAJ's (and Bennett's) argument that the repose provision is not supported by reasonable grounds or a rational basis. WSAJ fails to take the legislative findings seriously. But those findings reflect that the legislature struck a careful balance supported by reasonable grounds: it found that the eight-year repose provision would

protect against stale claims while providing a "reasonable time period" to sue, "balance[ing] the interests of injured plaintiffs and the health care industry." Laws of 2006, Ch. 8, § 301. Setting that sort of balance is an appropriate legislative function.

Finally, WSAJ does not support Bennett's challenge to the repose provision under Art. I, § 10, the open-courts provision. But the amicus briefs from the State and the state medical and hospital associations show that the open-courts provision does not guarantee a right to a remedy and that the repose provision does not violate the open-courts provision in any event.

ARGUMENT

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

Washington's eight-year statute of repose for medical-malpractice actions does not grant a privilege or immunity under Art. I, § 12 because it deprives no one of a fundamental right. Even if it does, it is supported by reasonable grounds: the need to balance the interests of people pursuing medical-malpractice claims against the interests of all citizens in limiting healthcare

providers' exposure to the uncertainty and difficulty associated with defending stale medical-malpractice claims. And it survives rational basis review for that same reason.

A. The repose provision does not cut off a fundamental right

Bennett and WSAJ claim that this case is about "the fundamental right to pursue a cause of action." WSAJ Br. 7 (citing Op. Br. 13). They are mistaken. The repose provision does not eliminate the right to pursue a cause of action; it limits the availability of the discovery rule to eight years (subject to tolling provisions). As the United States' answering brief explains (at 30–32), the right that Bennett seeks is thus the right to an unlimited discovery rule, not the right to pursue a cause of action. And as the answering brief also explains (at 32–42), the fundamental right to bring a cause of action does not include an unlimited discovery rule because the discovery rule was first recognized in 1969 and arose out of the interpretation of the statutory term "accrual."

1. The repose provision does not eliminate the right to bring a cause of action

WSAJ offers five sets of arguments in support of Bennett's contention that the right at issue is the fundamental right to bring a cause of action. None is convincing.

First, WSAJ says (Br. 21 & n.6) that the repose provision denies the right to bring a cause of action because it "effectively eliminates" the right to sue for plaintiffs who discover the cause of their injuries more than eight years after they occur. That argument is just word play—it is true only if the fundamental right to bring a cause of action includes the right to a discovery rule. But it does not. *See DeYoung* v. *Providence Med. Ctr.*, 136 Wn.2d 136, 143 (1998) ("Until 1969, when the court adopted the discovery rule for medical malpractice actions…a cause of action could accrue and the statute of limitations expire without a patient knowing of injury."); *Landgraff* v. *Wagner*, 26 Ariz. App. 49, 54, 546 P.2d 26, 31 (1976) ("We are referred to no case which holds that subjective awareness of [a] claim is something which

necessarily flows" from a right to sue for negligence.). The repose provision does not "effectively eliminate" anyone's right to sue from the outset; it just puts a time limit (subject to tolling) on that right.

Along those same lines, WSAJ argues (Br. 20–22) that a statute must be supported by reasonable grounds under *Grant County II* so long as it "implicates" or "limits" a fundamental right. And WSAJ says (Br. 20) that the repose provision "implicates" or "limits" the right to bring a cause of action because it cuts off that right after eight years (subject to tolling). But once again, that is true only if the fundamental right to bring a cause of action includes an unlimited discovery rule.

Second, WSAJ contends (Br. 7) that the repose provision grants the "immunity of limited liability" to healthcare providers. But an "immunity" is an outright exemption, not a time bar. *See* Black's Law Dictionary, 11th Ed. 898 (2019) (defining "immunity" as an "exemption from a duty, liability, or service of process"). And the repose provision provides "limited liability"

only in the same general sense as any other litigation-timing requirement. The repose provision does not limit healthcare providers' exposure to liability for a timely suit.

Third, WSAJ says (Br. 17) that the United States erroneously treats "the right of action as encompassing statutory law applicable at statehood." That is incorrect. The United States does not contend that the fundamental right to sue "encompassed" the precise statutory law at the founding, whatever WSAJ means by "encompassed." Rather, specific limitations in the founding-era code are relevant to understanding the fundamental right to bring a cause of action because they show that the right was never the unlimited right that WSAJ says Art. I, § 12 protects. *Cf. Hill* v. *Fitzgerald*, 304 Md. 689, 700–705, 501 A.2d 27, 33–35 (1985) (concluding 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 State was created, a statute of repose did not violate Maryland's right to a remedy).

For that reason, the founding-era statutory limitations that WSAJ cites (Br. 19)—such as restrictions on a married woman's right to sue—are irrelevant here. Those provisions are obviously constitutionally infirm under the federal equal protection clause (and thus under Art. I, § 12 without reference to fundamental rights) and do not limit the right to bring a cause of action today. But that does not mean that the fundamental right to bring a cause of action includes a right to an unlimited discovery rule even though the discovery rule is undisputedly a modern departure from the common law.

WSAJ also says (Br. 17–18) that the United States overstates the strictness of the statute of limitations that applied to claims for medical negligence at the founding, pointing to various tolling provisions from that era. But those tolling provisions actually show that adopting limits (and exceptions to those limits) has always been understood to be an appropriate legislative function that does not violate Art. I, § 12. And WSAJ ignores that the repose provision is itself subject to tolling and

thereby preserves the right to bring a cause of action as understood at the founding.

Ultimately, WSAJ's argument (Br. 18) that common law rights have an "enduring nature" that must be understood separately from the "fortuity and fluidity of statutes" is unconvincing. A statutory limit on a common law cause of action that goes unchallenged for decades is evidence that the cause of action's "enduring nature" does not extend beyond that limit. And even if WSAJ were right that Art. I, § 12 protects the right to bring a cause of action without reference to long-accepted statutory limits on that cause of action, WSAJ fails to explain how the "enduring nature" of the common law means that the right to bring a cause of action for medical negligence includes a right to an unlimited discovery rule even though this Court refused to recognize the discovery rule before 1969.[1] *Lindquist*

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[1] Relying on *Ockletree* v. *Franciscan Health System*, 179 Wn.2d 769 (2013), the United States' answering brief argued (Br. 41) that the discovery rule is not a component of the (continued . . .)

v. *Mullen*, 45 Wn.2d 675, 677–78 (1954) (rejecting discovery rule); *Ruth* v. *Dight*, 75 Wn.2d 660, 666 (1969) (adopting the rule for the first time).

Fourth, WSAJ argues (Br. 8) that the repose provision concerns a fundamental right under *Grant County II* because it applies to healthcare providers but not to other tort defendants. That argument misreads *Grant County II* and this Court's decisions applying it.

"[N]ot 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. Instead, the term privileges and immunities "pertain[s] alone to those fundamental

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fundamental right to bring a cause of action simply because it is important. WSAJ is correct (Br. 16) that the answering brief erred by treating the plurality opinion in *Ockletree* as a majority opinion and that five justices of this Court agreed in *Ockletree* that the right to work free from discrimination is fundamental. *See Ockletree*, 179 Wn.2d at 806. But the point still holds—the scope of the fundamental right to bring a cause of action cannot be understood to include a right to an unlimited discovery rule simply because the discovery rule is important.

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.'" *Am. Legion Post No. 149* v. *Wash. State Dep't of Health*, 164 Wn.2d 570, 608 (2008) (quoting *State* v. *Vance*, 29 Wn. 435, 458 (1902)).

A statutory scheme that treats all participants in a particular profession the same does not violate the privileges and immunities clause just because participants in a different profession are treated differently. *See Wash. Food Industry Ass'n & Maplebear, Inc.* v. *City of Seattle*, __ Wn.2d __, 524 P.3d 181, 196 (2023) (rejecting privileges-and-immunities challenge to gig-worker premium-pay ordinance because "the ordinance does not treat classes of the same business differently").

Fifth, WSAJ argues (Br. 13) that *Schroeder* v. *Weighall*, 179 Wn.2d 566 (2014), which consider a provision eliminating minority tolling in medical-malpractice cases, shows that the repose provision cuts off the fundamental right to bring a cause of action. But putting an outer limit on the discovery rule that applies equally to all potential medical-malpractice plaintiffs is not like preventing children from suing for medical malpractice. Unlike children, plaintiffs who discover the cause of their injury more than eight years after it occurs are not a meaningful class of plaintiffs, so the repose provision does not "limit the ability of certain plaintiffs . . . to bring medical malpractice claims" within the meaning of *Schroeder*. 179 Wn.2d at 573. Instead, the repose provision allows all plaintiffs to bring medical-malpractice claims for eight years, or for longer when tolling applies.

WSAJ's implicit argument that "plaintiffs affected by the discovery rule" is a meaningful class under Art. I, § 12 is inconsistent with *DeYoung*. The *DeYoung* Court rejected the argument that the tolling provisions for fraud, intentional

concealment, and foreign bodies show that "the group of persons to whose claims the repose provision applies was created arbitrarily." 136 Wn.2d at 146. The Court explained that there are "reasonable grounds for the tolling and other statutory provisions which except a cause of action from the eight-year bar, and thus reasonable grounds for the distinctions between the persons affected by those provisions and those who are not." *Id*.

The minority-tolling provision at issue in *Schroeder* and the repose provision are dissimilar in another way. Tolling during minority was available at the founding. *See* Ans. Br. 44. But the discovery rule was not. *Schroeder* had no reason to consider that difference. *Schroeder* thus cannot be read to hold that *every* limit on the right to pursue a medical negligence claim—including a limitation on a provision like the discovery rule that lacks the historical pedigree of minority tolling—triggers the reasonable-grounds test.

* * * * *

In the end, neither WSAJ nor Bennett offers any limiting principle for the argument that restrictions on the right to bring a cause of action trigger the reasonable-grounds test. But this Court has long recognized that statutes of limitation are lawful. *Fowler* v. *Guerin*, 200 Wn.2d 110, 118 (2022) ("statutes of limitation reflect the importance of finality and settled expectations in our civil justice system"). It has never required statutes of limitation to satisfy the reasonable-grounds test. *See Stenberg* v. *Pac. Power & Light Co*., 104 Wn.2d 710, 714 (1985) (explaining that the Court insists on "careful scrutiny of the changing conditions and needs of the times" when determining how to apply a statute of limitation but containing no suggestion that the statute must satisfy reasonable-grounds scrutiny). And it has rejected at least one Art. I, § 12 challenge to a statute of limitations. *Todd* v. *Kitsap Cnty.*, 101 Wn.2d 245, 250 (1984).

Under WSAJ's reading of *Schroeder*, any potentially outcome-determinative rule, including not just the statutes of limitation in RCW 4.16 but various immunities in RCW 4.24 and

potentially even some rules of civil procedure, would trigger the reasonable-grounds test. These rules sometimes cut off the right to sue and thus "limit" the right to bring a cause of action under Bennett and WSAJ's test. This Court should reject that broad understanding of the fundamental right to bring a cause of action.

2. The discovery rule is not a fundamental right

WSAJ (and Bennett) do not argue that the discovery rule stands alone as a fundamental right under *Grant County II*. And for good reason. As the answering brief explains (37–38), the discovery rule was a "depart[ure] from common law notions of accrual of a tort cause of action." *Gunnier* v. *Yakima Heart Ctr.*, 134 Wn.2d 854, 860 (1998); *see also Ruth,* 75 Wn.2d at 667–68.

B. Even if the repose provision does cut off a fundamental right, it is supported by reasonable grounds

Under *Grant County II*, a law that extinguishes a fundamental right must be based on reasonable grounds. 150 Wn.2d at 731. The reasonable-grounds test considers "the language [of the statute] itself, the context and related provisions

in relation to the subject of the legislation, the nature of the act, the general object to be accomplished, and the *consequences* that would result from construing a statute in a particular way." *Woods* v. *Seattle's Union Gospel Mission*, 197 Wn.2d 231, 244–45 (2021).

Here, the context in which the repose provision was adopted, the package of reforms that it was a part of, and the legislature's findings all show that the repose provision satisfies the reasonable-grounds test. As the State's amicus brief explains (7–14), the repose provision was reenacted after extensive negotiations by stakeholders including the WSBA, the Superior Court Judges Association, the Washington State Trial Lawyers Association (a predecessor organization to the WSAJ), the defense bar, medical and hospital associations, healthcare providers, insurers, and the Insurance Commissioner. *Id.* at 9. The statute resulted from the yearslong negotiation by these stakeholders of a package of reforms that the legislature adopted because "access to safe, affordable healthcare is one of the most

important issues facing the citizens of Washington state." Laws of 2006, Ch. 8, § 1.

The legislature found that the "answers to" the problem of ensuring that physicians (including especially physicians in high-risk specialties) are available when and where citizens need them most "are varied and complex," justifying the package of reforms including "encourag[ing] patient safety practices, increas[ing] oversight of medical-malpractice insurance, and making the civil justice system more understandable, fair and efficient for all participants." *Id*.

The legislature's specific findings in support of the repose provision respond to and adopt the *DeYoung* Court's conclusions that "compelling a defendant to answer a stale claim is a substantial wrong" and that "setting an outer limit to operation of the discovery rule is an appropriate aim." *DeYoung*, 136 Wn.2d at 150. The legislature found that even if the provision did not reduce insurance costs, it would "provide protection against claims, *however few*, that are stale, based on untrustworthy

evidence, or that place undue burdens on defendants" while also providing a "reasonable time period" to sue, "balance[ing] "the interests of injured plaintiffs and the health care industry." Laws of 2006, Ch. 8, § 301 (emphasis added).

The legislature's explicit finding that balancing the interests of medical-malpractice plaintiffs against the public's interest in limiting the undue burdens imposed by stale claims by adopting an eight-year statute of repose (subject to tolling) would improve the civil justice system and help make medical care more widely available provides reasonable grounds for the repose provision. *See Woods*, 197 Wn.2d at 244–245.

Contrary to WSAJ's assertion, this Court need not "hypothesize facts" to show that the repose provision is supported by reasonable grounds. (WSAJ Br. 23, quoting *Schroeder*, 179 Wn.2d at 574). The legislature found that the medical field's intersection with the civil justice system gives rise to "varied and complex" problems. And it found that an eight-year repose provision provided a reasonable amount of

time to sue while still protecting healthcare providers from defending stale claims, even if the repose provision only applies to a few cases.

WSAJ argues (Br. 25) that these findings encroach on the Court's authority to evaluate the law. There is no encroachment here. The findings do not insulate the statute from this Court's review. Instead, the legislature, as a coequal branch of government "in no way inferior to the judicial branch," *Wash. State Grange* v. *Locke,* 153 Wn.2d 475, 500 (2005), found in conversation with this Court's decision in *DeYoung* that an eight-year statute of repose for medical-malpractice actions would strike an appropriate balance between the interests of medical-malpractice plaintiffs and the healthcare industry and explained why. Determining that balance is a classically legislative function deserving of deference. *Wash. Off Highway Vehicle Alliance* v. *State*, 176 Wn.2d 225, 236 (2012) (This Court gives "great deference to the legislature's factual findings.").

The legislature's finding that the repose provision would make healthcare more readily available is also grounded in fact, as Planned Parenthood Great Northwest, Hawai`i, Alaska, Indiana, and Kentucky's amicus brief shows. The brief says (3–4) that the repose provision is critical to the "continued provision of high quality, full range of women's health services" because "even the most dedicated practitioners will not remain in states where their potential risk for providing care never ends." *See also* Amicus Curiae Cedar River Clinics Motion at 6-7 ("Eliminating the statute of repose on medical negligence claims will make it more challenging to recruit and retain qualified practitioners.").

WSAJ also says (Br. 26), citing *Schroeder,* that the repose provision lacks reasonable grounds because it favors medical-malpractice defendants without justification. In *Schroeder*, this Court recognized that preventing stale claims is a legitimate legislative goal but concluded that a rule eliminating minority tolling for medical-malpractice claims did not "in fact" serve that goal because the provision was "not addressed to stale claims

generally" and instead allowed other forms of tolling. 179 Wn.2d at 574–575. But unlike the provision eliminating minority tolling, the repose provision does not disfavor one class of medical-malpractice plaintiffs. All prospective medical-malpractice plaintiffs and defendants are subject to the same timing requirements.

And while the repose provision treats medical-malpractice claims differently than some other tort claims, that *claim distinction* is based on reasonable grounds—the evolving standards of care in medicine make it significantly harder to defend stale medical-malpractice claims than other stale claims.

Planned Parenthood's amicus brief provides (Br. 11–17) examples of how the evolving nature of standards of care make stale medical-malpractice claims especially difficult to defend against. Any stale claim presents challenges from faded memories and missing or incomplete records. But while the standard of care that applies to a garden-variety tort suit would be largely unaffected by staleness, the standard of care in a stale

medical-malpractice action will often be disputed and difficult to prove because of changes in medical practice. The need for repose is thus particularly acute in the medical field, and the legislature had reasonable grounds for adopting a repose provision specific to medical-malpractice actions.

WSAJ says finally that the repose provision lacks reasonable grounds because it treats plaintiffs who do not discover the cause of their injuries within eight years unfairly. But the statute takes a more nuanced account of the equities that apply when a plaintiff discovers the cause of an injury years after it occurred. The statute's tolling provisions protect plaintiffs who do not discover the cause of the injury because of fraud, intentional concealment, or the presence of a foreign body, while barring plaintiffs who cannot show that one of these reasons prevented them from discovering the cause of the injury.

This Court should conclude that the repose provision rests on reasonable grounds. The legislative conclusion that the collective benefits of a definitive eight-year cut-off (subject to

tolling) are more important than affording plaintiffs an unlimited right to the discovery rule provides reasonable grounds for the statute that are grounded in fact and deserving of deference.

C. The repose provision is supported by a rational basis

When a challenged provision does not infringe on a fundamental right, the only remaining question is whether it violates the equal protection clause of the federal constitution. *Am. Legion Post No. 149,* 164 Wn.2d at 608.

Like Bennett, WSAJ argues (Br. 27) that the repose provision fails rational-basis review based on *DeYoung*. WSAJ is mistaken.

The *DeYoung* Court held that the old medical-malpractice repose provision did not bear a rational relationship to the legislative purpose of responding to a "perceived insurance crisis" caused by "calculating and reserving for exposure to long-tail claims." 136 Wn.2d at 148. The Court reasoned that the repose provision "could not rationally be thought to have any

chance of actuarially stabilizing the insurance industry" because the record suggested that there were very few affected claims. *Id*.

The *DeYoung* Court also identified a separate "conceivable" purpose—limiting the undue burdens imposed by stale claims. 136 Wn.2d at 150. It concluded that this purpose was a legitimate legislative aim. *Id*.; *see also Schroeder*, 179 Wn.2d at 576 (reaffirming that conclusion). The *DeYoung* Court still thought that the old repose provision was not rationally related to that purpose because the number of claims affected would be "miniscule." 136 Wn.2d at 150. But the Court did not have before it explicit legislative findings that eliminating even a small number of stale claims would promote the fairness and efficiency of the civil justice system and help make healthcare more readily available in Washington. The Court thus never considered anything like the legislative findings here.

Also, as *DeYoung* observed, the number of cases barred by a repose provision has an obvious relevance to whether the provision might rationally be thought to resolve an insurance

crisis. But the number of cases barred by a repose provision has no obvious relevance to whether the legislature might rationally decide to address the harms and burdens a stale claim imposes on a defendant. The *DeYoung* Court nevertheless thought that the "conceivable" goal of preventing stale claims was not a rational basis for the old repose provision because the effect of the repose provision would be small. But *DeYoung* appears to have applied a form of rational-basis review more demanding than the rational-basis standard that applies when no fundamental right is at issue after *Grant County II*. *See Am. Legion Post No. 149,* 164 Wn.2d at 608; *FCC* v. *Beach Commc'ns*, 508 U.S. 307, 314–315 (1993). Under that standard, an explicit legislative judgment in favor of an admittedly small effect can be rational. *Id*. at 316 (under rational-basis review, "the legislature must be allowed leeway to approach a perceived problem incrementally").

In any event and as explained in footnote 4 of the United States' answering brief, the quarter century that has passed since *DeYoung* has given reasons to doubt that Court's assumption that

the number of claims brought more than eight years after injury is "miniscule." The inclusion of the repose provision in the 2006 package of reforms shows that the stakeholders who negotiated those reforms disagreed that the repose provision would have trivial effects. So too, the three amicus briefs by healthcare providers all attest to the real-world adverse consequences of an unlimited discovery rule on recruiting qualified healthcare practitioners and to the difficulties of defending stale medical negligence claims because of evolving standards of care.

* * * * *

This Court accords a "heavy presumption of constitutionality" to statutes. *Davison* v. *State*, 196 Wn.2d 285, 293 (2020). WSAJ and Bennett have not overcome that heavy presumption. Because they have not identified a fundamental right cut off by the statute of repose, and because the repose provision is in any event supported by reasonable grounds and a rational basis, this Court should answer the first question certified by the district court "no."

II. The amicus briefs show that the repose provision does not violate Washington's open-courts provision

WSAJ says nothing in support of Bennett's argument that the repose provision violates art. I, § 10, the open-courts provision. The amicus briefs show that Bennett's argument is mistaken.

The State's brief (at 19–23) and the healthcare provider associations' brief (at 20–23) explain why this Court should decline Bennett's invitation to find that the open-courts provision guarantees a remedy. They explain that the framers of Washington's Constitution considered and rejected an open-courts provision including the phrase "and every person shall have remedy by due course of law for injury done him in his person, property, or reputation." State Br. 20 (quoting The Journal of the Washington State Constitutional Convention 1889 at 51, 499 (B.P. Rosenow ed. 1999)).

Because Washington's open-courts provision does not guarantee a remedy, Bennett's reliance (Opening Br. 33) on

open-courts decisions from states that do have right-to-a-remedy language like the provision rejected by Washington is misplaced. *See McCollum* v. *Sisters of Charity of Nazareth Health Corp.*, 799 S.W. 2d 15, 18 (Ky 1990) (Section 14 of the Kentucky Constitution provides that "all courts shall be open, and every person for an injury done to him in his lands, goods, person or reputation, shall have a remedy by due course of law…"); *see also Yanakos* v. *UPMC*, 655 Pa. 615, 618, 218 A.3d 1214, 1216 (2019) (Art. I, § 11 of the Pennsylvania Constitution provides that "[a]ll courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law[.]").

But even if Washington's open-courts provision does guarantee a right to a remedy, the repose provision does not violate that guarantee, for the reasons provided in the answering brief and in the amicus briefs by the State and the healthcare provider associations. As the State explains (Br. 22), when the legislature adjusts a person's rights and remedies as part of a

larger scheme, courts consider that scheme in assessing an open-courts provision challenge. It is thus significant that the repose provision was enacted as part of a legislative compromise and reflects the considered judgment of the legislature that the package of reforms would help promote the fairness of the civil justice system and help ensure that all Washingtonians could obtain healthcare.

Finally, the repose provision does not reflect a departure from the common law. Instead, the discovery rule itself deviated from the common law. The repose provision is thus not the sort of limit that violates the open-courts provision. *See 1519-1525 Lakeview Boulevard Condominium Ass'n* v. *Apartment Sales Corp*., 144 Wn.2d 570, 581–582 (2001).

CONCLUSION

For all these reasons, and those given in the answering brief, this Court should hold in response to the district court's certified question that RCW 4.16.350(3) does not violate the privileges and immunities clause or the open-courts provision of Washington's constitution.

I certify that this brief in response to the amicus curiae briefs contains 4930 words excluding the parts of the brief exempted from the word count by RAP 18.17.

Respectfully submitted,

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May 12, 2023

CERTIFICATE OF SERVICE

I certify that on May 12, 2023, 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:

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