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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.

**NATIONAL RAILROAD PASSENGER CORPORATION'S
OPENING BRIEF**

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I. INTRODUCTION

For nearly a century, former RCW 4.20.020 required that second-tier beneficiaries be United States residents and financially dependent on the decedent in order to recover from a tortfeasor in a wrongful death action. Beginning in July 2019, revised RCW 4.20.020 eliminated these requirements so that second-tier beneficiaries no longer needed to be United States residents and dependent on the decedent in order to recover.

In this case, the Estate's personal representative and Amtrak entered into a settlement agreement ("the Release") one year before revised RCW 4.20.020 took effect. The Release was based on existing law at the time and, as such, only the decedent's mother was a second-tier beneficiary as defined by former RCW 4.20.020. The Estate's personal representative agreed to release all current and future claims against Amtrak, with successor personal representatives also bound to the Release.

The essential question presented here is whether the decedent's adult siblings (who were not eligible second-tier beneficiaries under former RCW 4.20.020) are barred from bringing a wrongful death action against Amtrak under the revised RCW 4.20.020 as a result of the Release.

The Release precludes successor personal representatives from bringing a second action on behalf of the decedent's adult siblings because all claims that the Estate could have brought were definitively settled and

the Estate's successor personal representative is bound by the Release. Furthermore, only a single right of action can be brought against a tortfeasor under Washington's wrongful death action. Even if a successor personal representative was not barred from bringing a second action, the retroactive application of revised RCW 4.20.020 would violate Amtrak's vested substantive rights and Washington's Constitution's Due Process and Contracts clauses.

II. CERTIFIED QUESTIONS

1. Is the revised RCW 4.20.020 remedial such that it applies retroactively to permit second-tier beneficiaries who were not eligible to assert wrongful death claims at the time of the decedent's death, or at the time the Estate's Personal Representative settled all claims arising out of the death, to assert wrongful death claims notwithstanding the tortfeasor's settlement with, payment to, and release by, the Personal Representative, so long as such new claims are not time-barred?

2. If so, does the application of the revised RCW 4.20.020 to permit such claims in this context affect Amtrak's vested substantive rights, thus violating the Washington Constitution's Due Process (Wash. Const., art. I, § 3) or Contracts (Wash. Const., art. I, § 23) Clauses?

III. STATEMENT OF THE CASE

A. Background Facts

In December 2017, James H. Hamre¹ was a passenger on Amtrak train 501 who died when the train derailed. Dkt. 1, at ¶¶ 1.2, 1.4. He was not married and had no children. His mother, Carolyn Hamre was James' sole heir. Dkt. 8-2. James' brother, Thomas Hamre, was appointed the Estate's personal representative. Dkt. 8-2.

As the personal representative, Thomas had the authority to bring a wrongful death action on behalf of all statutory beneficiaries as then defined by former RCW 4.20.020:

Every such action shall be for the benefit of the wife, husband, state registered domestic partner, child or children, including stepchildren, of the person whose death shall have been so caused. If there be no wife, husband, state registered domestic partner, or such child or children, such action may be maintained for the benefit of the parents, sisters, or brothers, who may be dependent upon the decedent person for support, and who are resident within the United States at the time of his or her death.

In short, the statute defined two tiers of beneficiaries: first-tier beneficiaries were the spouses or domestic partners and the children of the decedent, and second-tier beneficiaries were the parents or the siblings of the decedent if they were dependent on the decedent for support and were United States

¹ This brief refers to the members of the Hamre family by their first names solely for the sake of clarity. No disrespect is intended.

residents at the time of death. James had no first-tier beneficiaries, and only James' mother was a second-tier beneficiary who met the requirements of former RCW 4.20.020. *See* Dkt. 8-2, 8-5.

In April 2018, Thomas, in his capacity as personal representative, executed a Release in favor of Amtrak as follows:

Releasor specifically releases and discharges Releasees from all legal liability ... including ... all claims, demands, actions, causes of action of every kind, verdicts, judgments, and awards of every kind whatsoever, for any injuries or damages ... compensation of any kind, and losses now existing, or which may hereafter arise, whether known or unknown, sustained or received by the Releasor and Decedent James H. Hamre

By executing this Release, it is Releasor's intention to enter into a final agreement with Releasees, and to ensure that Releasees have no further obligations to Releasors for any payments whatsoever for anything arising out of or in any way related to the underlying incident referenced above....

Dkt. 8-8, at ¶ 9. Notably, the Release also provides that "Anyone who succeeds to Releasor's rights and responsibilities is also bound. This Release is made for Releasees' benefit and all who succeed to Releasees' rights and responsibilities." Dkt. 8-8, at ¶ 6.

Finally, the Release provides that the:

Releasor represents and warrants that **no other person or entity has, or has had, an interest in the claims, demands, obligations, or cause of action referred to in this RELEASE**, except as otherwise set forth herein; that **Releasor has the sole right, appropriate non-intervention powers and exclusive legal authority to execute this**

Release and receive the sum specified in it and in his representative capacity; and that Releasor has not sold, assigned, transferred, conveyed or otherwise disposed of any of the claims, demands, obligations or causes of action referred to in this Release.

Dkt. 8-8, at ¶ 11 (emphasis added).

Amtrak tendered payment, James' mother acknowledged receipt of her full distributive share in the Estate and consented to the closing of the Estate, and Thomas declared the administration of the Estate complete. Dkt. 8-5, 8-9.

About a year after the Estate closed, the Washington Legislature amended the wrongful death statute to eliminate the requirement that second-tier beneficiaries—such as brothers and sisters—be dependent on the decedent and be residents of the United States at the time of the decedent's death. The law became effective in July 2019 and provided:

Every action under RCW 4.20.010 shall be for the benefit of the spouse, state registered domestic partner, child or children, including stepchildren, of the person whose death shall have been so caused. If there is no spouse, state registered domestic partner, or such child or children, such action may be maintained for the benefit of the parents or siblings of the decedent.

Revised RCW 4.20.020. Although the amendment was labeled as retroactive, the official notes to the amendment state that it applies 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 4.20.010, 2019. c 150. The Estate

had no claims open, including no pending court claims, at the time of the revision.

In April 2020, Thomas successfully petitioned to re-open the Estate for the purpose of permitting James' siblings, Mary Kellogg and Michael Hamre, to bring claims against Amtrak. Dkt. 8-12, 8-13, 8-14. Mary was thereafter appointed Thomas's successor as the Estate's personal representative. Dkt. 8-16. Notwithstanding the express terms of the Release, in July 2020, Mary filed a wrongful death action against Amtrak, seeking damages on behalf of herself and her brother Michael.² Dkt. 1.

B. Procedural History

Amtrak moved to dismiss the complaint for failure to state a claim. Dkt. 6. Amtrak also moved for judicial notice of the probate file, the prior settlement, and the legislative history of the 2019 amendments to RCW 4.20.020. Dkt. 7-8. Mary opposed Amtrak's motion to dismiss, but she did not file separate papers opposing Amtrak's motion for judicial notice. Dkt. 9-10. Amtrak then filed a reply in further support of its respective motions. Dkt. 11, 12. Amtrak also filed a notice pursuant to Fed. R. Civ. P. 5.1, advising the Washington State Attorney General that Amtrak was

² Thomas has not claimed that he enjoys the same beneficiary status as his siblings, as in his capacity of Personal Representative of the Estate he previously released any potential claims arising out of his brother's death on behalf of all potential beneficiaries.

challenging the retroactive application of Revised RCW 4.20.020 to the particular facts of this case. Dkt. 13.

In March 2021, the federal district court granted Amtrak’s motion for judicial notice, denied Amtrak’s motion to dismiss the complaint without prejudice, and notified the parties of its intent to certify two questions to the Washington State Supreme Court. Dkt. 18. After the parties were given an opportunity to review the court’s proposed certified questions and submit revisions (Dkt. 19-21), the Court issued an order certifying the two questions stated above to this Court. Dkt. 22. The court noted that these questions needed to be addressed “in order to protect settling tortfeasors and thus to promote the public policy goal of encouraging settlements.” *Id.*, at 2. As further explained by District Judge Settle, 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.” *Id.*, at 3.

IV. ARGUMENT

A. Standard of Review

“Certified questions from federal court are questions of law that this court reviews de novo.” *Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576, 580, 397 P.3d 120 (2017); *Wright v. Lyft, Inc.*, 189 Wn.2d 718, 722, 406 P.3d 1149 (2017). When addressing certified questions, the Court considers

“the legal issues not in the abstract, but based on the certified record provided by the federal court.” *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 126, 196 P.3d 664 (2008).

B. The Release Precludes Mary From Bringing A Wrongful Death Action Against Amtrak Because Former 4.20.020 Was The Law At The Time The Release Was Executed.

Former 4.20.020 was the law in existence at the time Thomas and Amtrak executed the Release. The Release does not contain any language that allows a successor representative to rely on amendments to 4.20.020 to seek damages on behalf of additional beneficiaries.

Contracts are governed by the law in existence at the time the agreement was executed. *Wagner v. Wagner*, 95 Wn.2d 94, 98, 621 P.2d 1279 (1980) (“It is the general rule that parties are presumed to contract with reference to existing statutes....”); *Reynolds v. Insurance Co. of N. Am.*, 23 Wn. App. 286, 290-91, 592 P.2d 1121 (1979) (“The construction of the contractual language is governed by the law in existence at the time the parties enter into their agreement, unless they indicate a contrary intent.”), *review denied*, 92 Wn.2d 1020 (1979).

In *Reynolds v. Insurance Co. of N. Am.*, the plaintiff was injured at work and accepted as compensation a monthly pension from his employer’s voluntary workmen’s compensation carrier. 23 Wn. App. at 287. The pension amount was based on what the plaintiff would have received had

he been covered by the Workmen's Compensation Act. *Id.* Several years later, the plaintiff brought an action against the workmen's compensation carrier seeking an increase in his pension based upon recent amendments to the Workmen's Compensation Act. *Id.* at 288. The trial court granted the summary judgment in favor of the defendant. Observing the release was governed by the law at the time of execution and the plaintiff released all of his claims against his employer and workmen's compensation carrier, the Court of Appeals affirmed the trial court. *Id.* at 290-91. Notably, the court also observed that the parties' release "serves the purpose of protecting the insurer from future claims." *Id.* at 291.

Similarly, Thomas, as the Estate's first personal representative, had sole authority to bring a wrongful death action on behalf of all statutory beneficiaries. At the time of his death, James had no first-tier beneficiaries, and only James' mother, Carolyn, met the requirements of a second-tier beneficiary. *See* Dkt. 8-2, 8-5. Mary and Michael were not second-tier beneficiaries under former RCW 4.20.020 because they were not dependent on James for financial support.

Thomas settled with Amtrak and, in return, executed the Release. Dkt. 1, at ¶ 1.7; Dkt. 8-8. Significantly, the Release included "all claims [and] causes of action of every kind...now existing, or which may hereafter arise" (Dkt. 8-8, at ¶ 1) and applied equally to any successor personal

representative. Dkt. 8-8, at ¶ 6 (“Anyone who succeeds to Releasor’s rights and responsibilities is also bound.”).

Former 4.20.020 was in effect at the time the Release was executed, and furthermore, the Release does not contain any language permitting Mary or any successor a personal representative to seek additional damages based on future amendments to former RCW 4.20.020.

C. Mary Cannot Bring A Second Action Because Washington’s Wrongful Death Statute Permits Only a Single Right of Action

In addition to the plain terms of the Release, Mary also cannot bring a second action against Amtrak because Washington’s wrongful death statute permits only a single right of action. RCW 4.20.010. *See also* Dkt. 18, at p. 9 (“Amtrak also argues persuasively that the Washington wrongful death statute permits only a single action arising from a tortious death.”).

In a wrongful death action, an alleged tortfeasor should be protected “from being vexed by several suits instituted by or on behalf of different equitable plaintiffs for the same injury when all of the parties could be joined in one proceeding.” 22A Am. Jur. 2d Death § 20. Washington’s wrongful death statute, RCW 4.20.010, explicitly provides that:

When the death of a person is caused by the wrongful act, neglect, or default of another person, his or her personal representative may maintain **an** action against the person causing the death for the economic and noneconomic damages sustained by the beneficiaries....

(Emphasis added.). Washington cases uniformly recognize that the Legislature’s use of the word “an” in the singular form means that only one action may be brought. See *Estate of Dormaier ex. Rel. Dormaier v. Columbia Basin Anesthesia, PLLC*, 177 Wn. App. 828, 855, 313 P.3d 431 (2013) (“[T]he wrongful death statute created a single cause of action.”); *Mills v. Inter Island Tel. Co.*, 68 Wn.2d 820, 831, 416 P.2d 115 (1966) (“the statute ... authorized a single suit for wrongful death”); see also *In re Perrigo’s Estate*, 47 Wn.2d 232, 234, 287 P.2d 137 (1955) (“there is but a single right of action, even though there be a number of beneficiaries”) (quoting *Hansen v. Stimson Mill Co.*, 195 Wn. 621, 623, 81 P.2d 855 (1938)).³

At least one court has addressed the issue of whether unmarried or separated parents have one or two causes of action in a wrongful death suit. *Wrenn v. Spinnaker Bay Homeowners Ass’n*, 60 Wn. App. 400, 804 P.2d 645 (1991). That case expressly held that RCW 4.20.010 provides only one cause of action, and that both parents (whether married or not) have only one cause of action. *Wrenn*, 60 Wn. App. at 406 (“In mandating one cause

³ *In re Perrigo’s Estate* and *Hansen* were overruled “only to the extent that a personal representative was authorized to settle and release a wrongful death action on behalf of a minor beneficiary without appointment of a guardian and without court approval.” *Wood v. Dunlop*, 82 Wn.2d 719, 725, 521 P.2d 1177, 1180 (1974). The analysis that there can only be a single right of action does not change.

of action, we presume the Legislature sought to eliminate piecemeal litigation and the potential for double recovery.”).

Here, there is no dispute that Thomas was the Estate’s personal representative with sole authority to file suit against and to settle with Amtrak. Dkt. 8-2, 8-3, 8-4. There is also no dispute that neither Mary nor Michael were second-tier beneficiaries at the time the Release was executed. Since the Release covers all causes of action, known or unknown, and binds successor personal representatives (Dkt. 8-8, at ¶¶ 6, 11), Mary’s subsequent second action contravenes the single right of action principle. Nothing in revised RCW 4.20.020 permits Mary, as successor personal representative, to assert new claims after Thomas had earlier released all claims.

D. Allowing the Present Action Would Violate Amtrak’s Due Process and Contracts Clause Rights

For nearly a century, the criteria for first- and second-tier beneficiaries remained unchanged. *See, e.g., Machek v. City of Seattle*, 118 Wash. 42, 44, 203 P. 25 (1921) (the criteria to bring a wrongful death claim under Section 194, Rem. Code was virtually identical to former RCW 4.20.020). In revising the statute, the Washington Legislature characterized former RCW 4.20.020 as unfair and discriminatory because it barred potential claimants who were not United States residents. Dkt. 8-10, 8-11.

The Legislature was also concerned that former RCW 4.20.020 “did not recognize the value of children once they turn 18.” Dkt. 8-11, at 5. The Legislature characterized its efforts to cure these deficiencies through amendment as “remedial.” *See* Official Note to RCW 4.20.010, 2019. c 150.

But a statute is remedial only “when it relates to practice, procedure, or remedies and does not affect a substantive or vested right.” *In F.D. Processing, Inc.*, 119 Wn.2d 452, 463, 832 P.2d 1303 (1992). Notwithstanding the Legislature’s characterization of RCW 4.20.020, this Court must examine whether it affects a substantive or vested right. If so, it cannot be applied retroactively. *Gillis v. King County*, 42 Wn.2d 373, 376, 377, 255 P.2d 546 (1953) (a statute “may not be given retroactive effect, regardless of the intention of the legislature, where the effect would be to interfere with vested rights” such as “where the result would be to impair the obligation of a contract, or deprive one of his property without due process of law.”)

Not only do the Release and single right of action principle preclude Mary from bringing a second action, but the revised RCW 4.20.020 cannot be applied retroactively to revive new claims because it will infringe Amtrak’s vested right to have its liability fixed and enjoy immunity from further litigation in violation of the Due Process Clause. Furthermore,

retroactive application of RCW 4.20.020 will impair the Release executed by Thomas in violation of the Contracts Clause.

1. Amtrak's Release is a Vested or Substantive Contractual Right.

A vested right is defined as a “right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person’s consent.” Black’s Law Dictionary (11th ed. 2019). Although the term “vested right is not easily defined,” it connotes “‘an immediate, fixed right of present or future enjoyment’ and ‘an immediate right of present enjoyment, or a present, fixed right of future enjoyment.’” *Gillis*, 42 Wn.2d at 376-77 (quoting *Adams v. Erst*, 1 Wn.2d 254, 264-65, 95 P.2d 799 (1939)). The Court has also defined it in this way:

A vested right, entitled to protection from legislation, must be something more than a mere expectation based upon an anticipated continuance of the existing law; it must have become a title, legal or equitable, to the present or future enjoyment of property, a demand, **or a legal exemption from a demand by another.**

Godfrey v. State, 84 Wn.2d 959, 963, 530 P.2d 630 (1975) (emphasis added).

“The vested right doctrine is a constitutional protection for property rights,” and “[i]t [also] protects private citizens against legislative takings and impairments of contracts.” *Service Employees International Union Local 925 v. Department of Early Learning*, 194 Wn.2d 546, 543, 450 P.3d

1181 (2019). A vested right can be created by contract, and Washington courts have recognized vested rights arising from contract in numerous cases. *See, e.g., Tremper v. Northwestern Mut. Life Ins. Co.*, 11 Wn.2d 461, 464, 119 P.2d 707 (1941) (insurance contract); *Hearde v. Seattle*, 26 Wn. App. 219, 221-22, 611 P.2d 1375 (1980) (contract for electricity consumption); *Caritas Services, Inc v. Department of Social and Health Services*, 123 Wn.2d 391, 413-15, 869 P.2d 28 (1994) (contract to provide nursing services); *In F.D. Processing, Inc.*, 119 Wn.2d 452, 463, 832 P.2d 1303 (1992) (a bank's security interest is a vested right).

Here, the Release is a contractual agreement between Thomas (as the Estate's personal representative) and Amtrak, which resolves all claims that may be brought against Amtrak arising out of the derailment. Because Thomas warranted that he possessed "exclusive legal authority to execute" the settlement agreement and agreed to give up any and all claims against Amtrak (Dkt. 8-8), Amtrak tendered a confidential and substantial settlement check. The Estate's claims were then extinguished. Amtrak then possessed and continues to possess a vested right to have its liability fixed at the time the parties executed the Release and to be immune from further suits from the Estate for damages resulting from the train derailment. The fact that the Estate has appointed a successor personal representative does

not change the analysis. See Dkt. 8-8, at ¶ 6 (“Anyone who succeeds to Releasor’s rights and responsibilities is also bound.”).

2. Retroactive Application of Revised RCW 4.20.020 To This Case Will Infringe with Amtrak’s Vested or Substantive Rights in Violation of Due Process.

“[N]o law may retroactively infringe a vested right.” *Service Employees International Union Local 925*, 194 Wn.2d at 553 (citing *Caritas*, 123 Wn.2d at 413-15). See also *Gillis*, 42 Wn.2d at 376 (a statute “may not be given retroactive effect, regardless of the intention of the legislature, where the effect would be to interfere with vested rights. Thus, a statute may not operate retroactively where the result would be to impair the obligation of a contract, or deprive one of his property without due process of law.”) (internal citations omitted).

When an amended statute is applied retroactively, it may impair the contract by interfering with the vested rights of the contracting parties; it may “alter[] its terms, impose[] new conditions or lessen[] its value.” *Caritas Servs., Inc.*, 123 Wn.2d at 404; *In re F.D. Processing, Inc.*, 119 Wn.2d at 463; *Gillis*, 42 Wn.2d at 376. See also *Matter of Estate of Burns*, 131 Wn.2d 104, 110, 928 P.2d 1094, 1096 (1997) (“Courts disfavor retroactivity because of the unfairness of impairing a vested right or creating a new obligation with respect to past transactions.”) (internal citations omitted).

Regardless of the Legislature's intentions, courts have decided against the retroactive application of statutes if doing so would substantially impair contracts and interfere with vested rights in violation of due process. For example, the retroactive application of an amendment to a statute that allowed the compounding of interest as applied to an insurance contract executed prior to the amendment would have "interfered with a substantial rights of the assured, in that it reduced the value of his policy." *Tremper*, 11 Wn.2d at 464. An ordinance that retroactively imposed a surcharge for electricity that had already been delivered to consumers was an impairment of contract and interfered with vested rights. *Hearde*, 26 Wn. App. at 221-22. A statute and regulation that retroactively altered a reimbursement formula impaired the obligations of the contract between nursing homes and the State and infringed upon the nursing homes' vested rights in violation of due process. *Caritas Services, Inc*, 123 Wn.2d at 404-05.

The posture of this case is similar to *Kinder v. Peters*, 880 S.W.2d 353 (Mo. Ct. App. E.D. 1994), a wrongful death case. There, the decedent died in 1990. At the time of the decedent's death, Missouri's wrongful death statute (enacted in 1986) set forth three categories of beneficiaries who could bring a wrongful death action. *Id.* at 354. The first tier was the decedent's spouse or children, natural or adopted, legitimate or illegitimate, or by the father or mother of the decedent, natural or adoptive. *Id.* The

second tier was the brother or sister of the decedent, or their descendants. *Id.* And if no person meeting either the first or second classes were alive, then a plaintiff ad litem could bring a wrongful death action. *Id.*

In 1991, the Missouri Legislature amended the wrongful death statute to expand the first tier of beneficiaries to include “surviving lineal descendants of any decedent children.” *Id.* In 1993, the surviving spouse and the decedent’s children (class one beneficiaries) settled their wrongful death claim. *Id.* On the following day, the children of a pre-decedent child of Decedent moved to intervene, arguing that the 1991 amendment should be applied retroactively. *Id.* The trial court denied the motion, and the Missouri Court of Appeals affirmed, reasoning that the surviving spouse and the decedent’s children had a vested right in the damages recovered from the wrongful death action, and their rights would be infringed if the 1991 law were to be applied retroactively. *Id.* at 354-55. Notably, the Court of Appeals also observed that “applying the 1991 law retroactively would also impose an additional duty on the Defendant” and “change the substantive rights of the parties involved in violation of [Missouri Constitution].” *Id.* at 355.

The Wisconsin Supreme Court’s analysis of the retroactive application of an amended statute to a wrongful death case is also instructive. *Neiman v. American National Property and Casualty Co.*, 236

Wis.2d 411, 613 N.W.2d 160 (2000). There, the plaintiff was pregnant, and as a result of an automobile accident, she was injured and her child was stillborn. *Id.* at 417. At the time of the accident, Wisconsin statute limited damages in a wrongful death action to \$150,000, and plaintiffs settled with the underinsured driver and received \$100,000 as damages for the loss of society and companionship of their stillborn. *Id.* Subsequently, the Wisconsin Legislature retroactively amended the wrongful death statute to permit damages up to \$500,000 in the case of a decedent minor. *Id.* at 417. Plaintiffs filed suit against the insurance carrier, seeking additional payments for the wrongful death of their stillborn. *Id.* The defendant moved for a judgment declaring that the retroactive application of the statute was unconstitutional, and the circuit court denied the motion. *Id.* at 418. The Wisconsin Supreme Court agreed that the language contained in the amended statute was intended to be retroactive, but retroactive application of the amended statute would unfairly alter settled property rights without achieving a broad public benefit and violated due process guaranteed by the Fourteenth Amendment to the United States Constitution as well as the Wisconsin Constitution. More specifically, the Wisconsin Supreme Court held that (1) the insurance carrier possessed a substantive right to have its liability fixed on the date of injury, and the retroactive application of the amended statute “unfairly overturns settled expectations,” and (2) the

retroactive application of the statute did not outweigh the private interests it overturns because the amended statute did not remedy a general economic or social issue. *Id.* at 423-25. Ultimately, it held that retroactive application of the statute would violate due process and reversed the lower court. *Id.* at 428.

Like *Kinder* and *Neiman*, the retroactive application of revised RCW 4.20.020 to this case would sweep away Amtrak's settled expectations to have its liability fixed at the time the Release was executed. Where, as here, a personal representative has settled a wrongful death claim with a tortfeasor under former RCW 4.20.020, there is no rational basis to apply revised RCW 4.20.020 retroactively. Indeed, when the Washington Legislature amended RCW 4.20.020, it intended to ensure that at least one beneficiary could seek damages regardless of their dependency or residency status. *See* Dkt. 8-10, 8-11. But former RCW 4.20.020 did not preclude a beneficiary from seeking damages in this case; the decedent's mother was a second-tier beneficiary and received a confidential and substantial sum of money.

If revised RCW 4.20.020 is applied retroactively, Amtrak will be exposed to additional liability for damages—not only in this case, but potentially in all wrongful death cases Amtrak has settled. Thus, permitting Mary to seek damages from Amtrak on behalf of additional beneficiaries

will infringe with Amtrak's vested rights to have a fixed liability for damages and impose new obligations on Amtrak to other unknown beneficiaries in violation of due process. And as noted by the district court, Amtrak "is clearly not the only tortfeasor potentially facing newly-minted claims arising from torts that have already been settled and resolved." Dkt. 18, at p. 9.

3. Retroactive Application of Revised RCW 4.20.020 In This Case Will Violate the Washington Contract Clause.

Even if this Court accepts the view that application of revised RCW 4.20.020 does not violate the Due Process Clause, it still cannot be applied retroactively because it would impair Amtrak's contract in violation of the Washington Contract Clause, which prohibits the Legislature from passing laws that impair contracts. WASH. CONST. art. 1, § 23 ("No ... law impairing the obligations of contracts shall ever be passed."). The federal and Washington contract clauses are given the same effect. *Caritas Servs., Inc.*, 123 Wn.2d at 402.⁴ Moreover, Washington courts rely on cases construing the federal constitutional provision as persuasive authority in construing the Washington constitutional provision. *Ketcham v. King County Med. Serv. Corp.*, 81 Wn.2d 565, 576, 502 P.2d 1197 (1972).

⁴ U.S. CONST. art. 1, § 10 ("No state shall ... pass any ... law impairing the obligation of contracts.").

When the Legislature intends to apply an amendment or statute retroactively, it cannot do so in a manner that upsets settled transactions. *Caritas Servs., Inc.*, 123 Wn.2d 391, fn. 9 (“Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions.”) (quoting *General Motors Corp. v. Romein*, 503 U.S. 181, 191, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992)). See also *Landgraf v. USI Film Products*, 511 U.S. 244, 225, 114 S.Ct. 1483 (1994) (“[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.”).

For the Contract Clause to retain any meaning, “it must be understood to impose some limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power.” *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 235, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978). Significantly, the United States Supreme Court has held that:

The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are

binding under the law, and the parties are entitled to rely on them.

Id. at 245.

To determine whether retroactive application of a statute impairs contracts between private parties violates the United States Contracts Clause, federal courts inquire into the following: (1) whether the state law operates as a substantial impairment of the contractual relationship; (2) whether there is significant and legitimate public purpose behind the state law; and (3) whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. *Cycle Barn, Inc. v. Arctic Cat Sales, Inc.*, 701 F. Supp. 2d 1197, 1202 (W.D. Wash. 2010) (*quoting RUI One Corp v. City of Berkeley*, 371 F.3d 1137, 1147 (9th Cir. 2004)).

As to the first inquiry, there are three components: (1) the contractual relationship, (2) the change in law that impairs that contractual relationship, and (3) substantial impairment. *Allied Structural Steel Co.*, 438 U.S. at 244. Here, as fully described above, the Release at issue is clearly a contractual agreement between the Estate (as Thomas is the Estate's personal representative) and Amtrak, which specifically and explicitly resolves all claims that may be brought against Amtrak arising

out of the train derailment. The Release provides in part that the personal representative (“Releasor”) releases and forever discharges Amtrak and other entities (“Releasees”) from all legal liability, including:

Any and all claims, demands, actions, causes of action of every kind, verdicts, judgments and awards of every kind whatsoever, for any injuries or damages ... now existing, or which may hereafter arise, whether known or unknown....

By executing this Release, it is Releasor’s intention to enter into a final agreement with Releasees, and to ensure that Releasees have no further obligations to Releasors for any payments whatsoever for anything arising out of or in in any way related to the underlying incident referenced above. Releasor also warrants that he will not commence, prosecute, or permit to be commenced or prosecuted against the Releasees any action or other proceeding based upon any claims, demands, actions, causes of action, obligations, liabilities, damages, or losses herein released.

Dkt. 8-8., at ¶ 1. The Release is binding on all successors. *Id.*, at ¶ 6 (“Anyone who succeeds to Releasor’s rights and responsibilities is also bound.”).

The substantive change in revised RCW 4.20.020, if applied retroactively, would substantially impair the parties’ contractual relationship because the Estate’s successor personal representative would then be permitted to seek additional damages from Amtrak despite the plain

and explicit language contained in the Release. Indeed, retroactive application of revised RCW 4.20.020 would impair the value bargained for and subject Amtrak to additional liability that it believed was put to rest when the Release was executed. This frustrates Amtrak's expectations that its liability would be fixed and it would be immune from further liability from the Estate. Indeed, this unexpected liability to Amtrak (or any other alleged tortfeasor) subsequent to a settlement is not what the Washington Legislature intended. Neither Plaintiff nor any personal representative who has already had a chance settle their disputes should be permitted to have a "second bite of the apple."

In short, the retroactive application of revised RCW 4.20.020 will nullify the Release but still allow the Estate to unjustly keep the money Amtrak already paid pursuant to the Release. Neither party in this case anticipated the change in the law and did not incorporate any language indicating that they would be bound to any changes in the law. In fact, until the statute was amended in July 2019, the language in former RCW 4.20.020 had been virtually unchanged for at least a century. *See Machek*, 118 Wn. at 44.

As to the second inquiry, the issue is whether the impairment of a private contract is reasonable and necessary to fulfill an important public purpose. Put in another way, the amendment must protect a "broad societal

interest rather than a narrow class.” *Allied Structural Steel Co.*, 438 U.S. at 249. Courts weigh five factors to determine whether a sufficient public purpose exists. *Cycle Barn, Inc.*, 701 F. Supp. 2d at 1203. These factors are: “(1) the emergency nature of the legislation; (2) whether the state had previously regulated the subject activity; (3) whether the impact is generalized or specifically directed toward a narrow class; (4) whether the reliance on pre-existing rights was both actual and reasonable; and (5) whether the challenged law worked a severe, permanent, and immediate change in those relationships reasonably relied upon.” *Id.* (quoting *Chico’s Pizza Franchises, Inc. v. Sisemore*, 544 F. Supp. 248, 249 (E.D. Wash. 1981)).

Here, all of these public purpose factors weigh in favor of Amtrak. First, the amendment to the wrongful death statute did not result from any emergency. Indeed, nothing in the legislative history suggests this. *See* Dkt. 8-10, 8-11. Second, the wrongful death statute gives claimants the statutory right to bring a wrongful death claim, but this is not a regulated space akin to franchises or the like. Third, only a narrow class of people would be impacted by the substantive change in the law. The Washington Legislature characterized former RCW 4.20.020 as unfair and discriminatory because claimants whose family members died on the Ride the Ducks boat were barred from bringing a wrongful death claim because

they were neither United States residents nor dependents. Dkt. 8-10, 8-11. In fact, the Attorney General's Office Torts Division and Department of Enterprise Services estimates that there is on average 44 wrongful death claims and suits received per year, and the amended wrongful death statute would increase that number to just 52 cases annually. Dkt. 8-18, at 2-3. Fourth, the parties had a meeting of the minds, and Amtrak reasonably relied on the essence of the Release that no further claims would be made against Amtrak. Dkt. 8-8. Finally, retroactive application of revised RCW 4.20.020 will severely and permanently alter the parties' relationship such that the Release would be void and Amtrak will incur additional liability—not just in this case, but potentially in other wrongful death cases where Amtrak has settled with the personal representatives of the estate.

As to the third inquiry, the retroactive application of revised RCW 4.20.020 is not reasonably designed to further the Washington Legislature's purpose in this case. Again, when the Legislature decided to amend the wrongful death statute, it had in mind potential claimants who were barred from bringing wrongful death claims merely because they were not United States residents or dependents. Dkt. 8-10, 8-11. The Legislature did not intend or propose to permit personal representatives to breach settlement agreements to obtain a windfall or allow additional potential beneficiaries to make a claim against an alleged tortfeasor despite the existence of a valid

settlement agreement binding on the Estate's personal representative and its successors. To do so would violate the overarching public policy of the State of Washington to encourage settlements. *See, e.g., American Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 772, 174 P.3d 54 (2007) (citing cases).

The above analysis demonstrates that retroactive application of revised RCW 4.20.020 lacks the requisite legitimate public purpose to justify the impairment of the parties' Release here. To the contrary, it violates the public interest in encouraging prompt settlements and enforcing contractual rights. Thus, permitting Mary to proceed with this litigation will violate the Contract Clauses.

E. Washington Favors the Finality of Agreements to Settle

Washington courts favor finality in private settlements. *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 187, 840 P.2d 851 (1992). The Release at issue is a contract between the Estate's personal representative and Amtrak. *Boyce v. West*, 71 Wn. App. 657, 662, 862 P.2d 592 (1993) ("A release is a contract in which one party agrees to abandon or relinquish a claim, obligation, or cause of action against another party.") (citing 6 Marilyn Minzer, Jerome H. Nates, Carl, D. Kimball, & Diana T. Axelrod, DAMAGES IN TORT ACTIONS § 51.11 [3], at 51-9 (1991)).

As a rule of construction, changes to the law subsequent to the execution of a contract cannot be part of an agreement unless there is language indicating that the parties agreed to be bound by changes to the law. *See* 11 Williston on Contracts § 30:23 (4th ed.) (“The rule providing for incorporation of existing law into contracts applies to the law existing at the time when the contract is executed. Thus, as a rule of construction, changes in the law subsequent to the execution of a contract are not deemed to become part of agreement unless its language clearly indicates such to have been [the] intention of [the] parties.”).⁵ *See also Caritas Services, Inc v. Dep’t of Social and Health Svcs.*, 123 Wn.2d 391, 405, 869 P.2d 28 (1994) (“Parties are generally deemed to contract in reliance on existing law.”); *Cornish College of the Arts v. 1000 Virginia Ltd. P’ship*, 158 Wn. App. 203, 223 (2010) (“One of the basic principles of contract law is that the general law in force at the time of the formation of the contract is a part thereof.”).

⁵ “The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal. It was recognized by the Greeks ... by English common law ... and by the Code Napoleon. It has long been a solid foundation of American law.... Justice Story said that ‘retrospective laws are ...generally unjust; and ... neither accord with sound legislation nor with the fundamental principles of the social compact.’” *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855-56, 110 S. Ct. 1570, 108 L.Ed.2d 842 (1990) (Scalia, J., concurring) (*quoting* 2 J. Story, Commentaries on the Constitution § 1398 (2d ed. 1851)).

The Release does not contain any language suggesting that the parties agreed to be bound by any amendments to the wrongful death statute. As part and parcel of the Release, the Estate's personal representative agreed that Amtrak would not have any further obligations to the Estate or any of the James' beneficiaries, and that the Release would be binding on all successors. Dkt. 8-8, at ¶¶ 1, 6, 11. Thus, former RCW 4.20.020 is part of the formation of the Release, and Mary as successor personal representative is bound by the terms of the Release. There are no provisions in the Release that permit successor personal representatives to avoid their obligations.

V. CONCLUSION

Former RCW 4.20.020 was the law at the time the Release was executed, and the Release does not contain any language requiring that the parties be bound by any changes to the law. The plain language of the Release and single right of action principle preclude Mary from bringing a second action against Amtrak. Furthermore, permitting Mary to proceed with this lawsuit will infringe upon Amtrak's vested rights in violation of the Due Process Clause and impair the parties' contractual obligations in violation of the Contract Clause. Accordingly, this Court should answer the certified questions in the negative.

RESPECTFULLY SUBMITTED this 19th day of July 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) in the manner indicated below at the following address(es):

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