IN THE UTAH SUPREME COURT

TIFFANY BINGHAM, Appellant, vs. GEORGE C. GOURLEY, D.O., McKAY L. PLATT, M.D., and DOES I-X, Appellees.	Case No. 20230436-SC

APPELLANT'S OPENING BRIEF

On Appeal from the Fourth Judicial District Court, Utah County
Case No. 200401253, Judges Darold McDade and Sean Petersen

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Defendants/Appellees are George C. Gourley, D.O., and McKay L. Platt, M.D. Dr. Gourley is represented by Brian P. Miller and Andrew L. Roth of Snow Christensen & Martineau and by Benjamin K. Lusty and Cami R. Schiel of Rencher Anjewierden. Dr. Platt is represented by Kirk G. Gibb of Kipp and Christian, P.C.

All parties in this appeal were also parties below. There were no other parties in this case beyond unnamed Doe defendants.

Because this appeal challenges the constitutionality of a Utah statute in a case in which the Attorney General is not a party, this brief is being served on the Attorney General's office under Utah R. App. P. 25A.

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INTRODUCTION

Appellant Tiffany Bingham asks this Court to declare the four-year statute of repose found in the Utah Health Care Malpractice Act unconstitutional under both the Utah and United States Constitutions because it bars her from recovering for legal injuries sustained at the hands of medical professionals, which Ms. Bingham did not discover until more than four years had passed.

On July 21, 2010, Dr. George C. Gourley performed a vaginal hysterectomy on Ms. Bingham. Due to complications from this first surgery, Dr. Gourley and Dr. McKay L. Platt performed a second surgery on July 29, 2010, during which time they tethered Ms. Bingham's ureter to her bladder. After the second surgery, Ms. Bingham continued to experience severe kidney and bladder infections requiring IV antibiotic treatments over an extended period of time.

On November 15, 2017, another physician performed surgery to address her continuing problems. It was only then that Ms. Bingham first learned that the prior procedures performed by Drs. Gourley and Platt seven years earlier had caused her kidney to atrophy, necessitating its removal. As a direct, proximate, and legal result of those doctors' deviation from the standard of care, Ms. Bingham suffered damages, including the loss of her kidney.

The Malpractice Act contains a two-year statute of limitations based on discovery of the legal injury, which includes discovery of its cause. But it also contains a statute of repose providing that any medical malpractice action must be commenced no later than four years after the original injury occurred, regardless when it was discovered. Ms.

Bingham, through no fault of her own, was unable to discover the harm caused to her by Drs. Gourley and Platt until seven years after the original injury. Ms. Bingham therefore sought recourse in the courts to recover for her lost kidney and the pain and suffering she endured over many years caused by their negligence and medical malpractice. But her suit for redress was stymied in the lower court by a decision to let this Court make the call. This Court should now make that call and emphatically reverse.

Ms. Bingham asks the Court to declare that the four-year statute of repose is unconstitutional because it deprives her of her right to recover for her injuries, in violation of the Open Courts and Uniform Operation of Laws provisions in the Utah Constitution and the Equal Protection Clause in the United States Constitution.

STATEMENT OF THE ISSUES

1. Did the lower court incorrectly conclude that the four-year statute of repose in Utah's Health Care Malpractice Act passed constitutional muster even though Tiffany Bingham was unable to discover her legal injury until after four years had passed?

2. In reaching that erroneous conclusion on a motion to dismiss, did the district court incorrectly fail to apply heightened scrutiny to the Open Courts analysis in contravention of this Court's established jurisprudence?

Standards of Review: A trial court's decision granting a Rule 12(b)(6) motion to dismiss a complaint is a question of law that this Court reviews for correctness, giving no deference to the lower court's ruling. *See Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 8, 104 P.3d 1226. A 12(b)(6) motion admits the facts alleged in the complaint but challenges the plaintiff's right to relief based on those facts. *Id.* ¶ 8. The Court's

inquiry is concerned solely with the sufficiency of the pleadings and not the underlying merits of the case. *Id.* In reviewing the trial court's decision, this Court accepts the factual allegations in the complaint as true and interprets those facts and all inferences drawn from them in the light most favorable to the plaintiff as the non-moving party. *Id.* ¶ 9.

Whether a district court erred in its application of a constitutional protection is also a question of law that is reviewed for correctness. *Salt Lake Legal Def. Ass'n v. Atherton*, 2011 UT 58, ¶ 9, 267 P.3d 227. The level of scrutiny to be applied and its application are reviewed for correctness. *See, e.g.*, *Navajo Nation v. San Juan Cnty.*, 929 F.3d 1270, 1288 (10th Cir. 2019) ("We review the application of strict scrutiny de novo."); *McLean v. Dep't of Revenue of State of Ill.*, 704 N.E.2d 352, 359 (Ill. 1998) ("Whether a rational basis exists for a classification is a question of law, which we consider de novo.").

Preservation: Ms. Bingham preserved her appellate issues in the district court. (R.56-81, 113-19.) At her request, this Court elected to retain this appeal on its docket instead of transferring it to the Court of Appeals. (Order, 7/30/23.)

STATEMENT OF THE CASE

Background

Tiffany Bingham first saw George C. Gourley, D.O., on June 29, 2010, after being referred to him by her primary care provider for a possible hysterectomy. (R.32.) Dr. Gourley diagnosed Ms. Bingham with an enlarged uterus, adenomyosis, uterine fibroids, menorrhagia, severe dysmenorrhea, and rectocele. He also noted that she was hypersensitive to medications, which included certain antibiotics and narcotics. (R.32.)

On July 21, 2010, Ms. Bingham underwent a full laproscopic-assisted vaginal hysterectomy with a bilateral salpingo-oophorectomy and a posterior vaginal repair. (R.32.) Dr. Gourley performed the surgery at Utah Valley Regional Medical Center ("UVRMC"), where Ms. Bingham remained as an inpatient from July 21 to July 24, 2010. (R.32.) No complications were noted in the surgical report or the pathology report. (R.32.)

During her stay at UVRMC, Ms. Bingham developed increasing left flank pain and, on the day of her discharge from UVRMC, an intravenous pyelogram was ordered by the discharging physician to rule out ureteral damage. (R.32.) Shortly after, this procedure was canceled and instead a urinalysis was ordered which appeared normal. Ms. Bingham was sent home with antibiotics and instructions to follow up if the left flank pain persisted. (R.32.) Dr. Gourley's discharge note was entered for July 24, 2010, but the medical records show that he did not dictate it until October 17, 2010. (R.32.) In the note, Dr. Gourley explained that Ms. Bingham was discharged by a colleague, that she had difficulty with pain control, and that the urinalysis was normal, but she was sent home with an antibiotic. (R.32.)

On July 26, 2010, two days after her discharge from UVRMC, Ms. Bingham called Dr. Gourley to report an allergic reaction to the antibiotic. (R.32.) Ms. Bingham called Dr. Gourley again on July 27, 2010, to report a fever of 101.8. (R.33.) Dr. Gourley responded to her concerns by ordering another antibiotic. (R.33.) On July 28, 2010, Ms. Bingham called Dr. Gourley to report intermittent fever, flank pain, and feeling miserable. Dr. Gourley's office ordered a urinalysis and told Ms. Bingham to go to the

emergency room if her pain worsened and became unbearable. (R.33.) Then, on July 29, 2010, Ms. Bingham called Dr. Gourley's office to report urinary tract pain. (R.33.) Later that day, Dr. Gourley advised Ms. Bingham that he thought he knew what was causing her symptoms and asked Ms. Bingham to return to UVRMC so he could correct the problem. (R.33.) Ms. Bingham returned to the emergency room as Dr. Gourley requested. A CT scan was performed which showed a high-grade obstruction of the distal right ureter and significant extravasation of urine from the kidney, and the entire renal collecting system on that side showed significant hydronephrosis. (R.33.)

Dr. Gourley arrived at the UVRMC emergency room along with McKay L. Platt, M.D., who was the urologist on call that night and with whom Dr. Gourley consulted. Dr. Platt and Dr. Gourley advised Ms. Bingham to consent to surgery, explaining that the ureter could have been kinked with a suture or tied by a suture secondary to her July 10 surgery. Dr. Platt performed a left uretal reimplantation, bystoscopy, left retrograde pyelogram, and pelvic exploration with Dr. Gourley assisting. Dr. Platt's surgical report confirms that the left ureter was obstructed and kinked. (R.33.) Dr. Gourley's physician report, which was not dictated until October 17, 2010, mentions the possibility of a suture kinking or tying the ureter but does not list it as a surgical finding the way Dr. Platt did. (R.33.)

After the second surgery on July 29, 2010, Ms. Bingham continued to experience severe kidney and bladder infections requiring IV antibiotic treatment over an extended period of time. (R.34.) Ms. Bingham ultimately sought the care of another physician, Jay T. Bishoff, M.D., who performed corrective surgery on November 15, 2017, which

necessitated removal of an infected kidney and ureter. (R.34.) Ms. Bingham did not discover any breach of the standard of care until November 15, 2017, when Dr. Bishoff performed the surgery. (R.34.) At that time, he discovered that the doctors in the previous surgeries had tethered the ureter to the bladder and that the kidney had atrophied from 14.1 cm in length to 7 cm in length as a result of the prior procedures performed by Dr. Platt and Dr. Gourley. (R.34.)

Pre-Litigation and District Court Proceedings

On November 15, 2019, Ms. Bingham filed a Notice of Intent to Commence Legal Action in accordance with Utah Code § 78B-3-412(1)(a). (R.114.) The Division of Professional Licensing issued a certificate of compliance on June 29, 2020. (R.114; *see* Utah Code § 78B-3-418.) On August 28, 2020, Ms. Bingham filed a complaint in the district court against Dr. Gourley and Dr. Platt. (R.114.) An amended complaint was filed on February 2, 2021, alleging four causes of action. (R.30.) The claims at issue in this appeal are the first cause of action alleging Negligence - Health Care Malpractice Against Defendants and the second cause of action seeking a Declaratory Judgment on the constitutionality issues addressed in this appeal, both of which were dismissed below on a Rule 12(b)(6) motion to dismiss.[1]

Drs. Gourley and Platt originally filed their Motion to Dismiss Plaintiffs' Amended Complaint on February 16, 2021. (R.40-53.) In response, Ms. Bingham filed

[1] Ms. Bingham's remaining two causes of action, for breach of contract and promissory estoppel, were based on a settlement of her claims that she sought to enforce, but they were dismissed on summary judgment and are not appealed. (R.368, 532.)

her opposition memorandum on April 2, 2021. (R.56-81.) The doctors then filed their reply on May 4, 2021. (R.84-95.) Ms. Bingham raised constitutional challenges to the statute of repose in the Malpractice Act. (R.56-81.) Notably, in their briefing on the motion to dismiss, the doctors conceded the first part of an applicable two-part test outlined in the case law: "[f]or purposes of their Motion, Defendants assume the Act's statute of repose abrogates a cause of action and the legislature has not provided for an alternative remedy." (R.86.) A hearing on the motion was held on June 23, 2021, where the district judge ruled from the bench. (R.101-102, 550-89.) An order memorializing the ruling on the motion to dismiss, prepared by defense counsel, was entered on August 9, 2021. (R.113-19.)

In the order, the district court applied varying levels of scrutiny under each constitutional analysis. Rational basis scrutiny was applied to the court's analysis under the Open Courts provision of the Utah Constitution. (R.115-16.) Heightened scrutiny, on the other hand, was applied to the court's analysis under the Uniform Operation provision of the Utah Constitution. (R.116.) The court also determined that an analysis under the Equal Protection Clause was unnecessary and produced the same result, under the same level of scrutiny, as the analysis under the Uniform Operation provision. (R.117.)

After denying the motion, the district judge observed, "I recognize I'm probably the mediary. You want to get this to the appellate courts to make further rulings on that." (R.579.) He instructed opposing counsel to get the order approved by Ms. Bingham's counsel "so that he can have a chance then to take it where it needs to be." (R.579.) The judge continued: "From my standpoint, I don't have a lot of authority to do much, as you

both -- all are aware. It would be tough for me to make that type of determination here."
(R.579, 580.)

The final judgment in this case was entered on April 27, 2023, from which this appeal is taken. (R.542-44.) Ms. Bingham timely filed her Notice of Appeal on May 3, 2023. (R.545-46.)

SUMMARY OF THE ARGUMENT

This Court should reverse and remand.

The statute of repose in the Malpractice Act operates to deprive Ms. Bingham of redress for her injuries by violating the Open Courts and Uniform Operation of Laws provisions in the Utah Constitution and the Equal Protection Clause in the United States Constitution. It is unconstitutional on its face and as applied.

The statute of repose violates each of these three constitutional provisions. First, the statute of repose violates the Open Courts provision of the Utah Constitution. This Court's case law holds that the constitutionally protected right to redress for injury to one's person, as protected by the Open Courts provision, triggers heightened scrutiny. In any event, the statute of repose fails to satisfy even rational basis scrutiny, a much less demanding test. The statute of repose violates this provision of the Utah Constitution by effectively eliminating an existing legal remedy without providing a reasonable alternative remedy and without a clear social or economic evil to be eliminated. The time limit is arbitrary and unreasonable on its face because the four-year bar will inevitably deny a significant number of individuals, like Ms. Bingham, their right to seek redress for legal injuries that are yet to be discovered.

Second, the statute of repose violates the Uniform Operation clause of the Utah Constitution to the extent it is co-extensive with the federal Equal Protection clause. It does so by operating in a discriminatory fashion against individuals who suffer undetectable injuries which are not discovered until after the four-year statute of repose has run. In addition, the statute of repose operates to treat similarly situated individuals differently and individuals in different circumstances the same by failing to distinguish between those who discover their claims in time to bring legal action and those who do not. Ms. Bingham, through no fault of her own, did not discover her injury until outside the four-year time limit and now has no recourse to address the loss of her kidney based on others' negligence.

Finally, the statute of repose violates the federal Equal Protection clause even when that clause is considered on its own. Utah's Uniform Operation provision establishes different requirements than the federal Equal Protection clause, which can lead to distinct legal consequences. The district court failed to perform such an analysis which, when undertaken, shows that the statute of repose independently violates the Equal Protection clause.

Ms. Bingham asks that this Court declare the four-year statute of repose unconstitutional and reverse and remand.

ARGUMENT

I. THE STATUTE OF REPOSE VIOLATES THE OPEN COURTS CLAUSE OF THE UTAH CONSTITUTION.

The lower court incorrectly ruled that the statute of repose comports with the Open Courts provision of the Utah Constitution. (R.115.) Notably, the district judge expressed his reluctance to engage with constitutional issues, observing that he did not "have a lot

of authority to do much" about them and that "[i]t would be tough for [him] to make that type of determination here." (R.579.) But "[i]t is emphatically the province and duty of the judicial department to do say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 2 L. Ed. 60 (1803). The constitutional issues in this case fall precisely within the province of the Utah courts. The district court's order denying the motion to dismiss should be reversed. The statute of repose violates the Open Courts clause of the Utah Constitution.

The Open Courts clause found in Article I, Section 11 of the Utah Constitution provides the following:

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

As this Court has previously explained, a "plain reading of [this provision] establishes that the framers of the Constitution intended that an individual could not be arbitrarily deprived of effective remedies designed to protect basic individual rights." *Berry ex rel. Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 675 (Utah 1985). This "constitutional guarantee of access to the courthouse was not intended by the founders to be an empty gesture; individuals are also entitled to a remedy by 'due course of law' for injuries to 'person, property, or reputation.'" *Id.* In short, under the Open Courts clause, individuals have a constitutional right to an effective remedy through due course of law.

To assist courts in determining whether an individual has been unconstitutionally deprived of an effective remedy, the Court in *Berry* established a two-part test. In the first prong, courts must determine whether the individual has been left with "an effective and

reasonable alternative remedy 'by due course of law' for vindication of [Plaintiff's] constitutional interest." *Id.* at 680. In the second prong (if no alternative remedy exists), courts must determine whether "abrogation of the remedy or cause of action [was] justified." *Id.* According to *Berry*, the elimination of a remedy is justified "only if there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective." *Id.* Thus, if the legislature eliminates or limits the rights of injured parties to seek redress, there must either be an "alternative remedy" provided, or the elimination of the remedy (and the failure to provide an alternative remedy) must be a non-arbitrary or reasonable means of eliminating a "clear social or economic evil." Section 404 of the Malpractice Act fails both parts of this test, regardless which level of scrutiny applies.

A. Heightened Scrutiny Applies to Section 404.

The district court incorrectly failed to apply heightened scrutiny to section 404 under an Open Courts clause challenge. (R.115-116.) But section 404 impinges on Ms. Bingham's right to judicial redress under the Open Courts clause and should therefore be analyzed under this Court's heightened-scrutiny test announced in *Lee v. Gaufin*, 867 P.2d 572 (Utah 1993). *Gaufin* held "that a statutory classification that discriminates against a person's constitutionally protected right to a remedy for personal injury under Article I, section 11" is analyzed under "the heightened-scrutiny standard" and that the application of this standard is "supported by the rulings of other courts with respect to medical malpractice statutes and the effect of those statutes on the right to recover for negligently inflicted injuries." *Id.* at 582-83.

The lower court's Order on the Motion to Dismiss suggests that the "Utah Supreme Court has held that Open Courts rights are not properly characterized as fundamental and so are analyzed under the rational basis test." (R.117, citing *Judd v. Drezga*, 2004 UT 91, ¶ 30, 103 P.3d 135.) However, the question before the Court in the cited *Drezga* case was fundamentally different from the question before this Court.

In *Drezga*, the appellant challenged "the trial court's reduction of a jury's general damage award from $1,250,000 to $250,000." *Judd v. Drezga*, 2004 UT 91, ¶ 1, 103 P.3d 135. The question before the *Drezga* Court was whether a cap on quality of life damages was constitutionally infirm. *Id*. ¶ 6. The appellant challenged this damages cap on several constitutional grounds, including the Open Courts provision. *Id*. ¶ 10. This Court concluded there was "no open courts violation in the cap on quality of life damages . . . as applied to Athan's damages." *Id*. This was because "Athan's cause ha[d] been allowed before and ruled upon by the courts, and his remedy ha[d] been diminished, but not eliminated." *Id*. Here, in contrast, the remedy has been eliminated, which the appellees concede. (R.86.)

Additionally, the *Drezga* Court determined that the cap on quality of life damages satisfied both prongs of the *Berry* test. The first prong of the *Berry* test was inapplicable because the cap on quality of life damages "does nothing more than reduce Athan's recovery [and] does not provide a substitute remedy substantially equal to that abrogated." *Id*. ¶ 12. The opposite is true here. With respect to the second prong, the Court concluded that "the damage cap [was] designed to eliminate a social or economic evil, and [was] a reasonable, nonarbitrary means for doing so" and thus "does not violate

article I, section 11 of the Utah Constitution." *Id*. ¶ 18. Again, not true here. In sum, in *Drezga* "[t]he protections of the open courts provision ha[d] not been offended." *Id* ¶ 10.

Unlike *Drezga*, Ms. Bingham's "cause has [not] been allowed before and ruled upon by the courts[.]" *Id*. ¶ 10. The plaintiff's remedy in *Drezga* was merely diminished. Ms. Bingham's has been completely eliminated. The plaintiff's recovery in *Drezga* was reduced. Ms. Bingham's was precluded. The nature of the question in *Drezga* precluded application of the first prong of the *Berry* test. That prong forms a central question in this case. Moreover, the second prong of the *Berry* test was easily satisfied in *Drezga* where a remedy had already been provided. The nature – or reduction – of that remedy was all that had to survive the clear social or economic evil test. Here there is no such remedy to analyze. *Drezga* is inapplicable.

The language in *Drezga* that tripped up the district court stems perhaps from an oversight in reading *Condemarin v. University Hospital*, 775 P.2d 348 (Utah 1989). *Condemarin* explained that, "[a]s was clear in our opinion in *Berry*, this Court is not prepared to hold that the rights protected in article I, section 11 are 'fundamental' in the traditional equal protection sense." *Id.* at 359. But *Drezga* failed to recognize *Condemarin's* explicit caveat that follows: "[o]n the other hand, by construing article I, section 11 in *Berry* as 'an extension of the due process clause,' we committed ourselves to something more than a 'rational basis' deference under the equal protection doctrine." *Id.* at 360. The *Drezga* Court acknowledged that, in *Condemarin*, "we identified the right to recover for personal injuries as an important substantive right." *Id.* And *Condemarin* ultimately applied "a heightened standard of review under equal protection" to statutes

that limit "recovery rights in the medical malpractice area." *Id.* at 356. Thus, section 404 should be subject to heightened scrutiny, with or without *Drezga*.

Gaufin also supports this line of reasoning. *Gaufin*, as already noted, held that a heightened standard was applicable to statutory classifications that discriminate against the right to a remedy for personal injury protected by the Open Courts provision of the Utah Constitution. The *Gaufin* Court continued, "[a]fter [*Allen v. Intermountain Health Care, Inc.*, 635 P.2d 30 (Utah 1981)] was decided, *Malan v. Lewis*, 693 P.2d 661 (Utah 1984), held that a standard of scrutiny stricter than the rational-basis standard governed when a discrimination implicated a right protected by the open courts provision of Article I, section 11 of the Utah Constitution." *Gaufin*, 867 P.2d at 581. This Court also noted that when it comes to "rights protected by Article I, section 11 . . . a higher standard of judicial scrutiny was required because two constitutional values must be given due recognition," one of which includes "the policy that a person has a constitutional right to a remedy for an injury to one's person." *Id.*

Here, Ms. Bingham's right to a remedy for injury to her person is a constitutionally protected right under the Open Courts clause. As discussed above, section 404 creates a classification affecting just such a right and, under *Gaufin*, is subject to a heightened standard of scrutiny. In other words, the statute of repose unreasonably and arbitrarily impinges on Ms. Bingham's right to a remedy for injury to her person. *Gaufin* supports the application of heightened scrutiny to violations of the Open Courts clause.

The heightened scrutiny test itself was outlined in *Gaufin*, where this Court explained that discrimination against a certain class of individuals and their access to court for remedy of a personal injury is only constitutional "if it (1) is reasonable, (2) has more than a speculative tendency to further the legislative objective and, in fact, actually and substantially furthers a valid legislative purpose, and (3) is reasonably necessary to further a legitimate legislative goal." *Gaufin*, 867 P.2d at 582-83. Section 404 fails all three requirements. As shown in Argument Section I.C.i., *infra*, section 404's discrimination is not reasonable. As shown in Argument Section II.B, *infra*, the relationship between rising insurance rates and the affected class is too attenuated to sustain the statute's discrimination. And as shown in Argument Section II.A, *infra*, the discrimination does not further a legitimate legislative goal. Because the discussion of the two prongs of the *Berry* test informs this analysis, this brief will discuss those next before returning to the *Gaufin* factors in the brief sections just cited.

B. There is No Effective and Reasonable Alternative Remedy.

In this instance, the statute of repose eliminates an important and constitutionally protected right without providing a reasonable, alternative remedy. This Court, in its medical malpractice jurisprudence, has identified "the right to recover for personal injuries as an important substantive right . . . not only of monetary value but in many cases fundamental to the injured person's physical well-being and ability to continue to live a decent life." *Condemarin v. University Hosp.,* 775 P.2d 348, 360 (Utah 1989).[2] But

[2] The importance of this right, and the need for the judiciary to zealously protect it, was emphasized by Justice Zimmerman in a concurring opinion in *Berry*:

statutes of repose sometimes operate to "abolish[] causes of action that could not have been sued on within the [designated limitations] period." *Lee v. Gaufin*, 867 P.2d 572, 576 (Utah 1993). And when statutes of repose operate in this way, they "act[] substantively" rather than as procedural rules. So it is with the statute of repose at issue here.

The Malpractice Act provides the following regarding time limitations:

> A malpractice action against a health care provider shall be commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, *but not to exceed four years after the date of the alleged act, omission, neglect, or occurrence*.

Utah Code § 78B-3-404(1) (emphasis added). Because the limitation contained in the emphasized portion of this provision "begins to run from a date unrelated to the date of a [discovered] injury," it functions as a statute of repose and "is not designed to allow a reasonable time for the filing of an action once it arises." *Berry*, 717 P.2d at 672. For this

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> At any one time, only a small percentage of the citizenry will have recently been harmed and therefore will need to obtain a remedy from the members of a particular defendant class. The vast majority of the populace will have no interest in opposing legislative efforts to protect such a defendant class because the majority will not readily identify with those few persons unlucky enough to have been harmed. And *those few persons directly affected will, in all likelihood, lack the political power to prevent the passage of legislation that, in essence, requires every member of the citizenry who is injured by members of the defendant class to bear some or all of the cost of those injuries.*
>
> [T]he very act of drafting a constitution such as ours, which does not bestow unlimited power on the legislature and which does reserve certain rights to the people, constitutes a recognition that *there must be some limits on the legislature, that some interests of the people deserve special protection in the maelstrom of interest group politics that is the legislative process.*

Berry, 775 P.2d at 367-68 (Zimmerman, J., concurring) (emphasis added).

reason, it theoretically could operate to "bar the filing of a lawsuit even though the cause of action did not even arise until after it was barred and even though the injured person was diligent in seeking a judicial remedy." *Id.* That is exactly what happened in this case.

Here, Ms. Bingham suffered serious pain and other complications from a surgery on July 21, 2010. Due to these complications, Dr. Gourley and Dr. Platt soon performed another surgery. Ms. Bingham continued to experience severe kidney and bladder infections, which required IV antibiotic treatment over an extended period of time. But it was not until Dr. Bishoff performed a third surgery some seven years later that Ms. Bingham learned that Dr. Gourley and Dr. Platt had negligently tethered her ureter to her bladder, thereby causing her kidney to atrophy. Because Ms. Bingham did not discover this within the four-year repose window, section 404 of the Malpractice Act operated substantively to deprive her of her constitutional right to seek redress in court. Even though Ms. Bingham's constitutional right to recover for her injuries was abolished by section 404, neither the Malpractice Act nor any other law provides Ms. Bingham with an alternative remedy.

This Court has held "that discovering a legal injury includes discovering the causal event of the injury." *Daniels v. Gamma W. Brachytherapy, LLC*, 2009 UT 66, ¶ 25, 221 P.3d 256. In other words, the discovery requirement under the Malpractice Act has been interpreted "to mean a patient must discover the legal injury—that is, both the fact of injury and that it resulted from negligence—before the statute of limitations begins to run." *Daniels v. Gamma W. Brachytherapy, LLC*, 2009 UT 66, ¶ 1, 221 P.3d 256. Here, Ms. Bingham did not discover her "legal injury" until well after four years had passed.

The fact of Ms. Bingham's injury – a severely atrophied kidney – was not discovered until November 15, 2017 – over seven years later – when Dr. Bishoff performed a corrective surgery on Ms. Bingham and observed the cause of the damage that had occurred during Ms. Bingham's initial surgeries. (R.379, 381.) It was not until that same date that Ms. Bingham discovered that the damage was a result of prior negligence. (R.381.)

Ms. Bingham did not discover her injury until after the statute of repose ran. Although her cause of action did not accrue until that time, the statute of repose had already barred her claim. This left her without an effective and reasonable alternative remedy.

Notably, the appellees here conceded below that the statute failed the first prong of the *Berry* test. Ms. Bingham noted in the district court briefing that, in their motion to dismiss, the doctors did not raise any arguments regarding the first step of the *Berry* test, effectively conceding that section 404 abolished a substantive, constitutional right without providing an alternative remedy. (R 63.) The doctors then acknowledged as much in their reply brief on their motion to dismiss: "For purposes of their Motion, Defendants assume the Act's statute of repose abrogates a cause of action and the legislature has not provided for an alternative remedy." (R. 86.) Accordingly, on this record, section 404 indisputably fails the first part of the *Berry* test.

C. There is No Clear Social or Economic Evil to Be Eliminated.

Section 404 also fails the second part of the *Berry* test. As noted above, under this second part, the Court must determine whether the elimination of this important

constitutional right without the creation of an alternative remedy was a non-arbitrary or reasonable way to eliminate a clear social or economic evil. Section 404 fails this part for at least four reasons.

First, section 404 fails the *Berry* test because it imposes an arbitrary and unreasonable four-year time limit on all types of injuries governed by the Malpractice Act, even where the type of injury would make compliance within the four-year window impossible.

Second, section 404's exception is itself arbitrary.

Third, section 404 fails because it is too likely to deprive individuals of their constitutional right to redress for injuries that should be compensated.

Finally, Utah cases that have upheld the constitutionality of other statutes of repose are fundamentally inapposite.

This brief will discuss each in turn.

i. Section 404's Four-Year Time Limit is Arbitrary and Unreasonable.

First, section 404's statute of repose creates an arbitrary and unreasonable limitation that does not further the legislature's goal of eliminating a clear social or economic evil. In their motion to dismiss filed below, Dr. Gourley and Dr. Platt argued on a broad and general basis, citing a non-medical malpractice case, that "[s]tatutes of repose are generally enacted to curb rising insurance rates, to increase the availability of insurance, and to reduce the risk and uncertainty of liability." (R.20, citing *Raithaus v. Saab-Scandia of America, Inc.* 784 P.2d 1158, 1161 (Utah 1989).) But even if true, those

alleged legislative objectives do not qualify here as the type of "clear social or economic evil" required by the *Berry* test.

In determining whether there is a clear social or economic evil to be eliminated, the Court in *Berry* noted that the Utah Product Liability Act was drafted and sponsored by the Utah Manufacturers' Association (just as the Malpractice Act was sponsored by the Utah Medical Association). This Court observed that the "Legislature based the statute on a finding that the number of claims for damages arising from defective products [nationally] has increased greatly in recent years." *Id.* at 683. But even though rates were rising nationally, this Court rejected that fact as justification for the elimination of a constitutionally protected right because the rates did "not appear to have been [rising] within the state." *Id.*

In *Lee v. Gaufin*, this Court discussed at length the legislative purpose of the Malpractice Act and concluded that, although other states experienced increases in medical malpractice lawsuits and verdicts, "*there was no evidence of increased malpractice lawsuits or of greater verdicts in Utah*." *Lee v. Gaufin*, 867 P.2d 572, 584-88 (Utah 1993) (emphasis added). Based in part on that reason, this Court held that legislation targeting malpractice claims "does not actually and substantially further the policy of curbing and reducing malpractice premiums and of ensuring reasonably priced health-care services to the people of Utah and is not necessary to accomplish those ends." *Id.* at 588. This means that the purpose for which the Malpractice Act was enacted—to end the potential threat of a lawsuit to some medical professionals—does not qualify as a "clear social or economic evil" that justifies abrogating a victim's right to recovery by trampling

on their constitutional rights since those rights are afforded considerably more protection. *See, e.g., Berry*, 717 P.2d at 679-80 ("A statute could not bar the existing rights of claimants without affording this opportunity [to try rights in the courts]; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions.").[3]

The *Berry* court also concluded that the product liability statute of repose is likely to provide less incentive to manufacturers to ensure safety of products with a useful life longer than six years, thereby increasing the number of persons injured or killed by shoddy workmanship and thereby being counterproductive in terms of public safety. *Berry*, 717 P.2d at 683. Similarly, in medical malpractice, medical providers may have less incentive to properly inform and diagnose their patients of less common conditions, which may not be diagnosed for years, if all medical malpractice claims are barred after four years.

In *Horton v. Goldminer's Daughter*, 785 P.2d 1087 (Utah 1989), this Court concluded that a seven-year statute of repose for construction defects was unconstitutional. In so holding, this Court noted that "the potential threat of a lawsuit to some construction professionals" was not a "clear social or economic evil" that justifies

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[3] The same criticism can be leveled at the district court's blanket reliance on the doctors' briefing justifications and on the generalized, non-Utah-specific legislative findings set forth in the Malpractice Act. (*See* R.115-16; Utah Code § 78B-3-402.)

"forcing an injured person to forego a legal remedy." *Id.* at 1095. The same can be said here of the potential threat of a lawsuit to some medical professionals.[4]

In *Vega v. Jordan Valley Medical Center*, 2019 UT 35, 449 P.3d 31, this Court held that the provisions of the Malpractice Act mandating an affidavit of merit were unconstitutional. In doing so, the Court acknowledged that the legislature has some authority to combat rising health costs: "If, in the legislature's judgment, frivolous lawsuits are a major contributing factor to increased costs of care, it has the power and prerogative to attempt to mitigate any and all deleterious effects." *Id.* Even though the legislature has authority to combat rising health care costs, however, the Court stressed that "the legislature's solution is still subject to the Utah Constitution." *Id.*; *see also id.* (explaining that the judicial power "cannot be abrogated or eliminated by statute"); *Berry*, 717 P.2d at 676 ("If the legislative prerogative were always paramount, and the Legislature could abolish any or all remedies for injuries done to a person, his [or her] property, or reputation, section 11 would be a useless appendage to the Constitution").

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[4] The decision in *Horton* was based, at least partially, on a presumption that statutes abrogating a cause of action are unconstitutional. Under this presumption, the burden was on defendants to prove the existence of a clear social or economic harm. Such a presumption was subsequently overruled by this Court in *Waite v. Utah Lab. Comm'n*, 2017 UT 86, ¶ 21, 416 P.3d 635. Following the decision in *Waite*, Plaintiffs retain the burden of showing that both parts of the *Berry* test are in their favor. They have met their burden in this briefing. Furthermore, as already noted *supra*, the appellees conceded below that the first prong of the *Berry* test was met.

With this foundational legislative limitation in mind, the Utah appellate courts have deemed numerous statutes of repose to be unconstitutional under the *Berry* test.[5] The most obvious example is this Court's decision in *Berry. See id.* at 681 ("For the reasons stated below, we hold that the elimination of all causes of action after the period specified in section 3 of the Utah Product Liability Act is arbitrary, unreasonable, and will not achieve the statutory objective."). In that case, this Court struck down a product liability statute of repose because the Products Liability Act imposed an arbitrary six-year limit without distinguishing between the various types of products to which the Act applied. *Berry*, 717 P.2d at 673 (noting that "neither the inherent dangerousness of the manufacturer's product nor the expected useful life of the product affects the immunity conferred" and that "the immunity protects a manufacturer whether the defective product has an expected useful life of four years or twenty-four years and even though the defect is not detectable by a user so that he is wholly unable to protect himself").

Similar to the statute of repose struck down in *Berry*, section 404 imposes an arbitrary four-year time limit without distinguishing between the various types of injuries that can occur within the medical malpractice realm. In this way, the statute of repose was not designed to provide a reasonable time for the filing of every type of malpractice

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[5] *See Horton v. Goldminer's Daughter,* 785 P.2d 1087 (Utah 1989) (striking down a seven-year statute of repose for construction claims); *Stilling v. Skankey*, 784 P.2d 144 (Utah 1989) (*per curiam*) (affirming the unconstitutionality of a similar seven-year statute of repose against architects and engineers); *Sun Valley Water Beds of Utah, Inc. v. Herm Hughes & Son, Inc.,* 782 P.2d 188 (Utah 1989) (same); *Velarde v. Board of Review of Indus. Comm'n,* 831 P.2d 123 (Utah App. 1992) (striking down a three-year statute of repose for certain employment-related injury claims); *Wrolstad v. Industrial Comm'n*, 786 P.2d 243 (Utah App. 1990) (striking down a one-year statute of repose).

action governed by the Act. *But cf. Berry*, 717 P.2d at 672 ("To be constitutional, a statute of limitations must allow a reasonable time for the filing of an action *after* a cause of action arises.") (emphasis added). Under section 404, a person who suffers an obvious injury, such as a mistaken amputation, would have ample time to file a lawsuit, but a person who suffers an injury that is likely to avoid detection for some time is essentially robbed of any opportunity to avail themselves of his or her constitutional right to redress.

In sum, the defendants' asserted objectives for the repose statute, which the district judge appears to have adopted wholesale with little or no independent analysis, do not justify the legislature's imposition of an arbitrary four-year time limit without considering the reasonableness of that limit for all types of injuries.

ii. Section 404's Exception Is Itself Arbitrary.

Perhaps recognizing the constitutional problems created by the blanket, four-year bar, the legislature carved out an exception for claims involving a "foreign object [that] has been wrongfully left within a patient's body." Utah Code § 78B-3-404(2)(a). Under this exception, a plaintiff has one year after discovering the existence of a foreign object to file suit. This "foreign object" exception is a step in the right direction, and it suggests that the legislature understands that an arbitrary four-year time limit on injuries of every kind is unnecessary to achieve its legislative objectives. However, the inclusion of this exception does not cure section 404's constitutional infirmities because the exception itself is arbitrary.

As this Court explained in *Foil v. Ballinger*, 601 P.2d 144 (Utah 1979), there is "no basis for making a legal distinction" between an injury caused by a misplaced

"foreign object" and other injuries a plaintiff would have "no knowledge of." *Id.* at 148. The facts in this case demonstrate why that is so. Although the sutures that strapped Ms. Bingham's ureter to her bladder may not qualify as foreign objects under the foreign-object exception, they were equally positioned to avoid detection as a foreign object. By including the foreign-object exception in section 404, the legislature essentially conceded that its legislative aims may be achieved by something less than a blanket four-year limitation. But, as noted by the Court in *Foil*, there is no basis for exempting injuries stemming from misplaced foreign objects while simultaneously barring a right to redress for an injury that is equally difficult to detect. For this reason, section 404's blanket four-year ban is arbitrary and unreasonable on its face and as applied to the facts of this case.

In light of the legislature's admission that a blanket four-year bar is inappropriate, the problems with section 404's application to the facts of this case could be explained as not being directed to "a clear social or economic evil." In other words, although the legislature has some authority to target rising health care costs and frivolous lawsuits, it is unclear how barring a legitimate claim stemming from a previously undetectable injury would legitimately further the legislature's stated purposes. *Cf. Berry*, 717 P.2d at 683 (explaining that the statute of repose in question there "does not reasonably and substantially advance the stated purpose of the statute," and that "whatever beneficial effects may accrue from the statute of repose do not justify the denial of the rights protected by Article I, Section 11").

The conclusion that section 404's statute of repose is unconstitutional under the Open Courts clause is consistent with the rule in other states regarding their malpractice statutes. *See, e.g.*, *McCollum v. Sisters of Charity of Nazareth Health Corp*., 799 S.W.2d 15, 19 (Ky. 1990) ("While there may be certain salutary effects from limiting to five years the period in which suits can be brought, these cannot outweigh a plaintiff's constitutional right to have his or her day in court"). Other exemplary cases are collected here in a footnote.[6]

iii. Section 404 Is Too Likely to Deprive Individuals of Their Constitutional Right to Redress for Injuries That Should Be Compensated.

Additionally, section 404's statute of repose is arbitrary and unreasonable on its face because the four-year bar will inevitably deny a significant number of individuals their constitutional right under the Open Courts clause. As this Court noted in *Berry*, "[t]o

[6] *See Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984) (Holding that "two-year statute of limitations for actions arising out of medical malpractice violates the open courts provision of the State Constitution by cutting off a cause of action before the party knows, or reasonably should know, that he is injured[.]"); *Jackson v. Mannesmann Demag Corp.*, 435 So. 2d 725 (Ala. 1983) ("statute of repose regarding improvements to real estate is in violation of the open courts provision of the State Constitution"); *Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996 (Ala. 1982) ("products liability statute, in barring claims involving products that had been used for more than ten years, was unconstitutional as violative of the Alabama constitutional provision requiring that all courts be open"); *Diamond v. E. R. Squibb & Sons, Inc.*, 397 So. 2d 671 (Fla. 1981) ("where, under 12-year statute of limitations, daughter's and parent's right of action against manufacturer of drug was barred before it ever existed in that it was not discovered until 20 years after drug was administered that teenage girls whose mothers had been treated with drug during pregnancy were developing cancerous or precancerous conditions, limitations statute, as applied, violated State Constitution's guarantee of access to courts").

be constitutional, a statute of limitations must allow a reasonable time for the filing of an action after a cause of action arises." *Berry*, 717 P.2d at 672. And in *Craftsman Builder's Supply, Inc. v. Butler*, the Court clarified that even though the Open Courts clause "does not necessarily forbid forever and always" the imposition of a statute of repose, "it clearly does . . . make certain that [the] period of repose only be allowed when the possibility of injury and damage has become highly remote and unexpected." 1999 UT 18, ¶ 19, 974 P.2d 1194. In other words, the *Craftsman* court made clear that statutes of repose are arbitrary and unreasonable if they are "too likely" to bar otherwise meritorious claims. The four-year statute of repose fails this test.

Nothing in the Malpractice Act's stated legislative purposes suggests that the legislature was concerned with limiting section 404's statute of repose to bar only highly remote and unexpected claims. The four-year limitation is much shorter than other limitations Utah appellate courts have struck down as unconstitutional. *See, e.g., Horton*, 785 P.2d at 1095 (concluding that a seven-year statute of repose was unreasonable); *Stilling*, 784 P.2d 144 (Utah 1989) (per curiam) (affirming the unconstitutionality of a similar seven-year statute of repose against architects and engineers); *Sun Valley Water Beds of Utah, Inc.*, 782 P.2d 188 (Utah 1989) (same); *Hales v. Indus. Comm'n of Utah*, 854 P.2d 537 (Utah Ct. App. 1993) (workers compensation statute of repose which provided death benefits to dependents only when work-related injury caused death within six years of accident held unconstitutional under open courts provision).

Therefore, in addition to the arbitrary distinction the Malpractice Act makes for injuries stemming from foreign objects and other, equally undetectable injuries, section

404 is unreasonable because it is too likely to deprive individuals of their Open-Courts-clause right to redress for injuries that should be compensated. For these reasons, the Court should conclude that the statute of repose in section 404 of the Malpractice Act is unconstitutional on its face and as applied to Plaintiff in this case.

iv. Utah Cases Upholding the Constitutionality of Other Statutes of Repose Are Inapposite.

Finally, there are cases in which the Utah courts have upheld the constitutionality of certain statutes of respose. Those cases are distinguishable for several significant reasons.

For example, in their original motion to dismiss below the doctors cited *Craftsman Builder's Supply, Inc. v. Butler Mfg. Co.*, 1999 UT 18, 974 P.2d 1194. In that case, the legislature created a statute of repose for breaches of contract or warranty construction claims as well as for other construction-related tort claims. *Id.* ¶ 13. In so doing, the legislature attempted to target the specific social and economic evil caused by the "perpetual risk of liability" for certain actors in the construction industry. *Id.* ¶ 20. Importantly, while attempting to address this identified evil, the legislature was careful to calibrate the statute of repose so that it kicked in only "when the possibility of injury and damage becomes highly remote and unexpected." *Id.* ¶ 21. Specifically, the Court noted that during debates on the bill, evidence was presented to suggest that the "claims the builders' statute of repose would cut off represented less than one percent of the claims [typically] brought." *Id.*

The Malpractice Act's statute of repose is very different from the statute examined in *Craftsman.* In *Craftsman* (unlike with the statute at issue here), the legislature had been careful to establish different time limits for different types of construction claims. For example, the statute created a six-year repose period for contract and warranty claims and a twelve-year period for all other claims. Both of these repose periods were supported by legislative findings regarding the typical time period for filing the type of claims at issue.

Also, unlike the statute in *Craftsman,* nothing in the Malpractice Act suggests that the legislature was concerned with limiting the statute of repose to bar only those claims that were highly remote and unexpected. Indeed, common sense suggests that the four-year repose period is very likely to bar a high percentage of legitimate claims. Medical injuries can be difficult to detect and often require the diagnosis of a medical professional. Thus, the *Craftsman* statute of repose differs substantially from the Malpractice Act's statute of repose.

Additionally, this Court's decision in *Waite v. Utah Labor Commission,* 2017 UT 86, 416 P.3d 635, is distinguishable. In that case, the Court found that a *twelve-year* statute of repose for Workers Compensation claims should be deemed constitutional under the Open Courts clause. Again, the statute of repose in that case differed in substantial ways from the provision in the Malpractice Act. In *Waite*, the Court reasoned that the twelve-year time period far exceeded any statutes of limitations for civil claims and that in the Workers Compensation context, there are additional protections allowing for extended jurisdiction by the Utah Labor Commission, even after twelve years. *Waite,*

¶¶ 29, 30. The *Waite* Court also emphasized that there is no time limit on the insurance company's or employer's responsibility to cover medical treatment. *Id.* ¶ 29. In short, unlike the statute of repose in the Malpractice Act, in *Waite* there were "effective and reasonable alternative remed[ies]" satisfying the *Berry* test.

The *Waite* Court specifically rejected comparisons of workers compensation claims to personal injury awards. *Id.* ¶ 15. In workers compensation, the plaintiff generally knows exactly when he or she has been injured on the job, which reasonably triggers the statute of repose. In medical malpractice, the plaintiff is often dependent on subsequent medical professionals to inform him or her of an injury and that the injury is the result of earlier malpractice. Yet medical malpractice victims are given only four years to commence their claims, while injured workers are given twelve. This distinction underscores the arbitrary and unreasonable nature of the four-year statute of repose in section 404.

D. Section 404 Still Fails if Rational Basis is Applied.

Finally, in the event this Court determines that section 404 is not subject to heightened scrutiny, the statute is still unconstitutional even where the less demanding, rational-basis test is applied. Under this test, "state laws must 'treat similarly situated people alike unless a reasonable basis exists for treating them differently.'" *State v. Lafferty,* 2001 UT 19, ¶ 70, 20 P.3d 342 (citation omitted). "[W]e must determine what classifications are created by the statute, whether they are treated disparately, and whether the disparate treatment serves a reasonable government objective." *State v. Merrill*, 2005 UT 34, ¶ 31, 114 P.3d 585. "The general rule is that legislation is presumed

to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Rose v. Off. of Pro. Conduct*, 2017 UT 50, ¶ 80, 424 P.3d 134, 152 (quoting *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313 (1985)).

As discussed above, section 404 exempts from the statute of repose those individuals in whom a foreign object is found. This exception serves the important purpose of preserving the constitutional right to sue for certain individuals who, under the circumstances, could not possibly have availed themselves of the right to sue within the repose period. But section 404 does not include other individuals who are equally deprived of an opportunity to avail themselves of their right to bring a lawsuit because their injuries are undetectable. There is no rational explanation for this distinction.

The arbitrary and unreasonable nature of section 404's classification is apparent when applied to the facts of this case. The sutures that strapped Ms. Bingham's ureter to her bladder are equally as harmful and likely to avoid detection as, for example, a misplaced sponge left inside some other plaintiff's body would be. But under section 404, Ms. Bingham is barred from bringing a lawsuit while the other hypothetical plaintiff is not. There is also no rational relationship between increased costs of medical insurance in Utah and the class of persons disparately affected by section 404. *See e.g.*, *DeYoung v. Providence Med. Ctr.*, 960 P.2d 925 (Wash. 1998) ("[T]he relationship between the goal of alleviating any medical insurance crisis and the class of persons affected by the eight-year statute of repose is too attenuated to survive [even] rational basis scrutiny."). Section 404 is constitutionally infirm under any analysis.

In sum, the Malpractice Act's statute of repose violates the Open Courts clause, both on its face and as applied to the type of injury in this case. It impinges on Ms. Bingham's constitutionally protected right to a remedy for personal injury and is thus subject to heightened scrutiny. As established in *Berry*, a statute may not unconstitutionally deprive an individual of an effective remedy. If it does, the abrogation of that remedy is justified only if there is a clear social or economic evil to be eliminated *and* the elimination of that remedy is not arbitrary or unreasonable. Section 404 deprived Ms. Bingham of effective remedy but the abrogation of that remedy is not justified because there is no clear or social evil to be eliminated. Moreover, the elimination of Ms. Bingham's remedy is arbitrary and unreasonable. Under heightened scrutiny, section 404 violates the Open Courts clause of the Utah Constitution. And because there is no rational basis for section 404's discrimination and disparate treatment of similarly situated persons, it fails to survive even rational basis scrutiny. Accordingly, this Court should conclude that section 404 violates the Open Court's clause.

II. THE STATUTE OF REPOSE VIOLATES THE UNIFORM OPERATION CLAUSE IN THE UTAH CONSTITUTION AND THE EQUAL PROTECTION CLAUSE IN THE UNITED STATES CONSTITUTION TO THE EXTENT THOSE CLAUSES ARE CO-EXTENSIVE.

The district court's ruling that the "the statute of repose does not violate the Utah Constitution's Uniform Operations of Laws provision" was incorrect and should be reversed. (R.116.) In addition to violating the Open Courts provision of the Utah Constitution, section 404 violates the Uniform Operation clause of the Utah Constitution and the Equal Protection clause of the United States Constitution.

The U.S. Constitution establishes equal protection of the laws in the Fourteenth Amendment. U.S. Const. Amend. XIV. In addition, the Utah Constitution requires "uniform" operation of the laws, Utah Const. Art. I, § 24, which is treated by this Court as the Utah Constitution's corollary to the U.S. Constitution's Equal Protection clause. *See In re Adoption of J.S.*, 2014 UT 51, ¶ 67, 358 P.3d 1009. Under these provisions, laws are generally required to treat similarly situated individuals the same. *Id.* In the instant case, the Malpractice Act's statute of repose fails this simple test.

In *Condemarin v. University Hospital*, 775 P.2d 348 (Utah 1989), this Court held that "a heightened standard of equal protection scrutiny should be applied to statutes limiting recovery rights in the medical malpractice area." *Id.* at 356.

Based on a heightened standard of review, discrimination against a certain class of individuals (those injured by negligence of a medical professional who did not discover their injury within four years) and their access to court for remedy of a personal injury is only constitutional "if it (1) is reasonable, (2) has more than a speculative tendency to further the legislative objective and, in fact, actually and substantially furthers a valid legislative purpose, and (3) is reasonably necessary to further a legitimate legislative goal." *Lee v. Gaufin*, 867 P.2d 572, 582-83 (Utah 1993). Heightened scrutiny under this test is the standard the district court purported to apply. (R.116.) However, the statute of repose in the Malpractice Act does not pass this test, so reversal is in order.

As a threshold matter, it is clear that section 404 discriminates against individuals who suffer undetectable injuries. To be non-discriminatory, "it is not enough that [a law]

be uniform on its face. What is critical is that the operation of the law be uniform." *Lee v. Gaufin*, 867 P.2d 572, 577 (Utah 1993). "A law does not operate uniformly if 'persons similarly situated' are not treated 'similarly' or if 'persons in different circumstances' are 'treated as if their circumstances were the same.'" *Id.* The statue of repose in this case discriminates in two ways.

First, it discriminates because it fails to account for a significant difference between the circumstances of individuals with easily recognizable injuries and the circumstances of those who suffer injuries that are likely to go undiscovered for a lengthy period of time. Section 404 not only divides a class of individuals injured by the negligence of a medical professional from a class of individuals injured by the negligence of other professionals or individuals but it also creates a sub-class of individuals who fail to get the benefit of the discovery rule if they do not learn of their injury until after the statute of repose period of four years. *Cf. Wall v. Marouk*, 302 P.3d 775, 779 (Okla. 2013) (invalidating medical malpractice provision that "creates two classes, those who file a cause of action for negligence generally, and those who file a cause of action for professional negligence").

Second, the Malpractice Act discriminates because it treats similarly situated individuals differently. It does this by granting an exception from the statute of repose to those in whom a foreign object was discovered but not to individuals who have equally been deprived of an opportunity to seek redress for a medical injury, simply because those injuries could not be discovered during the repose period. Utah Code § 78B-3-

404(2); *see supra*, Part I.B.ii. Neither manner of discrimination is justified under the Uniform Operation clause.

A. Section 404 Treats Persons in Different Circumstances the Same.

First, Section 404 treats persons in different circumstances the same. Section 404's failure to account for a significant difference between the circumstances of individuals with easily recognizable injuries and the circumstances of those who suffer injuries that are likely to go undiscovered for an extended period of time is unreasonable and does not serve a legitimate legislative purpose. It is unreasonable because a claim cannot be asserted if an injury is discovered more than four years after the tortious conduct occurred, even if it was impossible to discover the claim earlier. This violates the *Gaufin* test. *See Gaufin*, 867 P.2d at 583.

Another way of describing this statute of repose is to say that it deprives a plaintiff of the benefit of the "discovery rule" in section 404. *See* Utah Code § 78B-3-404(1) ("A malpractice action against a health care provider shall be commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs . . . ."). The "discovery rule" is an instrument of fundamental fairness. It allows an injured plaintiff reasonable time to pursue a cause of action after discovering the injury, even if the act causing the injury occurred at an earlier time. This is crucial in the medical malpractice context, especially in cases of misdiagnosis. In such cases, medical providers, who have significantly more experience, knowledge, and training than a lay person, fail to discover or fail to inform a

patient of a discovery that is materially important to that person's health. In this case, Ms. Bingham did not discover her injury until she had surgery in 2017 to remove her kidney and was informed of relevant facts by a third-party medical professional. Clearly, lay persons cannot make such discoveries on their own without medical assistance.

A patient may eventually discover materially important information, but it might be only after the disease or damage progresses to a point that early intervention is no longer an option. The "discovery rule" in the statute of limitations allows plaintiffs who were unable to discover their injury earlier to pursue their rights. The statute of repose, however, denies the benefit of the discovery rule to medical malpractice victims whose claims take more than four years to accrue because their legal injuries were not known within that period of time. In these situations, the statute of repose actually runs before the statute of limitations, and essentially robs these individuals of their right to pursue a claim for an injury of which they were unaware, through no fault of their own. For this reason, individuals with difficult-to-detect injuries are uniquely susceptible to losing their constitutional right to seek judicial redress by a statute of repose.

By creating a blanket statute of repose in the medical malpractice context, the legislature unreasonably and unjustifiably treats individuals who are differently situated the same. "[T]o say that a cause of action accrues . . . before [the person] can reasonably be expected to have knowledge of any wrong inflicted upon her is patently inconsistent and unrealistic. She cannot maintain an action before she knows she has one. To say to one who has been wronged, 'You have a remedy, but before the wrong was ascertainable

to you, the law stripped you of your remedy,' makes a mockery of the law." *Foil v. Ballinger*, 601 P.2d 144, 148-49 (Utah 1979).

Based on similar provisions, many other states have held that the failure to distinguish between those who discover their claims in time to organize a legal action, and those who do not, does not further the goal of alleviating the alleged medical malpractice insurance crisis. In *Gaines v. Preterm-Cleveland, Inc*., 514 N.E.2d 709, 714 (Ohio 1987), "[t]he objective of the legislature in enacting [a four-year statute of repose for medical malpractice suits] was to remedy the perceived crisis in the area of medical malpractice." The relevant "distinction under review . . . [was] between those medical malpractice plaintiffs who discover their injuries within three years from the date of the act or omission constituting the malpractice, and those who do not." *Id.* The former class of persons has a full year to pursue claims before the absolute four-year bar; "[h]owever, a person injured by malpractice who, in the exercise of reasonable diligence, does not discover his injury until more than three but less than four years after the act constituting the malpractice will have less than a year to institute legal action before the four-year bar intervenes to cut off his rights." *Id.*[7]

With respect the latter group, the court continued: "[a] person in this class of plaintiffs is not any less injured than other malpractice victims. Nor has he been less vigilant in monitoring the quality of his medical care. Yet his legal rights are abridged

[7] An Ohio state *slip opinion* has suggested that *Gaines* is no longer controlling authority and that its conclusion has been overruled. *See Grayson v. Cleveland Clinic Found.*, 2022-Ohio-1668, ¶ 22. But recent *reported cases* treat it as controlling. *See e.g.*, *Freeman v. Durrani*, 2019-Ohio-3643, ¶ 20, 144 N.E.3d 1067.

and even cut off completely for no other reason than the fortuity of timing. We fail to discern any rational basis for distinguishing such a plaintiff from other medical malpractice litigants." *Id.* at 714-15. Although the goal of the legislature in *Gaines* was "entirely within its powers," the Ohio Supreme Court observed, "we cannot elevate our deference to legislative wisdom over our duty to uphold the Constitution of this state." *Id.* at 715. In other words, distinguishing between those who discover their claims in time to organize a legal action and those who do not did not further any legislative goal.

DeYoung v. Providence Med. Ctr., 960 P.2d 919 (Wash. 1998), is equally instructive. In that case, the appellant alleged that the appellee medical center negligently administered radiation treatment to her eyes in 1980, which she didn't discover had caused her injuries until 1995. Appellant sued the following year after her discovery. The Washington Supreme Court held that the "eight-year statute of repose was enacted in 1976 in response to a perceived insurance crisis said to result from the discovery rule and from increased medical malpractice claims, which allegedly created problems in calculating and reserving for exposure on long-tail claims." *Id.* at 924. The legislature "intended to protect insurance companies while hopefully not result[ing] in too many individuals not getting compensated." *Id.* (internal quotations omitted). However, the court concluded that "[t]he eight-year statute of repose could not avert or resolve a malpractice insurance crisis." *Id.* at 925. The court thus concluded that "[t]he relationship between the goal of alleviating any medical insurance crisis and the class of persons affected by the eight-year statute of repose is too attenuated to survive [even] rational basis scrutiny." *Id.*

This Court should join with the well-reasoned decisions of these high courts from other jurisdictions and conclude that the statute of repose in section 404 violates the Uniform Operation clause.

B. Section 404 Treats Similarly Situated Persons Differently.

Additionally, section 404 violates the Uniform Operation clause because it arbitrarily and unreasonably treats similarly situated individuals differently. As discussed above, section 404 exempts from the statute of repose individuals in whom a foreign object is found. This exception serves the important purpose of providing a right to sue to certain individuals who, under the circumstances, could not possibly have availed themselves of their right to bring a lawsuit within the repose period. Unfortunately, section 404 fails to account for other individuals who are equally deprived of an opportunity to avail themselves of their right to bring a lawsuit because they could not discover their legal injury earlier. This omission does not further any legitimate legislative purpose. In short, section 404 violates the *Gaufin* test. *See Gaufin*, 867 P.2d at 583.

Finally, as a general matter, the statute of repose does not further any alleged legislative objective of reducing malpractice premiums and is not reasonably necessary to further a legitimate legislative goal, as discussed above. This Court concluded that the evidence purportedly justifying the legislature's enactment of the Malpractice Act does not support the proposition that the "long tail" problem of older claims was a significant factor in causing high professional liability premiums in Utah. *See Lee v. Gaufin*, 867 P.2d 572,

588 (Utah 1993). The extremely short statute of repose at issue in the instant case burdens an injured party and significantly benefits one class, the health care professional class. Although statutes of repose exist for other types of actions, the four-year statute of repose in the Malpractice Act is one of the shortest, if not the shortest, in the state. There is no legitimate reason why the health care industry deserves special protections with an unreasonably short statute of repose at the expense of innocent malpractice victims.

In sum, section 404 of the Malpractice Act violates the Uniform Operation clause (and therefore the co-extensive Equal Protection clause of the U.S. Constitution) because it discriminates against individuals who had no opportunity to avail themselves of their constitutional right to seek redress for a personal injury. Section 404 discriminates against that class of individuals because it treats them the same as individuals with easily identifiable injuries even though the circumstances of the two classes of individuals are substantially different because the circumstances of the discriminated class make it impossible for them to avail themselves of their constitutional right. And it discriminates against them because it exempts an arbitrary subset of individuals who had no opportunity to avail themselves of their constitutional right to seek redress but not the remainder of that class. Because these forms of discrimination are unreasonable and fail to further any legitimate legislative purpose, they are unconstitutional under the test established in *Gaufin*.

III. THE STATUTE OF REPOSE VIOLATES THE EQUAL PROTECTION CLAUSE IN THE UNITED STATES CONSTITUTION WHEN THAT CLAUSE IS CONSIDERED ON ITS OWN.

Lastly, section 404 violates the Equal Protection Clause of the United States Constitution if considered independently. The district court ruled "that a separate analysis under the Equal Protection Clause is unnecessary, and in any event, the statute of repose passes such analysis." (R.117.) The lower court's conclusion is incorrect and should be reversed.

The Equal Protection Clause "provides that no state shall 'deny to any person within its jurisdiction the equal protection of the laws,' U.S. Const. amend. XIV, § 1, 'which is essentially a direction that all persons similarly situated should be treated alike.'" *Gallivan v. Walker*, 2002 UT 89, ¶ 67, 54 P.3d 1069 (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 439 (1985)). Under this Clause, the constitutionality of a statute often depends on the standard of scrutiny the court applies. If a statute "'impinge[s] upon the exercise of a fundamental right,' the Equal Protection Clause requires 'the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest.'" *Kitchen v. Herbert*, 755 F.3d 1193, 1218 (10th Cir. 2014) (*quoting Plyler v. Doe*, 457 U.S. 202, 216-17 (1982)). In other words, strict scrutiny will be applied to a statute challenged on Equal Protection grounds where the statute impinges the exercise of a fundamental right.

As described above, the arbitrary and unreasonable nature of section 404's classification is apparent when applied to the allegations in the Amended Complaint. The sutures that strapped Ms. Bingham's ureter to her bladder are equally as harmful and

likely to avoid detection as, for example, a misplaced sponge left inside some other plaintiff's body would be. But under section 404, Ms. Bingham is barred from bringing a lawsuit while other similarly situated plaintiffs are not. The language of section 404 on its face, makes an arbitrary and unreasonable distinction between such plaintiffs. Under the Equal Protection clause, the appellees must demonstrate that this classification has been precisely tailored to serve a compelling governmental interest. They cannot. Section 404 is independently unconstitutional under the federal Equal Protection clause.

Finally, even though the Uniform Operation provision "may, *in some circumstances*, [be] more rigorous than the standard applied under the federal constitution," this Court has clearly provided that "the differing language, context, and jurisprudential considerations found in and surrounding the two provisions have led to differing legal consequences." *State v. Drej*, 2010 UT 35, ¶ 32, 233 P.3d 476 (emphasis added) (internal quotation marks omitted); *see also State v. Mohi*, 901 P.2d 991, 997 (Utah 1995) ("Utah's uniform operation of laws provision establishes different requirements than does the federal Equal Protection Clause."). Because the Equal Protection clause establishes different requirements, which can lead to differing legal consequences, it is important to consider the two constitutional provisions separately. For this reason, the district court's failure to address how section 404 could separately satisfy the legal requirements of the Equal Protection Clause alone provides sufficient grounds for reversing and remanding.

CONCLUSION

In short, this Court should reverse the lower court's granting of the Motion to Dismiss against Ms. Bingham for three primary reasons. First, the statute of repose violates the Open Courts clause of the Utah Constitution. Second, the statute of repose violates the Uniform Operation clause in the Utah Constitution and the Equal Protection clause in the United States Constitution to the extent those clauses are co-extensive. And third, the statute of repose violates the Equal Protection clause in the United States Constitution when that clause is considered on its own. For these reasons, independently and collectively, this Court should reverse and remand for further proceedings.

DATED October 5, 2023.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Utah R. App. P. 24(g) because it contains 12,122 words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2). This brief complies with Rule 21 governing public and private records. This brief complies with the typeface requirements of Utah R. App. P. 27 because it has been prepared in a proportionally spaced typeface using Microsoft Word for Mac, Copyright 2021, Version 16.45, in Times New Roman 13.

DATED October 5, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2023, I served **APPELLANT'S OPENING BRIEF** upon the following counsel of record[8] via email, as follows:

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[8] Appellants have served a copy of Appellant's Opening Brief on Utah's Attorney General pursuant to Utah R. App. P. 25A.