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WASHINGTON STATE SUPREME COURT

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JARYD SCHROEDER,

*Plaintiff-Petitioner,*

vs.

STEVEN WEIGHALL, M.D. and COLUMBIA BASIN IMAGING, P.C.

*Defendants-Respondent.*

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**REPLY BRIEF OF APPELLANT**

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## I. ARGUMENT

Upon review of Respondents' brief, it seems necessary to clarify Mr. Schroder's argument. *See Brief of Resp.* at 8-9. Mr. Schroder argues RCW 4.16.190(2) violated his right to "access the courts" and seek redress for injuries suffered as a minor. *See Brief of App.* at 18, 20-21. RCW 4.16.190(2) excluded Mr. Schroeder's medical malpractice claim from the tolling provision of RCW 4.16.190(1) and triggered the shortened statutes of limitation in RCW 4.16.350(3). As a result of the shortened statute of limitations period Mr. Schroeder was barred from pursuing a medical malpractice claim for injuries he suffered as a minor. It is the elimination of tolling for minors' medical malpractice claims under RCW 4.16.190(2) that violates Article I, § 12 of the Washington State Constitution and the Fourteenth Amendment of the Equal Protection clause.

A. MR. SCHROEDER HAS SUFFICIENTLY PRESENTED ARGUMENTS WARRANTING CONSIDERATION OF HIS CHALLENGES TO THE CONSTITUTIONALITY OF RCW 4.16.190(2).

1. Burden of Proof.

A party challenging the constitutionality of a statute bears the burden of establishing its unconstitutionality beyond all reasonable doubt. *Island County v. State*, 135 Wn.2d 141, 146, 955 P.2d 377 (1998). "Beyond all reasonable doubt" refers to the fact the one challenging the

statute must, by argument and research, convince the Court that there is no reasonable doubt that the statute violates the constitution. *Id.* at 147; *State ex.rel. Peninsula Neighborhood Ass'n v. Washington State Dept. of Transp.*, 142 Wn.2d 328, 335, 12 P.3d 134 (2000). Thus, it is the challenging party's burden to provide research and argument to *persuade* the court as to the constitutionality of the statute, but ultimately it is the Court's duty to determine whether the challenging party has sufficiently met its burden.

2. Mr. Schroeder Set Forth Factual and Legal Arguments That Warrant Consideration.

The sole issue before this Court is whether the elimination of tolling (RCW 4.16.190(2)) violates the right of Mr. Schroeder, and every Washington citizen, to seek legal redress for injuries suffered as a minor. Mr. Schroeder set forth factual and legal arguments that enable the Court to determine whether the unconstitutionality of RCW 4.16.190(2) has been established beyond on reasonable doubt. In fact, Mr. Schroeder's arguments are sufficiently clear that it necessitated a forty-four (44) page response from the Respondents.

Respondents' erroneously rely on *Kinzy, Johnson*, and *In re Request of Rosier*. *Brief of Resp.* at 9; 141 Wn.2d 373 n. 33, 384, 5 P.3d 668 (2000); 119 Wn.2d 167, 171, 829 P.2d 1082 (1992); 105 Wn.2d 606,

616, 717 P.2d 1353 (1986). In each case, the Court declined to rule on issues not supported by argument, or issues raised for the first time at oral argument. See *Kinzy*, 141 Wn.2d 373 n.33, 384 (Plaintiff raised a constitutional issue in briefing, but presented no arguments except to say “[t]his Court has consistently held that article I, § 7 of the Washington State Constitution is especially protective of an individual’s right to privacy.”); See also *Johnson*, 119 Wn.2d at 171 (Defendant raised an issue for the first time at oral argument); See also *Rosier*, 105 Wn.2d at 616 (Only one of the eight appellate briefs filed raised an issue under Const. art I § 7, and therefore, did not warrant consideration by the Supreme Court). These cases are completely distinct from the present case. Mr. Schroeder has squarely outlined the issues to be evaluated by this Court. Each argument is supported by factual and legal arguments. Any issues warranting clarification are addressed in this reply brief. Thus, the Respondents’ interpretation of the law is simply an attempt to prevent the Court from deciding this issue on the merits.

3. Mr. Schroeder’s Privileges and Immunities Argument is Properly Before this Court.

Respondents’ also raise issue with Mr. Schroeder’s privileges and immunities argument because it is a “hybrid access to the courts/privileges and immunities analysis” which “no published decision prescribes or

validates.” *See Brief of Resp.* at 8 (internal quotations omitted). It is true that no Washington case has addressed whether the Washington privileges and immunities clause encompasses the right of every Washington citizen to seek legal redress for injuries suffered as a minor. But, Mr. Schroeder is not prevented from arguing such.

It is disingenuous for the Respondents’ to imply Mr. Schroeder’s legal analysis is completely novel. Numerous plaintiffs have set forth similar constitutional arguments. *See e.g. DeYoung v. Providence Medical Center*, 136 Wn.2d 136, 150, 960 P.2d 919 (1998) (Plaintiff argued that the eight year statute of repose, RCW 4.16.350(3), violated access to the courts provision of the state constitution.); *See also Gilbert v. Sacred Heart Medical Center*, 127 Wn.2d 370, 900 P.2d 552 (1995) (Plaintiff argued that RCW 4.16.350 unconstitutionally deprived their daughter of legal redress). Moreover, Mr. Schroeder is not prohibited from framing the legal issues before the Court. The Supreme Court has previously declined to address the constitutionality of RCW 4.19.190(2) and is now being asked to do just that.

**B. MEDICAL MALPRACTICE DEFENDANTS ARE FAVORED BY RCW 4.16.190(2).**

Independent analysis under the Washington privileges and immunities clause must “involve a grant of favoritism.” *Madison v. State*,

161 Wn.2d 85, 96, 163 P.3d 757 (2007). As set forth by the Court in

*Andersen*:

As we concluded in *Grant County II* [i.e., *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004)], the concern underlying the state privileges and immunities clause, unlike the equal protection clause, is undue favoritism, not discrimination, and the concern about favoritism arises where a privilege or immunity is granted to a minority class (“a few”). Therefore, an independent state analysis is not appropriate unless the challenged law is a grant of positive favoritism.

*Andersen v. King County*, 158 Wn.2d 1, 16, 138 P.3d 963 (2006). The Supreme Court is yet to prescribe a precise analytical framework for determining “favoritism.” But, the aim of the determination is obvious. Favoritism is meant to identify the party or party’s *granted* a privilege or immunity by the enactment of a statute to the detriment of all others.

RCW 4.16.190(2) favors medical malpractice defendants. RCW 4.16.190(2) eliminated tolling for medical malpractice plaintiffs exclusively. Instead, minors’ medical malpractice claims are subject to the statutes of limitation in RCW 4.16.350, which are triggered before a minor reaches the age of majority. This statute allows for a statute of limitations to expire before a minor possesses the legal capacity to file a claim on his or her own behalf. *See* RCW 4.08.050. Thus, medical malpractice defendants are immunized from liability for their negligence.

RCW 4.16.190(2) creates two distinct classes of tortfeasors. On one hand are medical malpractice defendants, who will only be held liable for their negligence if a minor's legal representative has the opportunity or foresight to discover the injury and file a claim. On the other hand, all other tortfeasors are held liable for their negligence upon a minor reaching majority. See RCW 4.16.190(1). No other tortfeasor is given the same immunity from liability that is afforded to medical malpractice defendants under RCW 4.16.190(2). Respondents' do not dispute the apparent favoritism, but merely seek to justify the distinction on public policy grounds. *Brief of Resp.* at 17-18.<sup>1</sup>

This is not an argument by "tautology." *Brief of Resp.* at 15. It is a lesson in plain reading. Medical malpractice defendants are the only class of tortfeasor whose claim is excluded from the tolling provision of

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<sup>1</sup> Furthermore, Schroeder's favoritism argument fails to account for differences among tortfeasors that frustrate his attempt to call it "favoritism" for RCW 4.16.190(2) to treat some differently than others. Health care providers are licensed professionals to whose services public policy favors broad access at affordable costs. Stated another way, more people need to deal directly and personally with, and be able to have access to, physicians and nurses than with, say, architects and engineers. Thus, it is not self evidence that legal rules for asserting claims against all types of professionals should be identical in all respects, or that it "favors" health care providers when the minority is eliminated as a basis for tolling tort claims against them.

More so than other potential defendants, health care providers also are subject to standards of care which change over time comparatively rapidly over time.

RCW 4.16.190(1) and subjected to the shortened statutes of limitation in RCW 4.16.190(2). No other claim is subject to the same statute of limitations, and therefore, no other defendant is afforded the same immunity from suit. Respondents' "tautology" argument requires the Court to ignore a plain reading of the statute.

RCW 4.16.190(2) is detrimental to every Washington citizen. Elimination of tolling in minors' medical malpractice claims, combined with the shortened statutes of limitation periods of RCW 4.15.350(3), would prevent countless Washington citizens from seeking redress for injuries suffered during minority by the negligent actions of a medical practitioner. This is exactly the type of favoritism and societal detriment the privileges and immunities clause was intended to prevent.

1. Respondent's Misconstrue the Aim of the Favoritism Analysis.

As noted in *Grant County II*, the framers of our constitution were concerned with laws that serve "the interest of special classes of citizens to the detriment of the interest in all citizens." *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 806-07, 83 P.3d 419(2004). This concern underlies why the *Grant County II* Court distinguished the Washington privileges and immunities clause from the federal constitution and developed the "favoritism" analysis. See *Andersen*, 158 Wn.2d at

17.<sup>2</sup> Thus, the favoritism analysis is focused on the party *granted* favoritism from the adoption of a particular statute, not those who may or may not have been favored as a result of a prior enactment. Thus, Respondents' contention that RCW 4.16.190(2) withdrew a previous grant of favoritism is meritless. *Brief of Resp.* at 16-17.

2. Mr. Schroder Does Haphazardly Define Medical Malpractice Defendants as A Favored Class.

Respondents' contend Mr. Schroeder defines medical malpractice defendants as a favored class "too haphazardly." *Brief of Resp.* at 19. However, Respondents' give no reason *why* the classification is "haphazard," except to argue that a legal guardian may pursue a claim on behalf of a minor. This argument in no way undercuts or disputes Mr. Schroeder's assertion that RCW 4.16.190(2) favors medical malpractice defendants. Moreover, this argument is contradictory to many of the Respondents' other arguments.

Respondents' seemingly argue RCW 4.16.190(2) is not only practical, but also necessary. *See Brief of Resp.* at 17-19. In an attempt to justify the apparent "favoritism" granted to medical malpractice

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<sup>2</sup> As we concluded in *Grant County II*, the concern underlying the state privileges and immunities clause, unlike that of the equal protection clause, is undue favoritism, not discrimination, and the concern about favoritism arises where a privilege or immunity is granted to a minority class ("a few"). Therefore, an independent state analysis is not appropriate unless the challenged law is a grant of positive favoritism to a minority class. In other cases, we will apply the same analysis that applies under the federal equal protection clause

defendants, Respondents' cite policy considerations warranting separate treatment of professionals.<sup>3</sup> Thus, even by the Respondents' own concessions, Mr. Schroder correctly defines medical malpractice defendants as a favored class.

3. *Waples v. Yi* Does Not Establish That Medical Malpractice Defendants Do Not Have Political and Economical Influence.

Respondents' attempt to minimize the political or economic influence of medical malpractice industry by citing Justice Johnson's *dissenting* opinion in *Waples v. Yi*, 169 Wn.2d 152, 168, 234 P.3d 187 (2010). *See Brief of Resp.* at 16 (cited as *concurring* opinion). This citation does not establish that medical malpractice defendants are not a class of individuals/corporations "with considerable economic and political clout." *Brief of App.* at 13; Appellant's Answer to Amicus Curiae Briefs of Washington State Medical Association (WSMA and Washington Defense Trial Lawyers), *Unruh v. Cacchiotti*, 172 Wn.2d 98, 257 P.3d 631 (2011) (No. 84707-0) (Previously un cited at *Brief of App.* at 13). It merely recognizes that the Laws of 2006, ch. 8, like most, were, on some level, the result of compromise and negotiation. This quote does not establish that RCW 4.16.190(2) is constitutional because it was the result of compromise.

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<sup>3</sup> More so than other potential defendants, health care providers also are subject to standards of care that tend to change comparatively rapidly over time. *Brief of Resp.* at 18.

*Waples v. Yi* degrades the validity of Respondents' arguments. In *Waples*, the Supreme Court struck down RCW 7.70.100, another "negotiated" provision of the Laws of 2006, ch. 8. 169 Wn.2d at 161. The Court's unwillingness to uphold this legislation evidences that even a statute reached by compromise is not impenetrable to scrutiny.

C. WASHINGTON CITIZENS HAVE A FUNDAMENTAL RIGHT TO SEEK LEGAL REDRESS FOR INJURIES SUFFERED AS A MINOR.

Respondents' do not dispute that Washington citizens have a right to access the courts and seek redress for injuries suffered as a minor resulting from another party's negligence. Rather, Respondents' contend, "[a]ny such right is non-fundamental." This assertion goes against the great weight of constitutional, statutory, and common law evidencing Washington's efforts to protect the rights of minors as if they were fundamental.

Washington has afforded special protection to minors' civil claims under our state constitution. *See generally Wiggins, Harnetiaux & Whaley, Washington's 1986 Tort Legislation and the State Constitution: Testing the Limits*, 22 *Goz. L. Rev.* 193, 246-50 (1986/87). Art. II, § 28, sub-sec. 4 prevents the legislature from enacting law authorizing the sale or mortgage of real or personal property of minors, and sub-sec. 11 prevents the legislature from declaring any person of age or authorizing

any minor to sell, lease, or encumber his or her property. Although these constitutional provisions do not address an individual's right to seek legal redress for injuries suffered as a minor, the protections evidence a clear intent to protect minors' civil claims stemming from inception of Washington law.

The Washington legislature has also afforded statutory protection to minors' civil claims. Most notably, Former RCW 4.16.190 tolled every potential tort claim by a minor. Even since being amended in 2006, RCW 4.16.190(1) tolls any other claim potential claim a minor may have. These special protections recognize that “[m]inors are not similarly situated to adults because they are unable to pursue an action on their own until adulthood, RCW 4.08.050, and they generally lack the experience, judgment, knowledge, and resources to effectively assert their rights.” *DeYoung*, 136 Wn.2d at 146. Thus, it can reasonably be argued that the legislature recognizes this right as fundamental.

Washington courts have also protected the right of minors to seek legal redress. The courts have been hesitant to uphold legislation that affect a person's right to file a claim for injuries suffered as a minor. *See, e.g., Gilbert*, 127 Wn.2d at 377 (The Supreme Court declined to interpret RCW 4.16.350 in a manner that would repeal the tolling provision of RCW 4.16.190 and acknowledged the “right of every citizen to seek

redress for injuries sustained during minority”). *See also Hunter v. North Mason High School*, 85 Wn.2d 810 (The Supreme Court opined that the right of a minor, and all citizens, to “be indemnified for personal injuries is a substantial property right[s], not only for monetary value but in many cases fundamental to the injured person’s physical well being and ability to live a decent life”). The Supreme Court has further held that the right to access the courts for all citizens is “the *bedrock foundation* upon which rest all people’s rights and obligations.” *John Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991) (emphasis added). The only decision that seemingly conflicts with those previously mentioned is *Schlarb v. Castaining*. 50 Wash. 331, 97 P. 289 (1908) (Supreme Court upheld the application of Washington property law which required minors to claim vested property within a certain amount of time.). However, this case is an outlier from 1908 and does not reflect the overt actions of the Court in contrast of this decision.

Respondents’ brief is noticeably absent of any mention of *Gilbert*, but the implications made therein are significant. In *Gilbert*, the Supreme Court refused to interpret RCW 4.16.350 in a manner that would implicitly repeal the tolling provision of former RCW 4.16.190. 127 Wn.2d 370, 375, 900 P.2d 552 (1995). Rather, the Supreme Court harmonized the two statutes so that a minor’s claim would be tolled until

they reached majority, at which point the minor was “charged” with whatever knowledge his or her parent had with respect to a potential medical malpractice claim. *Id.* at 375. The Court stated that only this reading could give “effect to the language of both RCW 4.16.190 and RCW 4.16.350 and the right of every minor to seek legal redress for injuries sustained during minority.” *Id.* at 377. And, in declining to address the Gilberts’ constitutional challenges to RCW 4.16.350, the Court noted that the Plaintiff’s argument that “any other interpretation of the relationship between RCW 4.16.190 and RCW 4.16.350 would violate constitutional guarantees” was “compelling.” *Gilbert*, 127 Wn.2d at 378; Appellant’s Answer to Amicus Curiae Briefs of Washington State Medical Association (WSMA and Washington Defense Trial Lawyers), *Unruh v. Cacchiotti*, 172 Wn.2d 98, 257 P.3d 631 (2011) (No. 84707-0). Thus, the Supreme Court implied that any interpretation of RCW 4.16.350 that would eliminate tolling for minors would be rejected. *Id.*

Washington’s history and legal evolution illustrate that the right of every Washington citizen to seek redress for injuries suffered as a minor is fundamental. The right to access the courts and seek legal redress is a substantial right that truly is the bedrock foundation for the enforcement of all the other rights we hold as Washington citizens. At every turn, Washington has taken precautions to prevent minors’ claims from being

prejudiced or eliminated before they are legally able to file a claim on their own behalf.

The fundamental nature of this right is not degraded because a legal representative *may* pursue a claim on behalf of a minor. As noted by the Supreme Court in *Cook*:

The possibility that a friend or relative may possess the foresight to file a timely claim on behalf of an incapacitated victim [minor], in our view, and it provides too slender a reed to bridge the inherent discrimination, and it becomes arbitrary and unreasonable when it penalizes the incapacitated if a friend or relative through inadvertence or ignorance fails to act.

*Cook v. State*, 83 Wn.2d 599, 605, 521 P.2d 725 (1974). The Supreme Court has a clear disdain for vesting the responsibility for a minors' claim on another party who may or may not act.

Even when a legal representative pursues a claim on behalf of a minor, they are strictly monitored to ensure that the minor's claim is not prejudiced. For example, a representative may only bind a minor to the acceptance of a settlement and release in a tort claim with the use of a formal guardianship or court supervisor. *See* RCW 11.88.010-.090; RCW 11.92.060. A legal guardian may not waive child's future cause of action for personal injuries. *See Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 834 P.2d 6 (1992). These protections illustrate the courts' hesitance for allowing a legal representative to affect any potential claim a

minor may have. Thus, the ability of a representative to sue on behalf of a minor is seemingly intended to supplement the tolling provision of RCW 4.16.190(1), not justify the abolition of tolling. Brief for Washington State Trial Lawyers Association as Amice Curiae Supporting Appellants, *Gilbert v. Providence Medical Center*, 127 Wn.2d 370, 900 P.2d 552 (1995) (No. 60570-0) (citing *Wood v. Dunlop*, 83 Wn.2d 719, 521 P.2d 1177 (1974)).

D. STRICT SCRUTINY SHOULD BE APPLIED TO RCW 4.16.190(2) BECAUSE IT AFFECTS A FUNDAMENTAL RIGHT.

Strict scrutiny is applied to statutory classifications that affect fundamental rights. *State v. Schaff*, 109 Wash.2d 1, 17, 743 P.2d 240 (1987); *Amunrud v. Board of Appeals*, 158 Wash.2d 208, 220, 143 P.3d 571 (2006); *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 57, 109 P.3d 405 (2005). Pursuant to this standard, a law will only be upheld if it is shown to be necessary to accomplish a compelling state interest. *Id.* Moreover, the statute must be narrowly tailored to further the states interest. *See Madison*, 161 Wn.2d 85, 99, 163 P.3d 757 (2006).

RCW 4.16.190(2) does not serve a compelling state interest. In *DeYoung*, the Supreme Court held the eight-year statute of repose did not bear a rational relationship to the purpose of the statute, which was to address concerns over rising medical malpractice costs. *Id.* at 147. The

legislative intent behind RCW 4.16.190(2) is almost identical to the statutory intent behind the adoption of RCW 4.16.350 analyzed in *DeYoung*. In fact, the legislature's stated purpose in enacting RCW 4.16.190(2) acknowledges its negligible effect on medical malpractice insurance rates. Laws of 2006, Ch. 8 § 301; Appellant's Answer to Amicus Curiae Briefs of Washington State Medical Association (WSMA and Washington Defense Trial Lawyers), *Unruh v. Cacchiotti*, 172 Wn.2d 98, 257 P.3d 631 (2011) (No. 84707-0). Thus, it stands to reason that if RCW 4.16.350 cannot withstand rational basis review, the lowest level of scrutiny, it cannot withstand strict scrutiny review.

1. Strict Scrutiny May Be Applied On De Novo Review.

Mr. Schroeder does not argue that *de novo* review mandates strict scrutiny. *See Brief of Resp.* at 12. Mr. Schroeder merely stated that “[t]his Court reviews the constitutionality of a statute *de novo*.” *See Brief of App.* at 8. This is the applicable standard of review when the constitutionality of a statute is placed in issue. *See Brief of App.* at 8. Mr. Schroeder is not prohibited from arguing that the Supreme Court may apply a higher level of scrutiny on De novo review.

2. Strict Scrutiny May Be Applied When A Washington Statute Is Subject To Independent Analysis.

Mr. Schroeder argues that strict scrutiny *should* be applied based on the nature of the right infringed upon. *See Brief of Appellant* at 16-19. Mr. Schroeder is not prohibited from arguing that a higher level of scrutiny should be applied upon independent analysis of a state constitutional provision, so long as Mr. Schroeder can illustrate that a fundamental right at stake. As stated in more detail above, the right of every citizen to seek redress for injuries suffered as a minor is afforded greater protection under Washington law. Thus, this case is distinct from *Madison* and strict scrutiny should be applied.

3. Respondents' Over Exaggerate Mr. Schroeder's Reliance On *State V. Coria*.

Respondents' assert that Mr. Schroeder's reliance on *State v. Coria*, 120 Wn.2d 156, 170, 839 P.2d 890 (1992), "makes no sense." *See Brief of Resp.* at 12. However, Respondents' over exaggerate Mr. Schroeder's reliance on *Coria*. Mr. Schroeder cited *Coria* merely for purposes of outlining the standard of review for strict scrutiny. Mr. Schroeder makes no legal or factual argument regarding *Coria* or even addresses the substantive portions of the case.

4. Finding RCW 4.16.190(2) Unconstitutional Would Not Make All Statutes of Limitation Unconstitutional.

Respondents' argue that finding RCW 4.16.190(2) unconstitutional would render *all* statutes of limitations unconstitutional. *Brief of Resp.*

at 29. This is simply wrong. Mr. Schroder acknowledges that the legislature has the authority to enact statutes of limitations. *See 1000 Virginia Ltd. Partnership v. Vertecs Corp.* 158 Wn.2d 566, 582, 146 P.3d 423 (2006) (citing *Ruth v. Dight* 75 Wn.2d 600, 666, 453 P.2d 631 (1969)). However, *1000 Virginia* and *Ruth* are completely distinct from the present case. *1000 Virginia* and *Ruth*, involved the enforcement of statutes of limitations against parties who were legally able to file a claim at the time the statutes of limitation triggered and extinguished.

Here, the statutes of limitations triggered by RCW 4.16.190(2) accrue against minors who are legally prohibited from filing a claim on their own behalf. Minors are “not similarly situated to adults because they are unable to pursue an action on their own until adulthood., and they generally lack the experience, judgment knowledge and resources to assert their claim.” *DeYoung* 136 Wn.2d at 146 (citing RCW 4.08.050). Thus, a statute that triggers a statute of limitations against a minor, who cannot file a claim on their own behalf, and potentially eliminates a persons right to file a claim for injuries suffered as a minor, is critically different from the statutes of limitations that were affirmed in *1000 Virginia* and *Ruth*.

#### E. RCW 4.16.190(2) FAILS RATIONAL BASIS SCRUTINY

Under rational basis review, a legislative enactment survives a constitutional challenge if: (1) the legislation applies alike to all members within a designated class; (2) there are reasonable grounds to distinguish between those with and those without the class; and (3) the classification has a rational relationship to the proper purpose of the legislation. *DeYoung*, 136 Wn.2d at 144. “Stated somewhat differently, under the rational basis standard the law must be rationally related to a legitimate state interest, and will be upheld unless the classification rests on grounds wholly irrelevant to the achievement of a legitimate state purpose.” *Id.* (citing *Seeley v. State*, 132 Wn.2d 766, 940 P.2d 604 (1997)).

Despite being the “most relaxed and tolerant form of judicial scrutiny,” a statute will not be upheld if the relationship of a classification is so attenuated as to render the distinction arbitrary or irrational.” *Id.* at 149. As relaxed and tolerant as the rational standard basis standard may be, the court’s role is to assure that even under this differential standard of review the challenged legislation is constitutional. *Id.* at 144.

1. Respondents Do Not Dispute that RCW 4.16.190(2) Treats Members of a Class Differently.

Respondents' offer no argument to dispute that RCW 4.16.190(2) arbitrarily denies the benefit of tolling to a sub group of minor plaintiffs. RCW 4.16.190(2) inexplicably eliminated tolling in medical malpractice claims without reason or justification. By default, this creates two classes of potential minor plaintiffs. Thus, the arbitrary elimination of tolling to a sub group of minor plaintiffs alone is enough to find RCW 4.16.190(2) fails rational basis scrutiny.

Respondents' offer no argument as to RCW 4.16.190(2) treats minors differently than incapacitated adults. Incapacitated adults and minors have traditionally been treated alike because they share common characteristics. *See* RCW 4.08.050. There is no reason or justification for this distinction in the Laws of 2006, ch. 8. Thus, it appears completely arbitrary.

2. RCW 4.16.190(2) Is Not Rationally Related To Reducing Medical Malpractice Insurance, Loss Of Available And Affordable Health Care, And Making The Judicial System More Understandable, Fair And Efficient.

Respondents contend that RCW 4.16.190(2) is rationally related to reducing medical malpractice insurance, loss of available and affordable health care, and making the judicial system more understandable, fair and efficient. *Brief of Resp.* at 38. This argument is flawed for several reasons. Not the least of which is the absence of

any policy considerations against eliminating tolling on behalf of minors.

*DeYoung* undercuts all of the Respondents' justifications for upholding RCW 4.16.190(2) as unconstitutional under the rational basis standard. *See Brief of Resp.* at 38-39. In *DeYoung*, the Court applied rational basis review and struck down the eight-year statute of repose in RCW 4.16.350 as unconstitutional. *Id.* at 150. The Court's decision relied upon a report by the National Association of Insurance Commissioners (NAIC) which evidenced the miniscule number of claims reported eight (8) years after the incident of malpractice:

The difficulty with the legislation, however, is that materials before the Legislature also showed that an eight-year repose provision could not rationally be thought to have any chance of actuarially stabilizing the insurance industry even if an insurance crisis did exist and even if every state adopted an eight-year statute of repose. Among other documents before the Legislature was a 1975 report by the National Association of Insurance Commissioners (NAIC). That report discloses, based upon a study of 3,247 claims nationwide, that less than one percent (plaintiff's calculations show about 1/2 of 1 percent) of the claims were those of adults reported over 8 years after the incidents of malpractice. According to plaintiff's calculations, of the total of \$24,446,469 paid in indemnity on all claims, less than .2 percent was paid for claims reported over eight years after the incidents of malpractice.

A repose provision affecting so few claims and involving a small amount of what insurers were paying *could not possibly have any meaningful impact on the medical malpractice industry*, much less when only claims of the

type subject to Washington's eight-year statute of repose are considered.

We are aware that "the Legislature may constitutionally approach" a problem "one step at a time." *Griffin*, 130 Wash.2d at 66, 922 P.2d 788; see *Beach Communications, Inc.*, 508 U.S. at 316, 113 S.Ct. 2096 (" '[t]he legislature may select one phase of one field and apply a remedy there, neglecting the others' ") (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955)). However, the relationship of a classification to its goal must not be so attenuated as to render the distinction arbitrary or irrational. *Nordlinger v. Hahn*, 505 U.S. 1, 11, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992); *City of Cleburne, Texas v. Cleburne Living Ctr.*, 473 U.S. 432, 446, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *Haves v. City of Miami*, 52 F.3d 918, 922 (11th Cir.1995); *Margola Assocs. v. City of Seattle*, 121 Wash.2d 625, 651, 854 P.2d 23 (1993); *Foley v. Department of Fisheries*, 119 Wash.2d 783, 788, 837 P.2d 14 (1992). ***The relationship between the goal of alleviating any medical insurance crisis and the class of persons affected by the eight-year statute of repose is too attenuated to survive rational basis scrutiny.***

*DeYoung*, 136 Wn.2d at 148-149 (emphasis added). So, although the Court held that defendants *may* be able to rationally speculate that protection of the medical malpractice industry was needed to alleviate or avert a medical malpractice crisis, the persons affected by RCW 4.16.350 was too attenuated to survive rational basis scrutiny. This is exactly the attenuated leap of rationality that the Respondents' now asks this Court to ignore.

RCW 4.16.190(2) is not rationally related to the goal of addressing rising medical malpractice insurance because the class affected by RCW 4.16.190(2) bears no relationship to that goal. *See Brief of Resp.* at 38-39. As stated above, the *DeYoung* Court struck down RCW 4.16.350 because the class affected by the statute (Washington adults bringing a claim eight years after the negligent act occurred) was not rationally aimed at reducing medical malpractice insurance. *DeYoung* is strikingly similar to the case in front of this Court presently. RCW 4.16.190(2) affects a class of citizens with no hope or expectation that it will have any effect on the medical malpractice industry. Laws of 2006, ch. 8 § 301 (“the legislature finds that compelling even one defendant to answer a stale claim is substantial wrong, and setting an outer limit to the operation of the discovery rule is an appropriate aim.”). Thus, this case rational should receive the same treatment as RCW 4.16.350 did in *DeYoung*.

RCW 4.16.190(2) is not a rationally related to addressing the loss of available and affordable health care. *See Brief of Resp.* at 38. As stated above, the class of individuals affected by RCW 4.16.190(2) does not bear a rational relationship to the goal of alleviating medical malpractice insurance premiums, and therefore it is illogical to argue that restricting Washington minors’ claims would have any more

profound effect on providing affordable health care, especially when considering the magnitude of the entire health care industry.

RCW 4.16.190(2) is not rationally related to creating a fair, efficient, and more understandable judicial system. The argument that RCW 4.16.190(2) somehow creates a more fair judicial system is ludicrous. Although it may be more difficult for medical malpractice defendants to defend older claims, RCW 4.16.190(2) bars a class of Washington citizens for seeking redress for the negligent actions of medical malpractice defendants. If anything, RCW 4.16.190(2) creates more inequity among potential claimants. If upheld, minors' claims will be solely dependent on a legal representative to discover the injury, and have the wherewithal to file a claim before the statutes of limitation expire. Moreover, there is absolutely no way to speculate that RCW 4.16.190(2) would have any effect on creating a more efficient or understandable judicial system in Washington.

3. *DeYoung* Does Not Require Mr. Schroeder to Produce "Smoking Data."

Respondents' mistakenly contend that Mr. Schroeder's claim is distinct from the plaintiff in *DeYoung* because he lacks "smoking data." However, RCW 4.16.190(2) was enacted in direct response to *DeYoung* and in conjunction with the re-enactment of the eight-year

statute of repose. Laws of 2006, ch. 8 § 301. There are no meaningful changes in the legislature's intent analyzed in *DeYoung* and the Laws of 2006, ch. 8. Laws of 2006, Ch. 8 § 301; Appellant's Answer to Amicus Curiae Briefs of Washington State Medical Association (WSMA and Washington Defense Trial Lawyers), *Unruh v. Cacchiotti*, 172 Wn.2d 98, 257 P.3d 631 (2011) (No. 84707-0). In fact, the legislative intent is almost identical. The 2006 Legislature even acknowledged the negligible effect that eight-year statute of repose, and its corresponding section may have on medical insurance premiums. *Id.* Thus, despite the absence of "smoking data," the legislature has conceded that RCW 4.16.190(2) may have little or no impact on reaching their aim.

4. The Exclusion of Minors' Medical Malpractice Claims Exacerbates the Already Miniscule Impact of RCW 4.16.190(2).

In *DeYoung*, the Court specifically noted the small number of claims reported by *adults* over eight years after the incidents of malpractice. *See DeYoung*, 136 Wn.2d at 149. The Court went on to note that RCW 4.16.350 would have even less of an impact when considering the percentage of medical malpractice claims brought only by Washington citizens. *Id.* at 149. Here, the Legislature enacted the

same eight-year statute of repose fully cognizant of the meaningless impact that it would have on claims brought by *adults* in Washington.

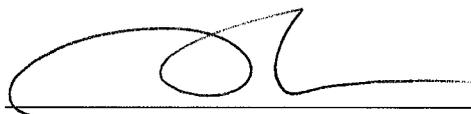
It stands to reason that the number of claims would be reduced even farther when considering the claims brought by *minors* from the state of Washington. Thus, it seems that the relationship between the goal of alleviating medical malpractice insurance rates and the class of persons affected would be even more attenuated relationship.

## II. CONCLUSION

Based on the aforementioned reasons, the Appellant asks this Court to reverse the decision of the trial court and remand this matter for trial in accordance with the Court's decision.

DATED this 13 day of September, 2012.

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