NO. 99724-1

THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

MARY A. KELLOGG, as Personal Representative of
the ESTATE OF JAMES H. HAMRE,
Respondent/Plaintiff,

v.

NATIONAL RAILROAD PASSENGER CORPORATION, a/k/a
AMTRAK, a District of Columbia Corporation; and, DOE
DEFENDANTS 1-50,
Petitioner/Defendants.

BRIEF OF RESPONDENT MARY A. KELLOGG

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I. INTRODUCTION

In 2019, Washington's Legislature finally swept away a racist, misogynist relic of our State's tort law. The Legislature amended Washington's wrongful death statutes, deciding that a claim for wrongful death no longer would depend on a person's citizenship or on their financial relationship with a decedent. With these laudable revisions to RCW 4.20.020, Washington now rightly recognizes that it is the solely the nature of a familial relationship, not financial dependency or fortunate birth, that establishes whether a person has a cause of action to recover for the harms they suffer due to the tortious death of a loved one.

Petitioner Amtrak negligently killed decedent James Hamre, the brother of Respondent Mary Kellogg and wrongful death claimant Michael Hamre. Due to Amtrak's admitted misconduct in training, supervision, operations, and maintenance, Amtrak Train 501 derailed near DuPont, Washington in December 2017. Failing to navigate a low-speed turn due to grossly excessive speed, the train and its passenger-filled cars jumped off the rails and plunged from an overpass onto Interstate 5 below. The crashing rail cars killed multiple passengers, and severely injured scores more, including multiple motorists and passengers on the freeway. This was one of the worst mass casualty events involving passenger rail in Washington history.

At the time this crash occurred, then-RCW 4.20.020 did not

recognize any wrongful death claim under Washington law for Respondent Mary or her brother Michael, related to the death of their brother James.[1] Under Washington's two-tiered wrongful death beneficiary statutory scheme, siblings and parents are "second-tier" beneficiaries, only able to assert a claim for their own personal injuries if there is no surviving spouse or children. Even where this was the case, however, former RCW 4.20.020 only allowed a cause of action for wrongful death in second-tier beneficiaries where they were citizens of the United States and also were financially dependent on the decedent.

Here, there were no first-tier beneficiaries, because James died without children or a spouse. But the siblings' potential wrongful death claims still did not exist, because although they are citizens of the United States, they were not financially dependent on their deceased brother. Until the Legislature amended RCW 4.20.020 to remove these antiquated qualifications, the tremendous loss that Amtrak's negligence caused James' siblings went both unrecognized and unremedied.

That changed in July 2019, when the revisions to RCW 4.20.020 vested in Mary and her siblings new, previously non-existent causes of action for wrongful death. It is the prerogative of a legislative body, in the proper exercise of its lawmaking powers, to create causes of action in just

[1] Like Petitioner Amtrak and the trial court below, Respondent refers to herself and her family members variously throughout this brief by first names, solely for sake of clarity.

this fashion; it has happened in the past, and will doubtless happen in the future. Indeed, all causes of action that are creatures of statute or that are in derogation of common law norms—specifically including wrongful death claims—are created in just this fashion.

The Legislature clearly stated its intent to apply these changes in a retroactive fashion, providing that all claims either pending or not otherwise time-barred could proceed under the new statutory scheme. Where retroactive intent is clearly stated in the operative legislation, as it was here, courts give effect to the Legislature's intent. It is only if doing so would violate established constitutional principles or rights that the expressed retroactive intent can be disregarded. There is no such concern here, however. The sole legislative purpose of the amendments to RCW 4.20.020 was to vest causes of action in persons who had previously been wholly deprived of a legal remedy in the context of wrongful death in Washington. The three-year statute of limitations for wrongful death claims arising from the Amtrak 501 crash had not yet expired, and so Mary and Michael timely brought suit against Amtrak for the wrongful death of their brother.

Petitioner Amtrak now asks the Court to set aside this valid exercise of the Legislature's authority to create causes of action in Washington. Amtrak claims that because it managed to hurriedly secure a signed release from James' Estate in the immediate aftermath of the crash, James' siblings' non-existent claims somehow were released and waived. Despite admitting that the siblings' claims did not exist at the time of the Release, despite the

fact that the Release does not reference or name the siblings or their claims, despite the fact that the creation of new legal causes of action was not within the contemplation of the actual parties to the Release, and despite the fact that the Release provided no consideration for the supposed settlement of the siblings' non-existent claims, Amtrak nevertheless claims expansive "vested rights" in that settlement agreement. Amtrak argues that simply because it attempted to settle all then-existing claims via the Release, the fact that the Legislature subsequently vested new claims in new parties prior to the expiration of the statute of limitations is unconstitutional. That is not so.

Amtrak does indeed have some "vested rights" here. But those rights are strictly limited to the parties with whom it actually settled—namely, the Estate of James Hamre in its own right (resolving the decedent's survival action) and Carolyn Hamre (James' surviving mother, who was the sole qualified second-tier beneficiary under the former RCW 4.20.020). Amtrak simply has no "vested rights" as to the new sibling wrongful death claimants. This Court affirming the legal validity of Mary and Michael's wrongful death claims will not disturb the prior settlement, and so will do no violence to Amtrak's actual vested rights. Put another way, allowing Respondent's claims to proceed will not undo any aspect of the "peace" that Amtrak bought via its 2018 Release.

This is because neither James Hamre's Estate in its own right, nor

Carolyn Hamre's Estate[2] seek to undo any portion of that settlement transaction, or to make a new claim. To the contrary, all parties agree that those two claims were effectively settled by that Release. This case is about new parties who seek to make new claims, under a new statute.

These new claims did not exist at the time of the Release, and so could not have been released or waived, as a matter of established Washington law. The current sibling claimants were not party to the Release anyhow; the Personal Representative of the Estate lacked authority as a limited statutory agent to act on behalf of the siblings at that time. Even if somehow Mary and Michael *were* deemed party to the release, the contract purportedly releasing their claim still is unenforceable against them, pursuant to well-worn principles of contract law. Amtrak settled with some, but not all, claimants. Even with the most expansive general future release language imaginable, a party to a contract has no ability to release third parties' claims that do not then exist, and over which it has no authority.

Petitioner Amtrak's position also is unintentionally ironic. It is actually Mary and Michael whose "vested rights" are threatened here, not Amtrak's. Amtrak claims that its contract with a third party conveys to it "vested rights" that require this Court to declare unconstitutional an act of the Legislature that vested new claimants with their own unique, personal property rights. Indeed, this Court has previously described a wrongful

[2] Carolyn Hamre recently passed away.

death cause of action as precisely that—a property right that vests personally in the beneficiary, as opposed to the Estate or Personal Representative. Were Mary and Michael stripped of their legislatively-conferred status as wrongful death beneficiaries here, they would be deprived of this fundamental property right vested in them by the Legislature.

In the end, although factually unique, this is not a difficult case. The retroactivity of the revised wrongful death statute is facially plain, as is its retroactive intent. Whether that retroactive intent can be given life in this particular case turns on whether Amtrak's 2018 Release actually vested Amtrak with any contractual rights of settlement or waiver, vis-à-vis the newly-enfranchised Respondent wrongful death claimants. It did not.

The Legislature's intent in creating a cause of action for beneficiaries like Mary and Michael should be given effect, and their newly-cognizable claims against Amtrak permitted to proceed to trial. This Court should answer the first certified question in the affirmative, and the second certified question in the negative. This would effectively affirm the trial court's denial of Amtrak's Motion to Dismiss below, and uphold the clear intention of the Legislature in creating a wrongful death cause of action for persons just like Mary and Michael. The Court should also take this opportunity to further clarify and define the scope of administrative responsibility and authority borne by a Personal Representative in managing third parties' wrongful death claims.

II. ADDITIONAL STATEMENT OF THE CASE

A. Certified Questions

Petitioner Amtrak has correctly reproduced the certified questions from the Western District of Washington. However, this Court also may reformulate the certified questions as it sees fit. *E.g., Danny v. Laidlaw Transit Servs., Inc.,* 165 Wn.2d 200, 205, 193 P.3d 128 (2008).

In this regard, Respondent notes that she sought to advance an additional certified question to this Court, but the trial court declined to certify that question. *See* (Dkt. No. 22). Respondent contended that the existence of any "vested right" arising from the Release contract in many ways depends on the scope of the statutory authority of a Personal Representative to convey any such rights by contract, on behalf of Respondent Mary Kellogg and her brother Michael Hamre. *See id*.

As part of the Court's resolution of the certified questions before it, Respondent respectfully requests that the Court also address the threshold issue regarding the actual powers of a Personal Representative to dispose of claims of third parties by settlement, particularly where those claims do not exist as a matter of law. Admittedly, doing so need not necessarily result in re-formulation of any certified question; the scope of contractual rights conveyed by the Release is the central issue before the Court anyhow. Reformulation to explicitly include this inquiry may aid in the precedential value of this Court's ultimate opinion, however.

B. Additional Facts

In most respects, the recitation of facts provided by Petitioner Amtrak is sufficient for resolution and evaluation of this case, and Respondent therefore will not restate them. RAP 10.3(b). However, Amtrak's attempts to selectively characterize the trial court's reasons for certifying questions to this Court are argumentative, and should be disregarded. RAP 10.3(a)(5) (providing that facts are to be presented "without argument"). The Court can and should review the rulings of the trial court in their entirety, but this Court's standard of review on these questions of law is *de novo* in any event.

Additionally, further detail regarding the operative language in the Release at issue in this case is warranted.

The April 2018 Settlement Agreement nowhere identifies claimants Mary Kellogg or Michael Hamre as "Releasors," or otherwise identifies them as parties to the claims being settled. *See generally* (Dkt. No. 8-8). Rather, "Releasors" is defined in that document only as "Thomas C. Hamre, as personal representative of the Estate of James H. Hamre [address omitted], and the Estate of James H. Hamre." *Id*. at 1.

The April 2018 Settlement Agreement also only purports to settle claims "sustained or received **by the Releasor and Decedent** James H. Hamre as a passenger on Amtrak Train 501 at or near Dupont, Washington on December 18, 2017." *Id*. at 1 (emphasis added). There is no mention of settling any claims or injuries sustained by any other person. The only

releasing parties identified in the contract are the Estate (for the decedent's claims) and the PR (for any claim subject to the PR's authority at the time of the release, which was Carolyn Hamre's wrongful death claim only). *Id*.

Additionally, the April 2018 Settlement Agreement does not anywhere purport to release any sibling claims for wrongful death. *See id*. Third-party claims are not itemized or listed among the claims released. Similarly, no current or potential future wrongful death beneficiaries are specifically identified or acknowledged. *See generally* (Dkt. 8-8 at 1).

No consideration was paid to or received by surviving siblings Mary Kellogg or Michael Hamre, in connection with the April 2018 Settlement Agreement. *See generally* (Dkt. 8-8); *see also* (Dkt. 18).

There is no contractual language suggesting that any party to the April 2018 Settlement Agreement ever contemplated or intended the future wrongful death claims of Mary Kellogg or Michael Hamre to be subject to that contract. *See id*.

Nowhere in the April 2018 Settlement Agreement are either Mary Kellogg or Michael Hamre's interests or injuries identified, considered, or addressed by the parties. *See id*.

Respondent Mary Kellogg contended below that the Estate did not have the legal capacity or authority to settle any claims of Mary Kellogg or Michael Hamre at the time of the April 2018 Settlement Agreement, because such claims did not yet exist under the law. (Dkt. No. 9, 10).

On July 18, 2018, Carolyn received 100% of the distributive share

of the settlement, and former PR Thomas Hamre confirmed that the administration of James's Estate was complete the same day. (Dkt. 8-9).

Effective July 28, 2019, the Washington Legislature amended the State's wrongful death statutes, taking away any requirement of financial dependency in order to qualify a surviving sibling as a wrongful death beneficiary. *See* RCW 4.20.010, *et seq*.

At the trial court level, Petitioner Amtrak submitted as evidence the House Bill Report, and the Senate Bill Report from the Legislature's consideration of the revised RCW 4.20.010*, et seq*. Respondent objected to their consideration as a source of purported legislative history; as stated on those documents "This analysis is not a part of the legislation, nor does it constitute a statement of legislative intent." (Dkt. No. 8-11 at 2 (House Bill Report)) and (Dkt. No. 8-10 at 2 (Senate Bill Report)). The clear language of the statute controls, including the official reports of the enacted law.

III. ARGUMENT

A. Standards of Review

RCW 2.60, *et seq*. creates the mechanism by which a federal court may certify questions of law to this Court for review. In turn, RAP 16.16 reflects the rules governing the handling of such certified questions by the Court.

The standard of review for matters before the Court on certified questions is *de novo*. *E.g., Allen v. Dameron*, 187 Wn.2d 692, 701, 389 P.3d 487, 491 (2017). This Court considers the legal issues not in the abstract,

but on the certified record provided by the federal court. *Carlsen v. Glob. Client Sols., LLC,* 171 Wn.2d 486, 493, 256 P.3d 321 (2011). As noted above, the Court has the authority to reformulate certified questions, if it chooses to do so. *E.g., Danny,* 165 Wn.2d at 205.

Statutory interpretation also is a matter of law reviewed *de novo*. *State v. Keller,* 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). The goal of statutory interpretation is to carry out the intent of the legislature. *Seven Gables Corp. v. MGM/UA Entm't Co.,* 106 Wn.2d 1, 6, 721 P.2d 1 (1986). When the statutory language is unclear and ambiguous, the court may review legislative history to determine the scope and purpose of the statute. *Wash. Fed'n of State Employees v. State,* 98 Wn.2d 677, 684–85, 658 P.2d 634 (1983).

In reviewing a statute, the Court will construe a statute as constitutional, if at all possible. *Philippides v. Bernard*, 151 Wn.2d 376, 391, 88 P.3d 939, 946 (2004), *as amended* (May 4, 2004) (citation omitted). The statute is presumed constitutional and the party challenging it has a heavy burden of proof. *Id.* (citing *Cosro, Inc. v. Liquor Control Bd.,* 107 Wn.2d 754, 760, 733 P.2d 539 (1987)). This Court has held that it is bound to "liberally construe" the wrongful death statute in particular, because it is remedial in nature. *Gray v. Goodson*, 61 Wn.2d 319, 324, 378 P.2d 413, 415–16 (1963) (citations omitted). !

B. Summary of Argument

In *Philippides v. Bernard*, this Court held that the Legislature's

determinations of proper beneficiaries under Washington's wrongful death statutes are entitled to strict adherence and deference by this Court, even in the face of a constitutional challenge:

> The courts of this state have long and repeatedly held, "causes of action for wrongful death are strictly a matter of legislative grace and are not recognized in the common law." *Tait v. Wahl,* 97 Wn. App. 765, 771, 987 P.2d 127 (1999). The legislature has created a comprehensive set of statutes governing who may recover for wrongful death and survival, and there is no room for this court to act in that area. *Windust v. Dep't. of Labor & Indus.,* 52 Wn.2d 33, 36, 323 P.2d 241 (1958). "It is neither the function nor the prerogative of courts to modify legislative enactments." *Anderson v. Seattle,* 78 Wn.2d 201, 202, 471 P.2d 87 (1970).
>
> The legislature has identified the statutory beneficiaries. … and we cannot alter the legislative directive. The change the plaintiffs seek must come from the legislature rather than this court.

Philippides, 151 Wn.2d at 390 (citations and quotations in original).

Philippides was a consolidated case including certified questions from a federal district court, in which parents of a deceased child—second-tier wrongful death beneficiaries—asked this Court to find that the Legislature's historical and stringent limitations on second-tier wrongful death beneficiaries was unconstitutional. *See generally id*. Alternatively, the parents asked the Court to imply and extend a common law right of action in favor of the parents for the death of their child. *See generally id*. But because the parents were not financially dependent on their deceased child, and because a wrongful death cause of action is strictly statutory in Washington, this Court held that the parents had no cause of action for

wrongful death, and affirmed the dismissal of those claims. *Id*. at 388, 393-94.

Faced with a challenge to the constitutionality of the legislative determination of qualified wrongful death beneficiaries, as it is here, the *Philippides* Court was strictly deferential to the Legislature's demonstrated intent and statutory language. The Court acknowledged that the result might seem harsh or unfair in light of evolving societal norms (*see id*. at 388-90), but it nevertheless held that any such moral unfairness must find remedy in the Legislature, not the courts: "the change the plaintiffs seek must come from the legislature rather than this court." *Id*. at 390.

In July 2019, the Legislature provided that very remedy, albeit too late for the parents in *Philippides* and countless other similar cases. Washington law now explicitly permits second-tier beneficiaries—like Mary Kellogg and Michael Hamre here—to assert claims for the wrongful death of their family members, without first being subjected to antiquated financial dependency or citizenship tests.

The limited retroactive application of this statutory change is the prerogative of the Legislature, and one it clearly intended to exercise here. This Court can and should uphold the Legislature's intent in making these amendments, which were aimed at righting a historical wrong that had so devalued human life and familial relationships. In this case, Respondent ultimately asks that the Court be consistent, and that it exercise the same degree of legislative deference as it did in *Philippides*, where a similar

question was presented regarding the exact same statute.

Petitioner Amtrak seeks to invalidate the Legislature's amendments to RCW 4.20.020 in this case, but its selectively-framed constitutional arguments rest on a fundamentally flawed premise. Amtrak's entire case depends on its presumption that it has some legally-cognizable "vested right" that prohibits the wrongful death claims asserted by Respondent Mary Kellogg here. Amtrak has no such rights, as against Respondent. Its constitutional complaints therefore are irrelevant, and unavailing. The Court should rule in favor of Respondent Mary Kellogg, and give force and effect to the intent of the Legislature in this case.

The Court should answer the first certified question in the affirmative. The Legislature has the right to determine that a statute should have retroactive effect, and it did so explicitly here. Those retroactive provisions created a new cause of action for wrongful death in this case, which are constitutionally-protected personal property rights vested in siblings Mary Kellogg and Michael Hamre. These rights are not in the Estate, or the Personal Representative. No party contends that these newly-created causes of action are time-barred under existing statutes of limitation, nor did the Legislature's amendments unconstitutionally change or invalidate any existing statute of limitations. The retroactive application of these amendments in these circumstances is valid, provided that it does not otherwise infringe on any valid vested rights of Petitioner Amtrak.

Fortunately, no such infringement exists here. Under existing principles of waiver, agency, and contract law, Amtrak simply has no "vested rights" from the April 2018 Release with regard to Mary Kellogg or Michael Hamre's newly-created wrongful death claims. Prior rulings of this Court establish that a party cannot waive a right that does not yet exist, and that a statutory right in particular cannot be waived before the enabling statute is made effective. Allowing these newly-created claims to proceed as the Legislature intended does not disturb or invalidate any valid aspect of the settlement Amtrak reached with other parties. Amtrak simply reached an early settlement with some, but not all, claimants. The Court thus should answer the second certified question in the negative.

C. Revised RCW 4.20.020 Is Retroactive Due to the Legislature's Clearly Expressed Intent. The First Certified Question Should Be Answered in the Affirmative.

The trial court below framed the retroactivity issue as follows: "The Court will accept Mary's assertion that the Release did not apply to claims that did not then exist and that the Legislature consciously chose to retroactively permit the assertion of new wrongful death claims by newly eligible second tier beneficiaries, so long as they were not time-barred." (Dkt. 18 at 7). The first certified question before the Court asks whether this conclusion was correct. It was, and the Court should so rule.

Washington courts typically presume that a statute applies prospectively, but legislative intent to make a statute retroactive will make it so. This Court recently summarized the relevant analysis succinctly:

> A statute is presumed to operate prospectively unless the Legislature indicates that it is to operate retroactively. This presumption can only be overcome if (1) the Legislature explicitly provides for retroactivity (2) the amendment is 'curative,' or (3) the statute is 'remedial.'

Densley v. Dep't of Ret. Sys., 162 Wn.2d 210, 223, 173 P.3d 885, 891 (2007) (citing *Landgraf v. USI Film Prods.,* 511 U.S. 244, 264–66, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994)) (additional citations omitted) (internal quotations omitted). Thus, where the retroactive application of a statute is challenged, as here, there are three questions presented: (a) did the Legislature intend retroactive application? or (b) is the statute remedial? or (c) is the statute curative? *E.g., In re F.D. Processing, Inc.*, 119 Wn.2d 452, 460, 832 P.2d 1303 (1992). An affirmative answer to any one of these three affords the statute retroactive effect, unless that retroactivity would otherwise violate constitutional principles of due process or impairment of contracts. *See id*.[3]

The proper answer in this case is simple. The Legislature expressed a clear intent to make the revisions to RCW 4.20.020 retroactive in application, and so it is. Thus, despite the wording of the first certified question arguably implying otherwise, a statute need not be deemed "remedial" in order to be "retroactive." Rather, being classified as "remedial" is simply one of three independent ways that a statute can have

[3] Since the constitutionality of giving this statute retroactive effect is essentially the second certified question, Respondent presents her analysis on that subsequent issue in the corresponding argument section, sec. III (D), below.

retroactive effect. Petitioner Amtrak glosses over this analysis and caselaw entirely in its brief, and with reason: it is fatal to its position.

The revised statute's official notes explain that the Legislature intended the revisions to RCW 4.20.020 to apply retroactively to "all claims that are not time-barred, as well as any claims pending in any court on July 28, 2019." Official Note to RCW 4.20.020 (2019), (Dkt. 10, at Ex. A (Certificate of Enrollment of Substitute Senate Bill 5163) ("**This act is remedial and retroactive and applies to all claims that are not time barred**, as well as any claims pending in any court on the effective date of this section.") (emphasis added)). In construing the meaning of a statute, the goal of statutory interpretation is to carry out the intent of the legislature. *Seven Gables Corp.*, 106 Wn.2d at 6. When the statutory language is unclear and ambiguous, the court may review legislative history to determine the scope and purpose of the statute. *Wash. Fed'n of State Employees,* 98 Wn.2d at 684–85. Whether the Court deems this language clear on its face, or whether the Court views analysis of the legislative history necessary, the intent of the Legislature was clear: this was meant to be a statute with retroactive effect, as the trial court below correctly concluded.

The Legislature intended to create a right of action in second-tier wrongful death beneficiaries that had previously been deprived of standing to have their injuries redressed. It intended to do retroactively, but in a judicious, limited fashion: claims were only recognized for those newly-

empowered second-tier beneficiaries whose three-year statute of limitations had not yet expired, or whose claims were otherwise active in the courts. Mary and Michael are precisely the types of beneficiaries contemplated by these legislative amendments.

As the Court has explained in the past, "[this Court will] also assume that the legislature would not enact a remedial statute granting rights to an identifiable class without enabling members of that class to enforce those rights." *Swank v. Valley Christian Sch.,* 188 Wn.2d 663, 681–82, 398 P.3d 1108, 1119 (2017) (citations omitted) (implying cause of action for wrongful death under new concussion protocol laws in case arising from death of minor student-athlete football player). From a policy perspective, and in light of the proper deference shown to the Legislature to create and implement statutory causes of action, this Court has also explained that "when a statute has provided a right of recovery, it is incumbent upon the court to devise a remedy." *Bennett v. Hardy*, 113 Wn.2d 912, 920, 784 P.2d 1258, 1261 (1990) (citations and internal quotations omitted). Those are the stakes in this case. Amtrak seeks to deprive Mary and Michael of property rights newly vested in them by the Legislature.

Although the changes to RCW 4.20.020 at issue here need not be deemed "remedial" in order to be retroactive, the operative policy principle is the same here as it is with remedial statutes, or statutes that give rise to implied causes of action: there can be no right without a remedy. The Legislature intended to retroactively confer a right to sue on plaintiffs like

Mary and Michael, and this Court should give force to that clear intention.

D. Amtrak Has No "Vested Rights" related to the Newly-Created Wrongful Death Claims of the Siblings. The Revised Statute Works No Mischief on Any Other Valid "Vested Right." The Second Certified Question Should Be Answered in the Negative.

Both parties agree that the only conceivable source of Amtrak's claimed "vested rights" for present purposes is the April 2018 Release. Both parties also agree that Release is a bilateral contract, entered into between Amtrak and the former Personal Representative of the Estate of James Hamre, before the 2019 wrongful death amendments became law. Amtrak claims that the April 2018 Release effectively preemptively settled Mary's and Michael's non-existent wrongful death claims, despite the fact that the siblings were not party to the Release, and despite the fact that they garnered no benefit from it. Respondent disagrees, pointing out that the siblings are not parties to the Release, and that even if the Release did purport to release their claims, any such release would be legally invalid and unenforceable.

The dispositive issue in this case thus is whether the April 2018 Release actually settled Respondent's new, statutorily-created wrongful death claims. If it did, then Amtrak's position is correct, and its vested contractual rights cannot be disturbed by the retroactive change in law here. If it did not, then Respondent must be allowed to pursue the siblings' newly-vested wrongful death claims at trial. Despite its factual novelty, this second certified question also is easily answered when applying well-established legal principles of waiver, agency, and contract law.

First, Amtrak did not and could not secure any contractual rights via the Release against Respondent Mary Kellogg, or her brother Michael Hamre. This is because the April 2018 Release was created before any wrongful death cause of action legally existed in the decedent's siblings. As this Court has repeatedly explained, a party cannot waive or release a claim that does not exist.

Second, a Personal Representative is not permitted to act as a statutory agent without an underlying principal. This is a related, but distinct issue of agency, contract, and probate law. Thomas Hamre, the PR who signed the Release, lacked both actual and apparent authority to settle the siblings' later-acquired claims, even had he tried to do so. His signature on that Release was as the designated statutory agent for only two people: the decedent James, and the sole recognized wrongful death beneficiary at that time, the decedent's mother Carolyn. Thomas had neither the authority nor the intention to sign a contract on behalf of anyone else.

Finally, even if a future waiver were legally permissible, and even if the PR somehow had the legal right to convey it, Amtrak's claims of vested contractual rights still fail. This is because established principles of contract law render the Release unenforceable against Mary and Michael.

Amtrak has no "vested rights" as to these wrongful death claims. This Court giving effect to the Legislature's intent here causes no constitutional consternation. The wrongful death claims asserted by Mary in this case have no effect on the prior settled claims, and so do not disturb

the actual "vested rights" purchased by Amtrak. The Release simply reflects a partial settlement with some, but not all, parties injured by Amtrak's negligence. Those prior contractual rights are left undisturbed by Mary and Michael's new claims. The Court should answer the second certified question in the negative.

1. Under Washington Law, a Party to a Contract May Not Waive a Right That Does Not Exist at the Time.

First and foremost, the Release does not apply to Mary and Michael's claims, because a party cannot waive a right that does not exist. *E.g., Panorama Res. Protective Ass'n v. Panorama Corp. of Wash.*, 97 Wn.2d 23, 28, 640 P.2d 1057 (1982) (explaining that "the right alleged to have been waived must, however, have existed at the time of the purported waiver. Even unilaterally, [a party] could not waive any right it did not yet have. … **We agree a waiver can apply only to a right that existed at the time of the waiver.**") (citations omitted) (emphasis added). Even more specifically, the Court has consistently held that "[w]here a statutory right is involved, it cannot be waived before the statute creating the right becomes effective." *Yakima Cty. (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 384, 858 P.2d 245, 252–53 (1993) (citing *Ferndale v. Friberg,* 107 Wn.2d 602, 607, 732 P.2d 143 (1987)).

Amtrak has no legitimate "vested right" or property right expectation at all with regard to later-acquired, statutory causes of action made by the sibling wrongful death beneficiaries in this case. This is

because neither these claimants nor any authorized agent for them could lawfully have granted the release or waiver of claim on which Amtrak's entire case relies, before that right came into being.

In order for a waiver to be effective, there must be a clear, intentional relinquishment of a "known right." Logically, a surrendered right must first exist in order for it to be "known." This Court explained as much, more than 65 years ago:

> The doctrine of waiver ordinarily applies to all rights or privileges to which a person is legally entitled.[4] A waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. It may result from an express agreement or be inferred from circumstances indicating an intent to waive. It is a voluntary act which implies a choice, by the party, to dispense with something of value or to forego some advantage**. The right, advantage, or benefit must exist at the time of the alleged waiver**. **The one against whom waiver is claimed must have actual or constructive knowledge of the existence of the right.** He must intend to relinquish such right, advantage, or benefit; and his actions must be inconsistent with any other intention than to waive them.

Bowman v. Webster, 44 Wn.2d 667, 669, 269 P.2d 960, 961 (1954) (emphasis added). The *Bowman* Court further held that typically "whether there has been a waiver is a question for the trier of the facts." *Id*. at 962.

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[4] This principle is important here, as it reflects that there is no functional legal difference in this case between a "waiver" and a "release." For present purposes, the terms and interpreting caselaw can be viewed as interchangeable. Both terms involve agreeing to forego some legal right, the colloquial distinction typically being whether the "voluntary relinquishment" is in written form (as typically is the case in a release), or implied circumstantially by behavior (as often seen in cases of waiver). Here, of course, the purportedly waived "right" or "privilege" in question is Respondent's right to pursue a cause of action against Petitioner Amtrak for wrongful death.

In this case, however, the question of waiver can be resolved as a matter of law. None of the factors necessary to establish a contractual waiver exist. All parties agree that James' surviving siblings had no actual rights to release at the time of the 2018 Release. They were not party to—or even privy to[5]—the Release. It also is undisputed on the record before the Court that Mary and Michael received no consideration or benefit from the Release, took no "voluntary act" to enter any contract, made no "choice" to surrender any rights they had, and took no "action" consistent with an intent to waive. There was no waiver here.

The trial court below seemed to indicate its agreement with this analysis:

> The Court agrees, and indeed assumed for purposes of the motion that though Amtrak's Release was amply broad, it could not release claims that did not exist when it was executed. The core issue is whether the application of revised RCW 4.20.020 to settled cases deprives a tortfeasor of vested rights, violating the Washington Constitution.

(Dkt. 22 at 2-3). What the trial court's ruling failed to account for, however, is that the first sentence quoted above answers the question presented in the second. Without an effective release of their wrongful death claims, by definition Amtrak obtained no "vested contractual right" as to Mary and Michael. Without any contract to which Mary or Michael may be bound,

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[5] The Release contains confidentiality provisions that rendered the Release confidential as to third parties, which included Respondent Mary Kellogg and Michael Hamre. *See* (Dkt. No. 8-8). It strains credulity for Amtrak to argue that its Release effectively waived claims on behalf of these third parties, when the terms of the Release prohibited those same third parties from even being apprised of the terms of the agreement.

their claims remain fully unadjudicated, and unresolved.

Allowing these open claims to be tried works no mischief on the claims of the Estate (for James' personal injuries) or Carolyn (for wrongful death), which were settled and will remain so.

2. The Personal Representative Lacked the Power to Waive the Rights of Wrongful Death Claimants Whose Claims Did Not Yet Exist.

Even if a cause of action could somehow be waived or released before it legally existed, former Personal Representative Thomas Hamre did not have the power do so in this case. For purposes of wrongful death claims, a Personal Representative is the exclusive means designated by the Legislature to bring a claim on behalf of a wrongful death beneficiary. *See* RCW 4.20.010 (establishing procedure for wrongful death claim, and stating that the decedent's "personal representative may maintain an action against the person causing the death for the economic and noneconomic damages sustained by the beneficiaries listed in RCW 4.20.020 as a result of the decedent's death."). But Thomas' power during the duration of his appointment of PR was limited, and he only could resolve wrongful death claims where he actually had a principal on behalf of whom he could act. Here, his signature on the 2018 Release was on behalf of the only persons for whom he was permitted to serve as agent: the Estate (for James' personal injuries, which survived) and Carolyn (for her second-tier wrongful death claim). He did not, and could not, sign or act for his siblings, as he had no agency authority to do so.

In this context, this Court has explained that a PR is a statutory agent and quasi-trustee only, a "contrivance of convenience" whose authority is narrowly limited to serving as a procedural conduit for asserting the vested property rights of others. *See, e.g., Gray*, 61 Wn.2d at 326–27 ("The personal representative is merely a statutory agent or trustee acting in favor of the class designated in the statute, with no benefits flowing to the estate of the injured deceased."). The PR for an estate is charged with the authority to bring and resolve the wrongful death claims of others, but only to the extent those claims exist. The Estate, as the post-death corporate entity of the deceased, has no wrongful death claim in its own right.[6]

In *Gray*, the Court explained that any assertion that the wrongful death statutes allowed wrongful death claims to vest in the Personal Representative, as opposed to the beneficiaries themselves, is fundamentally flawed, and incorrect: "Such an interpretation would permit form to rule over substance and would subvert the very purpose of the statutes' intended benefit. The right of action [for wrongful death] 'vests' in the personal representative only in a nominal capacity since the right is to

[6] The confusion between so-called "survival actions," and wrongful death actions is fairly common, and likely derives from the similarity of terms utilized in post-death tort claims and probate. *See, e.g., Otani ex rel. Shigaki v. Broudy*, 151 Wn.2d 750, 755, 92 P.3d 192, 194 (2004) (providing overview of these distinct causes of action). Where a tort results in death, the decedent's personal injury claim survives their death, and belongs to the Estate; this is a "survival action." *E.g.,* RCW 4.20.046(1)-(2). A wrongful death claim is an entirely different cause of action that belongs personally to statutorily-defined aggrieved family members, for their own personal injuries; the Estate has no interest in this claim, except inasmuch as the PR is the actual party with standing to bring both types of claims. *E.g.,* RCW 4.20.010.

be asserted in favor of the members of the class of beneficiaries." *Id*.

Since neither the PR nor the Estate had any *direct* right to the siblings' wrongful death claims at the time of the April 2018 Release, Thomas could only have acted to settle, waive, or release those claims if he had power as an agent for a principal. He had no such power. Basic agency principles illustrate this fact:

> An agency relationship may exist, either expressly or by implication, when one party acts at the instance of and, in some material degree, under the direction and control of another. *Matsumura v. Eilert,* 74 Wn.2d 362, 368, 444 P.2d 806 (1968). Both the principal and agent must consent to the relationship. *Moss v. Vadman,* 77 Wn.2d 396, 402–03, 463 P.2d 159 (1969). The burden of establishing the agency relationship rests upon the party asserting its existence. *Hewson Constr., Inc. v. Reintree Corp.,* 101 Wn.2d 819, 823, 685 P.2d 1062 (1984).
>
> Before the [acts] of an agent can be visited upon his principal, the agency must be first established. *Matsumura,* 74 Wn.2d at 363. Under Washington law, an agency relationship is created, either expressly or by implication, when one party acts at the instance of and, in some material degree, under the direction and control of another. *Hewson,* 101 Wn.2d at 823. Consent and control are the essential elements of the relationship. *Moss,* 77 Wn.2d at 403.

Stansfield v. Douglas Cty., 107 Wn. App. 1, 17, 27 P.3d 205, 215 (2001) (citations in original) (internal quotations omitted).

In the wrongful death context, since a PR is a statutorily-mandated agent as opposed to a selected one, their powers should be even more limited than in a more traditional agency relationship. This type of limitation is justified, because the principal is not voluntarily delegating any

powers at all to the agent; the Legislature has done it for them. In this construct, a PR surely cannot be permitted to waive, release, or settle claims for persons who are not yet his principals.[7]

Were it otherwise, the PR would be left in the wholly untenable position of acting on behalf of a limitless universe of potential future claimants, who might someday be empowered by statute to bring wrongful death actions. Reading so far into a PR's duties as a limited statutory agent and "trustee" would create a manifestly absurd result, which this Court studiously avoids. *E.g., Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655, 663 (2002) ("This court, however, will avoid literal reading of a statute which would result in unlikely, absurd, or strained consequences. The spirit or purpose of an enactment should prevail over ... express but inept wording." (citations omitted).

Washington law related to *ultra vires* actions is also helpful by analogy here. In *State v. O'Connell*, this Court explained in a review of applicable case authority that "even where there was an express contract, if it was *ultra vires*, [a party] ordinarily cannot recover upon either the contract itself or an implied contract." 83 Wn.2d 797, 836, 523 P.2d 872, 895 (1974), *supplemented*, 84 Wn.2d 602, 528 P.2d 988 (1974). This was so, according

[7] Although this appears to be an issue of first impression in the specific case of a PR's duty to serve as an agent for a third party's wrongful death claim, this is the correct conclusion.

to the *O'Connell* Court, "even though [the party] has performed in reliance upon the authority of the agent with whom he has contracted." *Id*. In a footnote, the Court explained why this outcome is not unjust: "This principle includes the rule that one dealing with a [person] whose powers are defined by statute is presumed to know the limits of those powers." *Id*. at fn10. Similarly, an *ultra vires* action of a PR is invalid as a matter of law. Any reliance by Amtrak in this regard is immaterial, as the statutory authority of the PR with whom it contracted was strictly limited by statute to resolve only then-existing claims. Amtrak is charged with knowledge of the law, including knowledge of the laws governing the limited agency powers of the PR with whom it chose to contract. !

Like the question of waiver, above, this issue of a PR's authority is dispositive of the second certified question. Since Thomas as PR had no power to address or limit non-existent wrongful death claims on behalf of his siblings, then Amtrak obtained no "vested rights" from him via the Release, as to those siblings' claims.

3. Any Purported Release between Amtrak and the Siblings regarding Their New Wrongful Death Claims Fails under Principles of Contract Law.

Even if the PR were somehow empowered to act as agent on behalf of his siblings, and even if he were also somehow empowered to waive claims that did not exist, the purported waiver and release of these siblings' wrongful death causes of action *still* is ineffective as a matter of long-standing contract law. Amtrak's attempts to stretch the Release to cover

Respondent's claims is invalid because (a) the contract lacks consideration; (b) it was not "knowingly and fairly made"; (c) it was premised on a mutual mistake; and (d) it is otherwise void as violative of public policy.

As a threshold matter, this Court has consistently held that personal injury releases are contracts governed by contract principles. *Del Rosario v. Del Rosario*, 152 Wn.2d 375, 382–83, 97 P.3d 11, 14 (2004) (citing *Beaver v. Estate of Harris*, 67 Wn.2d 621, 627–28, 409 P.2d 143 (1965) (holding that a release is generally enforceable in contract unless induced by fraud, false representations, or overreaching, or a mutual mistake is established)); *see also Vanderpool v. Grange Ins., Ass'n,* 110 Wn.2d 483, 756 P.2d 111 (1988) ("A release is a contract and its construction is governed by contract principles subject to judicial interpretation in light of the language used.").

Contractual releases serve an important purpose in our civil justice system, but they are not sacrosanct. As the Court has previously explained:

> Generally, we are loath to vacate properly executed releases because Washington favors finality in private settlements.
>
> **However, Washington also favors just compensation of accident victims**. We have accordingly recognized an exception to the general rule. A release may be avoided if (1) there is an unknown or latent injury discovered after the release was executed and (2) the plaintiff proves the release was not fairly and knowingly made. …[W]e have consistently applied the exception to circumstances where there were unknown or latent injuries at the time the release was executed.

Del Rosario, 152 Wn.2d at 382–83 (citations and internal quotations omitted) (emphasis added).

To the extent that the Court holds that the Release contemplated a waiver by Mary and Michael of their non-existent claims, via the *ultra vires* actions of a limited statutory agent, the Release still is unenforceable.

a. The Release Fails as to Mary and Michael, for Want of Consideration.

Generally, a contract must be supported by consideration. *Keystone Land & Dev. Co. v. Xerox Corp.,* 152 Wn.2d 171, 178, 94 P.3d 945 (2004). In Washington, a contractual waiver can be unilateral and without consideration, provided that it is expressed clearly and otherwise permissible. *See Hanks v. Grace*, 167 Wn. App. 542, 548, 273 P.3d 1029, 1032 (2012). Of course, as noted above, a party cannot waive in contract a right that does not yet exist. "Whether consideration supports a contract and whether a contractual provision contravenes public policy are questions of law, which we review *de novo*." *Id*.

Here, Amtrak concedes that the siblings were not afforded any consideration for their purported waiver of their nonexistent cause of action. Indeed, Amtrak and the trial court below both note that the sole proceeds from the settlement were paid to Carolyn Hamre, the financially-dependent mother of decedent James. *E.g.,* (Dkt. No. 18). Indeed, this fact alone would invalidate any such contractual waiver, as a lack of consideration renders a purported contract invalid. *E.g., Yakima Cty.*, 122 Wn.2d at 389 ("consideration is also an essential element of a contract") (citing *Peoples Mortgage Co. v. Vista View Builders,* 6 Wn. App. 744, 747, 496 P.2d 354

(1972)); *Ponder v. Chase Home Fin., LLC*, 865 F. Supp. 2d 13, 18 (Dist. D.C. 2012) ("The essential elements of a valid contract are competent parties, lawful subject matter, legal consideration, mutuality of assent, and mutuality of obligation.") (*citing Henke v. U.S. Dep't of Commerce,* 83 F.3d 1445, 1450 (D.C. Cir. 1996)).[8]

With no funds or other things of value accruing to either Mary or Michael by way of the purported release of their wrongful death claims, there is an obvious want of consideration. As such, no contractual obligations from the Release are enforceable against Mary and Michael, regardless of any contractual language to the contrary.

b. Any Purported Prospective Release of the Siblings Claims Was Not "Fairly and Knowingly Made."

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In *Finch v. Carlton*, this Court explained that when a party seeks to set aside a release because of the discovery of a previously unknown or unrecognized injury, an inquiry is made into whether the release was "fairly and knowingly made." 84 Wn.2d 140, 145–46, 524 P.2d 898, 901 (1974). ! The criteria for this inquiry are as follows:

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[8] The terms of the 2018 Release indicate that it is to be construed and interpreted according to the laws of the District of Columbia. (Dkt. No. 8-8 at 3, ¶ 7). Of course, the underlying questions of the wrongful death tort and the effectiveness and meaning of Washington's statutory and constitutional schema are questions of Washington law, and contractual selection of D.C. law cannot control such issues. Whether someone is party to the contract, likewise, is not a question "arising from" the contract; if someone is not party to a contract, then by definition the contract does not apply and they did not consent to the choice of law provision. But to the extent that questions of contractual validity would be interpreted subject to this contractual choice of law, D.C. law is briefly cited herein for that purpose. For these basic contractual principles, D.C. law appears to be the same as in Washington. Notably, Amtrak's opening brief does not cite D.C. law for any purpose.

> (1) The peculiar dignity and protection to which the law cloaks the human person, as contrasted with articles of commerce;
>
> (2) The inequality of the bargaining positions and relative intelligence of the contracting parties;
>
> (3) The amount of consideration received;
>
> (4) The likelihood of inadequate knowledge concerning future consequences of present injury to the human body and brain; and
>
> (5) The haste, or lack thereof, with which release was obtained.

Id.

This Court explained its reasoning behind creating this exception in *Bennett v. Shinoda Floral, Inc*.:

> When a person signs a release of all claims and has no knowledge that he has any personal injury, as in *Finch,* it is supportable to permit avoidance of the release once it is found that the release was not executed fairly and knowingly.
>
> As this court indicated in *Finch,* in such a case the policy favoring just compensation of accident victims outweighs the policy favoring finality of private settlements. Because the plaintiff is unaware of any personal injury at the time he signs the release, it is unjust to hold him to the release where it is clear that he did not contemplate the possibility that an injury would arise in the future.

Bennett v. Shinoda Floral, Inc., 108 Wn.2d 386, 395, 739 P.2d 648, 653 (1987). A few years later, the Court handed down its decision in *Nevue v. Close*, which further explained the scope of this "knowingly and fairly made" exception:

> We hold that where there are known injuries…the release is

> binding as to those injuries and as to the unknown consequences of the *known* injury. **However, as to an injury unknown to the plaintiff, and not within the contemplation of the parties to the release, the release should not be binding per se**.

Nevue v. Close, 123 Wn.2d 253, 258, 867 P.2d 635, 637 (1994) (bold emphasis added) (italics emphasis in original) (citations omitted). As implicit in *Nevue,* "whether a release was fairly and knowingly made is typically a question of fact, which often precludes entry of summary judgment." *Del Rosario*, 152 Wn.2d at 383 (citations omitted).

Here, the *Finch* factors weigh heavily in favor of determining that any purported release offered by Mary and Michael was not "fairly or knowingly made." First, Mary and Michael had no legally-cognizable injury under Washington law at the time that the 2018 Release was signed. They therefore could not have had any "known" injury within the meaning of the pertinent caselaw.

Next, Thomas (the eldest brother of decedent James), was not represented by tort counsel when he was serving as PR, or when he was approached by Amtrak shortly after his brother's death, and settlement offered. Amtrak moved quickly, and executed the Release in April 2018, mere months after James' death. This was a calculated business risk by Amtrak, as it also knew that the statute of limitations would not run for years on James' death. Amtrak should bear the downside of that risk, which is that within the statutory period, new claimants previously unknown may emerge with causes of action. A party only achieves certainty in settlement

once the operative statute of limitations has expired.

Likewise, the terms of the Release itself are conspicuously silent on the term "wrongful death," and make no reference at all to any potential wrongful death claims maintained by the siblings. Where an unrepresented and unsophisticated layperson is presented with an exculpatory release of this type, the absence of such specific language is especially telling. Thomas cannot be fairly charged with a duty to inquire about or bargain for future rights that did not exist, especially where the Amtrak-drafted release was silent on the issue.

Finally, when releasing an admittedly at-fault entity for killing one's sibling, doing so for a grand total of $0 and no other benefit suggests that any release in this regard simply was not "knowingly and fairly made."

All the *Finch* factors weigh in favor of Respondent Mary and her brother Michael here. Even if the Release is deemed to reference them, it is invalid as to the purported release of their future claims.

c. The Contract Fails Due to the Mutual Mistake of the Parties in Failing to Account for the Possibility That Future Wrongful Death Claimants Might Emerge.

Under contract law, a release is voidable if induced by fraud, misrepresentation, overreaching, or if there is clear and convincing evidence of mutual mistake. *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 187, 840 P.2d 851, 856 (1992) (citing *Beaver,* 67 Wash.2d 621). A contract is voidable on grounds of mutual mistake when both parties independently make a mistake at the time the contract is made as to a basic

assumption of the contract. *PUD 1 v. WPPSS,* 104 Wn.2d 353, 362, 705 P.2d 1195 (1985).[9] Ultimately, the test for mutual mistake is whether the contract would have been concluded if there had been no mistake, that is, that neither party would have entered into the contract if they had a proper understanding of the material facts. *Nationwide*, 120 Wn.2d at 189–90.

Here, it is difficult to believe that if both parties were contemplating the intentional prospective release of potential future wrongful death claims, this would not have been stated clearly in the Release. Of course, even if it was clearly stated any waiver would be invalid, for reasons stated above. But to suggest that a sophisticated party like Amtrak, ably represented by counsel, would not specifically *even mention* sibling wrongful death claimants suggests that neither party intended that non-existent, prospective future legal claims from unmentioned parties were settled, too.

d. The Purported Prospective Release of Mary and Michael's Not-Yet-Extant Wrongful Death Claims Is Invalid on Public Policy Grounds.

Contracts of settlement or release may be set aside on public policy grounds, as well. Washington courts generally accept, "subject to certain exceptions, [that] parties may contract that one shall not be liable for his or her own negligence to another." *Wagenblast v. Odessa Sch. Dist. No. 105-157-166*, 110 Wn.2d 845, 848, 758 P.2d 968, 970 (1988). However, "[t]here

[9] However, a party bears the risk of a mistake when "he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient". RESTATEMENT (SECOND) OF CONTRACTS § 154(b) (1981).

are instances where public policy reasons for preserving an obligation of care owed by one person to another outweigh our traditional regard for freedom of contract." *Scott v. Pac. W. Mountain Resort,* 119 Wn.2d 484, 493, 834 P.2d 6 (1992). This Court at times has analyzed express releases seeking to immunize a defendant for negligent breach of a duty imposed by law, and found that these violate public policy.

For instance, in *Wagenblast*, this Court held that requiring students and their parents to sign an agreement releasing the school district from all potential future negligence claims as a condition of participating in interscholastic athletics violated public policy. *See generally Wagenblast*, 110 Wn.2d 845. The Court identified and examined six characteristics common to invalid releases:

> (1) the agreement concerns an endeavor of a type thought *suitable for public regulation*;
>
> (2) the party seeking to enforce the release is *engaged in performing an important public service*, often one of practical necessity;
>
> (3) the party *provides the service to any member of the public*, or to any member falling within established standards;
>
> (4) the party seeking to invoke the release has *control over the person or property* of the party seeking the service;
>
> (5) there is a decisive *inequality of bargaining power* between the parties; and
>
> (6) the release is a standardized *adhesion contract*.

See id. at 851-56. The more of these characteristics present in a case, the more likely courts are to declare the agreement invalid on public policy

grounds. *Hanks*, 167 Wn. App. at 548–50. All six of the *Wagenblast* factors are present here.

As to factors (1), (2), (3), and (4), the fact that this incident arose from a train crash caused by the National Railroad Passenger Corporation is of tremendous significance. Amtrak is a highly-regulated entity, from the Federal Railroad Administration, to the National Transportation Safety Board, to Congress itself. It performs a unique public service in the United States, as it is the sole interstate common carrier of rail passengers for hire in much of the county. Amtrak is a common carrier, open to all members of the public who wish to purchase a ticket to ride. And when a passenger is aboard an Amtrak train, the railroad has sole custody and control (and rights to control) the on-board persons and property of its passengers. This is precisely the type of public entity that should not be able to pursue prospective exculpatory clauses for later-arising injuries due to its negligent conduct.

Factors (5) and (6) are perhaps most upsetting from a public policy standpoint, however. Thomas Hamre, aggrieved brother of decedent James, was not represented by counsel in his negotiations as PR with Amtrak. Despite the boilerplate reference to an "ability to consult with counsel" in the Release, the fact of the matter is that Amtrak rushed to the doorstep of the family of a man it killed, offered a sum of money confidentially, and then presented its standard form of release, drafted by its sophisticated and capable company lawyers.

Amtrak seeks to stretch this rapidly-obtained adhesion contract to fit this unique circumstance. But it does not. Amtrak's attempt to invoke a pre-claim release offered by a third party to exculpate it from liability due to future-arising claims is precisely the type of contractual provision that is void against public policy in Washington.

4. Because the Siblings Are Neither Party to nor Bound by the Release, the Contracts Clause Is Not Implicated.

Amtrak claims that the Contracts Clause of the Washington State Constitution prohibits Mary and Michael's claims, because its 2018 Release was a contract by which it attempted to settle all claims arising from James' death. Try it may well have, but Amtrak did not succeed. The terms of a contract only apply to the parties to that contract, or to lawful beneficiaries of the contract. As established above, the newly-created claims of Mary and Michael are not addressed in that contract, nor could they be. Mary and Michael are not party to the contract or beneficiaries of the contract, and so its provisions may not lawfully be enforced against them. A statutory amendment cannot "impair" a contractual relationship where there is no contractual relationship. The Contracts Clause simply is not implicated here.

Article I, section 23 of the Washington Constitution provides that "[n]o ... law impairing the obligations of contracts shall ever be passed." This Court has explained that for any unconstitutional "impairment" to be found, there must be a "contractual relationship," and the law must

"substantially impair" that relationship. *Pierce Cty. v. State*, 150 Wn.2d 422, 437, 78 P.3d 640, 649 (2003), *as amended on denial of reconsideration* (Mar. 9, 2004) (citing *Tyrpak v. Daniels,* 124 Wn.2d 146, 152, 874 P.2d 1374 (1994)). Even if these two criteria are met, the law may still be constitutional if the impairment is "reasonable and necessary to serve a legitimate public purpose." *Id*.

This Court should correctly conclude that there is no contract between Amtrak and Mary/Michael here. That disposes of the matter entirely. But even if there were a contract that was somehow impaired here, the legislative amendments would still be constitutionally permissible.

This is because the amendments to RCW 4.20.020 are "nevertheless justified as a reasonable and necessary exercise of the State's sovereign power." *Tyrpak*, 124 Wn.2d at 156. To evaluate this question, the Court must make "two broad and interrelated inquiries: (1) can a legitimate public purpose for the legislation be identified and, if so, (2) is the legislation reasonable and necessary to achieve that public purpose." *Id*. (citing *Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 412–13, 103 S.Ct. 697, 705, 74 L.Ed.2d 569 (1983)).

Here, the Legislature's amendments to RCW 4.20.020 clearly reflect a legitimate public purpose. Allowing aggrieved family members access to justice and remedy for the wrongful death of their loved ones due to the fault of another is a fundamental and vital interest of the State in maintaining an effective civil justice system. Since the Legislature is the

"gate keeper" of this statutory cause of action, that body is the sole arm of the State that can bring about change in the area.

Additionally, the scope of the legislative amendments is modest, and is not overreaching. There is no new statute of limitations created here, and so there are no extinct claims that are suddenly revived from their just repose. To the contrary, the Legislature strictly limited the universe of retroactive application to only non-expired claims under the existing statute of limitations, or to claims presently pending. In neither instance would the potential tortfeasor have any legitimate belief that its potential universe of exposure had resolved. Indeed, *the only possible effect of this legislation is to empower new claims, from new claimants*. It does not disturb any claim already resolved, including those actually settled by Amtrak here.

That is the epitome of a reasoned and nuanced approach to solve the laudable public purpose of recognizing the interests of aggrieved family members, without either a monetary or citizenship test as a precedent to their cause of action. Even if it technically impaired a legitimate contractual expectation—which it did not—these amendments to RCW 4.20.020 are nevertheless constitutional under these circumstances.

In its rush to reach an early settlement with the unrepresented family of James years before the expiration of the statute of limitations period, Amtrak took a calculated, business judgment risk. And that risk has paid dividends, to the precise degree that it should: Amtrak has successfully bought its peace with James' Estate and Carolyn, via the Release. Those

rights are indeed vested by contract, and should not be disturbed—as to those parties. But the newly-created claims of Mary and Michael are not addressed by that contract.

A statutory amendment cannot "impair" a contractual relationship that does not exist. Here, any impairment that even theoretically exists would be permissible in any event, as it reflects a "reasonable and necessary exercise" of the legislative power.

5. The Cases Cited by Petitioner Amtrak Are Readily Distinguishable.

Amtrak cites numerous cases for the proposition that retroactive application of statutes can be unconstitutional by virtue of impairing contractually-obtained vested rights. In the abstract, of course, this legal principle is correct. But as discussed above, that is not really the pertinent analysis in this case. This case is different, as an examination of the authorities cited by Amtrak reveals.

Among each of the Washington cases Amtrak cites for this proposition, there is one important common thread: each case is evaluating the effect of a retroactive statute where it potentially impairs a contractual relationship *between the original contracting parties*. That is not the case here. Just because a "Personal Representative" was the procedural vehicle for settling James' and Carolyn's claims in 2018 does not mean that Respondent as "Personal Representative" is the same party at all, simply because she carries the same title. The legislative amendments do not purport to allow James (via his Estate) to broaden his claims, or allow

Carolyn to assert some new theory of recovery. Those parties settled their case already, and that will remain so.

Amtrak's entire position assumes that the Release provides it vested contractual rights as to Mary and Michael, because of the state of the law at the time the 2018 Release was created. But as stated in *Godfrey v. State*, which Amtrak cites, a "vested right" is "more than a mere expectation based upon a continuance of existing law; it must have become a title . . . to the present or future enjoyment of property." *Godfrey v. State*, 84 Wn.2d 959, 963, 530 P.2d 630 (1975). There is simply no Washington case that stands for the proposition that an exculpatory, *ultra vires* release can be offered to waive future property rights[10] of third parties, where those property rights do not even exist as a matter of law at the time of the release.

Amtrak also cites out-of-state authority from Missouri and Wisconsin, which it contends supports its argument that a legislature exceeds its authority by attempting to amend wrongful death statutes, as Washington's Legislature did here. Amtrak's analysis of foreign authority omits one important step, however. Amtrak fails to examine the constitutional provisions in those states, which make retroactive laws unconstitutional on their face.

Failing to do so makes Amtrak's citations misleading. In its

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[10] "Since the [wrongful death] beneficiary is given the benefit of a cause of action for the wrongful killing of another human being, the statutorily created interest is comparable to a property right." *Gray*, 61 Wn.2d at 328.

discussion of *Kinder v. Peters*, for instance, Amtrak conspicuously edits out and omits the key element that ultimately is dispositive in that case. 880 S.W.2d 353 (Mo. Ct. App. E.D. 1994); *see Pet. Brief*, 18. The omitted quotation reveals that the reason the amendments to the Missouri's wrongful death statutes were held unconstitutional in that case was because Missouri has an explicit, constitutional prohibition on retroactive effect of *any* statutes. *See* Mo. Const., art. I, sec. 13 ("[t]hat no ex post facto law, nor law impairing the obligation of contracts, *or retroactive in its operation*, or making any irrevocable grant of special privileges or immunity, can be enacted.") (emphasis added). There is no parallel provision in Washington's Constitution. *Kinder* is unhelpful here.

Amtrak's cited Wisconsin case, too, is not on point. *See Neiman v. American National Property and Casualty Co.*, 236 Wis.2d 411, 613 N.W.2d 160 (Wis. 2000). As with the Washington authorities Amtrak cites, the retroactive amendment at issue was invalid as applied in that case because it would have worked to unsettle existing contractual rights *between the same parties to the contract*. *See generally id*. That is not the situation here. Unlike *Neiman*, where the identical already-settled party returns for a "second bite at the apple" because a damages statute has been amended, Mary and Michael never settled their claims in the first place. Nor would Amtrak have agreed to do so in 2018, because their claims did not exist until the Legislature created them in 2019. Like the other authorities cited by Amtrak here, the *Neiman* case is inapposite.

E. There Was No "Action" Commenced by Any Wrongful Death Beneficiary Except Mary. The Policy Behind Any Implied "Single Action" Requirement Is Not Threatened Here.

Amtrak urges the Court to adopt a narrow interpretation of the wrongful death statute, despite the remedial intent and this Court's consistent guidance to the contrary to interpret it liberally. Amtrak claims that Mary's suit under the Legislature's amendments would unfairly present Amtrak with a multiplicity of litigation arising from James' death, and that this is contrary to the statutory intent of having a single action presented by a PR. Here, there is only this single suit, as the former PR never filed an "action" against Amtrak at all. Even apart from that unambiguous reading of what constitutes an "action," the vital policy of ensuring that newly-vested property rights be afforded effective protection by the law militates against such a slavish procedural contrivance.

Additionally, this Court has implicitly recognized that an out-of-court settlement by a Personal Representative is not the same thing as an "action" for damages under the wrongful death statutes. *E.g., Wood v. Dunlop*, 83 Wn.2d 719, 721-22, 521 P.2d 1177, 1178 (1974) (observing that plaintiff Mr. Wood was appointed administrator of his deceased wife's estate for purposes of an out-of-court settlement, but explaining that "no wrongful death action was commenced by him in that capacity, however," and allowing a second suit to proceed for a minor beneficiary). In *Wood*, this Court held that a pre-suit release and settlement authorized by the PR did not bar a subsequent action brought for wrongful death on behalf of

decedent's minor child. *See generally id*. That was so, even though the PR was the same person in both instances.

In construing the legislative amendments to the wrongful death statutes, the Court should not myopically focus on the fact that a "personal representative is the only party who may maintain an action for wrongful death. [Doing so] ignore[s] those for whose benefit the statute was drafted—the specifically designated survivors. They are the ones for whom the judgment or settlement must serve as consolation for the loss they have suffered." *Id*. at 724.

There is only one "action" for wrongful death asserted against Amtrak arising from James' death—this one. The Court should give force and effect to the intention of the Legislature in creating a remedy here, not close the door to these newly-vested property rights without any opportunity for trial.

IV. CONCLUSION

The Court should rule in favor of Respondent Mary Kellogg, and give force and effect to the intent of the Legislature in this case. The first certified question before the Court should be answered in the affirmative. The second certified question should be answered in the negative.

The Legislature has the right to determine that a statute should have retroactive effect, and it did so here. Those retroactive provisions created a new cause of action for wrongful death in this case, which are property rights vested in the siblings Mary Kellogg and Michael Hamre. Those rights

are not held by the Estate or the Personal Representative, either in 2018 or today. This action is not time-barred, nor did the Legislature's amendments unconstitutionally change or invalidate any previous statute of limitations. The Court thus should answer the first certified question in the affirmative.

Under existing principles of waiver, agency, and contract law, Amtrak has no "vested rights" from the April 2018 Release with regard to Mary Kellogg or Michael Hamre's newly-created wrongful death claims. Allowing these claims to proceed as the Legislature intended does not disturb or invalidate any valid aspect of the settlement Amtrak reached with other parties. The claims of James Hamre, decedent, and his mother, Carolyn, are settled, and will remain so, regardless of this suit. The Court thus should answer the second certified question in the negative.

Respectfully submitted this 11th day of August, 2021.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on the 19th day of July 2021, I caused the opening brief of Petitioner/Defendant to be filed in the Washington State Supreme Court and a true copy of the same to be served to the following person(s) by electronic service and first-class mail at the following address(es):

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