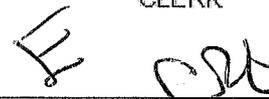


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NO. 87207-4

SUPREME COURT OF THE STATE OF WASHINGTON

JARYD SCHROEDER,

Appellant,

v.

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

Respondents.

BRIEF OF RESPONDENTS

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ORIGINAL

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I. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Are Jaryd Schroeder's arguments sufficiently coherent and "considered" to allow this Court to rule on his challenge to the constitutionality of RCW 4.16.190(2)?

2. Is RCW 4.16.190(2) subject to "strict" scrutiny or "rational basis" scrutiny?

3. Has Schroeder demonstrated beyond a reasonable doubt that the relationship between the stated purposes, and/or purposes that conceivably existed, for enacting RCW 4.16.190(2) is too attenuated for the statute to pass muster under either Const. art. I, § 12 or U.S. Const. amend. XIV, § 1?

II. COUNTERSTATEMENT OF THE CASE

A. Prelitigation Events.

Jaryd Schroeder was born January 14, 1992. *Appellant's Brief* ("*App. Br.*") at 1; *see CP 1*. On May 22, 2001, when Schroeder was age nine, Steven Weighall, M.D., a radiologist employed by Columbia Basin Imaging, P.C., read an MRI of Schroeder's head as normal, allegedly missing a diagnosis of Arnold-Chiari Type I malformation. CP 2, 5, 18.

In 2006, the legislature enacted RCW 4.16.190(2), *Laws of 2006, ch. 8, § 303*, which took effect June 7, 2006, and eliminated tolling of the medical malpractice statute of limitations during minority. According to

the Second Substitute Senate Bill Report, Governor Gregoire, Insurance Commissioner Kreidler, and representatives of the Washington State Hospital and Medical Associations, the Washington State Bar Association, three insurance companies, and John Budlong on behalf of the "Washington State Trail [sic] Lawyers Association" (p. 7) were among those who testified in support of the provision in 2SHB 2292 under which "tolling of the statute of limitations during minority is eliminated [for medical malpractice claims]," (p. 6). The Senate passed the bill by a 48-0 vote and the House concurred, 82-15. *Final Bill Report at 8*. Summarizing the bill's purposes, the legislature found that "addressing the issues of consumer access to health care and the increasing costs of medical malpractice insurance requires comprehensive solutions that encourage patient safety, increase oversight of medical malpractice insurance, and make the civil justice system more understandable, fair, and efficient." *Id. at 4*. As the legislature declared:

The legislature finds that access to safe, affordable health care is one of the most important issues facing the citizens of Washington state. The legislature further finds that the rising cost of medical malpractice insurance has caused some physicians, particularly those in high-risk specialties such as obstetrics and emergency room practice, to be unavailable when and where the citizens need them the most. The answers to these problems are varied and complex, requiring comprehensive solutions that encourage patient safety practices, increase oversight of medical malpractice insurance, and making the civil justice system

more understandable, fair, and efficient for all the participants.

Laws of 2006, ch. 8, § 1.

Schroeder allegedly experienced headaches and other neurologic symptoms after his 2001 MRI and, on November 10, 2009 – 65 days before his eighteenth birthday – underwent another MRI.¹ CP 18. The radiologist who read the 2009 MRI concluded, and allegedly reported to Schroeder’s mother, Tobi Schroeder, on November 10, 2009, that Schroeder had Arnold-Chiari Type I malformation and that it was present “on the prior MRI exam of 5/22/2001.” CP 18-19.

As Schroeder acknowledges, *App. Br. at 20*, because of the “imputation of knowledge” provision in RCW 4.16.350(3), his mother’s receipt in November 2009 of the information concerning the results of the second MRI triggered the one-year-from-discovery limitations period of RCW 4.16.350(3) with respect to any medical negligence claim against Dr. Weighall and his employer arising out of the health care Schroeder received when he was nine.² Neither his mother nor anyone else filed a

¹ Although the complaint lists the date of the second MRI and discovery of the Arnold-Chiari Type 1 malformation as November 19, 2009, CP 2 (¶ 3.4), Tobi Schroeder has sworn in her declaration that the date was November 10. CP 18-19. The difference in dates is not particularly material to any issue in this appeal.

² In *Unruh v. Cacchiotti*, 172 Wn.2d 98, 108-09, 257 P.3d 631 (2011), the Court declared that RCW 4.16.190(2) applies to claims that accrued before its enactment but did not begin to operate with respect to such claims until June 7, 2006. Applying that formula to Schroeder’s claims, RCW 4.16.350(3)’s three-year limitations period, which is measured

medical malpractice lawsuit on Schroeder's behalf before he came of age on January 14, 2010. *See* CP 33.

B. This Lawsuit and Its Dismissal.

On January 13, 2011, the day before he turned nineteen, Schroeder filed an "Amended Complaint" against Dr. Weighall, Columbia Basin Imaging, and Kadlec Regional Medical Center.³ CP 1-3. Schroeder later stipulated to dismissal of his claim against Kadlec. CP 20-22. The gravamen of Schroeder's claim against Dr. Weighall and Columbia Basin Imaging was that, as a result of Dr. Weighall's alleged negligence and the delay in diagnosis of the Arnold-Chiari Type I malformation, Schroeder has "lived with headaches, nausea, leg weakness and vision problems that . . . would have been cured." CP 3 (¶ 3.5).

The record contains no explanation as to why Schroeder (who turned eighteen on January 14, 2010) did not file suit within one year (before November 10, 2010) of the time his mother (and by imputation, he) learned of Arnold-Chiari Type 1 malformation that was found on the November 2009 MRI but had not been seen by Dr. Weighall on the 2001 MRI. Nor does the record explain why Schroeder failed to avail himself of a one-year extension of the statute of limitations by serving a request

from the date of the alleged negligent act or omission without regard to "discovery," thus expired June 7, 2009.

³ The Benton County Superior Court docket in this case does not show any previous filing of a complaint in this action.

for mediation pursuant to RCW 7.70.110 before November 10, 2010. Schroeder did not sue through a guardian *ad litem* and has never claimed that he was incompetent for any reason other than his minority.

On January 26, 2012, defendants moved for summary judgment based on the statute of limitations. CP 32-37, ___-___ (sub #33)⁴. In response, Schroeder argued that RCW 4.16.190(2) is unconstitutional, citing Const. art. I, § 12, CP 43, but not Const. art. I, § 10, or *Putman v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974, 978, 216 P.3d 374 (2009), or a right of “access to courts. CP 39-47. The trial court entered the order granting defendants’ motion on March 9, 2012. CP 23-25.

C. Schroeder’s Appeal.

Schroeder has appealed, seeking direct review. CP 26. In his statement of grounds for direct review, Schroeder argued only that RCW 4.16.190(2) unconstitutionally denied him “access to courts,” not that it violates Const. art. I, § 12 or the Fourteenth Amendment’s Equal Protection clause. But, in his opening brief, he makes arguments under both Const. art. I, § 12 and U.S. Const. amend. XIV, § 1.

⁴ Defendants/Respondents’ Supplemental Designation of Clerk’s Papers, designating sub # 33, “Defendants Steven Weighall, MD and Columbia Basin Imaging, P.C.’s Rebuttal Memorandum in Support of Motion for Summary Judgment,” was filed on August 14, 2012. The index to that Clerk’s Paper has not yet been received. Assuming consecutive pagination from the last page of the previously designated clerk’s papers, it is assumed that sub #33, will be given CP 48-55.

1. Schroeder's state constitutional challenge.

For his challenge based on the Washington State Constitution, Schroeder argues that:

– if not for elimination of tolling due to minority, he would have had one year after turning age eighteen in which to sue instead of “a mere ten months” and, thus, RCW 4.16.190(2), as applied to him, denied him “access to courts,” *App. Br. at 19-21*;

– because RCW 4.16.190(2) denied him “access to courts” and “favor[s] those who would possibly be named as defendants in medical malpractices [sic] claims,” it is subject to *de novo* review and strict scrutiny under the state “privileges and immunities” clause, Const. art. I, § 12, *App. Br. at 8-9 and 13-14*;

– RCW 4.16.190(2) fails under strict scrutiny because “none [of the stated reasons for the passage of *Laws of 2006, ch. 8*] are compelling,” and because the statute immunizes health care providers from “repercussions for errors” in providing care to minors, *App. Br. at 25*;

– RCW 4.16.190(2) affects only a small number of claims and thus, like the 1976 repose provision struck down in *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 142, 960 P.2d 919 (1998), “cannot be rationally related to the goal of reducing medical malpractice premiums,” and that “the same purpose proposed by the government in the present

case cannot survive strict scrutiny,” *App. Br. at 27*; and

– RCW 4.16.190(2) thus is unconstitutional as applied to him, *App. Br. at 28*.

2. Schroeder’s Fourteenth Amendment challenge.

In his argument based on U.S. Const. amend. XIV, § 1, the Fourteenth Amendment’s Equal Protection Clause, Schroeder contends that RCW 4.16.190(2):

– does not treat minors and “incompetent/disabled adults” equally, *App. Br. at 30-31*;

– “arbitrarily only discriminates against minors that advance medical malpractice claims” and not against minors with other negligence claims, *App. Br. at 33*; and

– is not rationally related to any of the legislature’s stated purposes for enacting it for the same reason that the eight-year repose provision enacted in 1976 was held unconstitutional in *DeYoung*, *i.e.*, the statute’s relationship with the chapter’s stated goals is “too attenuated to survive even rational basis review,” *App. Br. at 31-33*.

III. STANDARD OF REVIEW

This Court reviews the constitutionality of a statute *de novo*. *State v. McCuiston*, 174 Wn.2d 369, 387, 275 P.3d 1092 (2012); *Putman*, 166 Wn.2d at 978. Statutes are presumed to be constitutional, and Schroeder

bears the burden of persuading the Court beyond a reasonable doubt that RCW 4.16.190(2) is unconstitutional. *E.g., Am. Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 609-10, 192 P.3d 306 (2008); *Island County v. State*, 135 Wn.2d 141, 146-47, 955 P.2d 377 (1998). As the Court explained not long ago:

[T]he separation of powers requires a careful balance by the judiciary that respects the role and authority of the legislature, while assuring its adherence to the constitution. This court's reasoned judgment for nearly the past century has been that the "beyond a reasonable doubt" standard for reviewing the constitutionality of a statute achieves the appropriate balance.

Sch. Dists.' Alliance for Adequate Funding of Special Education v. State, 170 Wn.2d 599, 606 n.1, 244 P.3d 1 (2010).

IV. ARGUMENT

A. Schroeder Has Not Met His Burden of Presenting Arguments Coherent and Developed Enough to Warrant Consideration of His Challenges to the Constitutionality of RCW 4.16.190(2).

In his opening brief, Schroeder offers a kind of hybrid "access to courts"/"privileges and immunities" analysis that no published decision prescribes or validates. It appears that Schroeder is not arguing that RCW 4.16.190(2) is facially unconstitutional, but instead is asking the Court to hold the statute unconstitutional only as applied to him, *see App. Br. at 19, 28*, but even that is not clear.

Schroeder bears the burden of presenting an argument sufficiently coherent and forceful to persuade the Court beyond a reasonable doubt that RCW 4.16.190(2) is unconstitutional. *Island County*, 135 Wn.2d at 146-47. He has not done so, and the Court should decline to consider his constitutional arguments on that basis alone. *See State v. Kinzy*, 141 Wn.2d 373 n.33, 385, 5 P.3d 668 (2000) (“This Court will not address constitutional issues not supported by adequate briefing”); *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (“Parties raising constitutional issues must present considered arguments to this court”); *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (“naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion”) (quoting *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970)).

If the Court decides, however, to consider Schroeder’s arguments that RCW 4.16.190(2) is unconstitutional, it should decline to hold the statute unconstitutional for the reasons explained below.

B. Schroeder’s Arguments that RCW 4.16.190(2) Must Be Subjected to Strict Scrutiny Under Const. art. I, § 12 Lack Merit.

Schroeder seems to argue that RCW 4.16.190(2) infringes upon his right of access to courts and that, therefore, the Court should apply “strict” scrutiny rather than “rational basis” scrutiny to RCW 4.16.190(2) and

declare it unconstitutional as applied to him under the privileges and immunities clause of the state constitution, Const. art. I, § 12.⁵ Schroeder's strict-scrutiny arguments are unpersuasive for several distinct reasons, not the least of which is that his "access to courts" argument based on *Putman*, 166 Wn.2d 974, overstates the holding of *Putman* and the reach of the right it recognized.

1. Even if strict scrutiny were to be applied to RCW 4.16.190(2), Schroeder fails to explain why it would not pass constitutional muster.

Schroeder asserts that RCW 4.16.190(2) is subject to strict scrutiny, *App. Br. at 17*, and that a statute will be upheld under strict scrutiny "if the state has a compelling purpose and the statute is necessary to accomplish that purpose," *App. Br. at 19*. Schroeder thereafter neglects to say what strict scrutiny entails or why RCW 4.16.190(2) does not withstand it, except to make bald assertions that confuse purposes with methods. "The government," he asserts, "cannot establish a compelling interest for eliminating tolling with respect to minors in medical

⁵ Schroeder argues only that his claim ought to have been "preserved until [he] reached the age of majority," such that "his claim would have been timely filed within the one year statute of limitation." *App. Br. at 20-21*. Nowhere in his brief does Schroeder argue that he should have had *three* years after reaching the age of majority in which to sue. Schroeder thus tacitly concedes that there is no constitutional infirmity either in statutes of limitation generally or in the three-year limitations period that RCW 4.16.350(3) applies to medical malpractice lawsuits – a period that expires three years after the alleged negligent act or omission no matter the patient's age at the time the health care was provided and no matter when or if the patient, or the patient's parent or guardian, "discovered" that a cause of action might exist.

malpractice cases,” *App. Br. at 24*, even though eliminating tolling was a means to an end, not a legislative purpose in and of itself. He asserts that, of the legislature’s preamble statements of intent, Laws of 2006, ch. 8, § 1 (miscited by Schroeder as § § 301-02), “[n]one of these interests are [sic] compelling,” and that “[t]he government has no compelling interest in regulating ‘fair’ medical malpractice insurance rates.” *App. Br. at 25-26*. The only reason Schroeder offers for those assertions is his claim that RCW 4.16.190(2) is like the 1976 repose provision in RCW 4.16.350(3) that this Court struck down on equal protection grounds in *DeYoung*. *App. Br. at 26 (citing DeYoung, 136 Wn.2d at 150)*.

Schroeder’s reliance on *DeYoung* is misplaced. That decision did not hold or suggest that regulation of, or concern about, medical malpractice insurance rates is not a compelling state interest. In *DeYoung*, the Court applied rational basis scrutiny to the 1976 repose provision in RCW 4.16.350(3), and thus did not need to determine how compelling any legislative purpose had been.

Thus, Schroeder is left merely *asserting* that the public purposes that the legislature sought to advance by enacting Laws of 2006, ch. 8 are not compelling. He neglects to explain why that is so. Bald assertions do not make a persuasive constitutional argument, particularly when one bears the burden of demonstrating unconstitutionality beyond a reasonable

doubt. *In re Rosier*, 105 Wn.2d at 616 (“naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion”); *State v. Johnson*, 119 Wn.2d at 171 (“Parties raising constitutional issues must present considered arguments to this court”); *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004) (allegations of constitutional error may not rely on bald assertions).

2. *State v. Coria* does not support application of strict scrutiny.

Schroeder’s reliance on *State v. Coria*, 120 Wn.2d 156, 170, 839 P.2d 890 (1992), for his strict-scrutiny argument, *App. Br. at 8*, makes no sense. That decision *overruled* a Court of Appeals decision and applied *rational basis* scrutiny, not strict scrutiny, to the statute being challenged.⁶

3. *De novo* review and strict scrutiny do not go hand in hand.

Schroeder asserts, *App. Br. at 8-9*, that the trial court’s ruling must be reviewed *de novo*. While it is true that “[c]onstitutional questions are questions of law and, accordingly, are subject to *de novo* review,” *State v. McCuiston*, 174 Wn.2d at 387, *de novo* review does not necessarily mean strict scrutiny review. Insofar as Schroeder suggests otherwise, he cites no

⁶ The statute at issue, RCW 69.50.435, doubles the fine and term of imprisonment for dealing drugs on a school bus, in a school, or within 1000 feet of a school or school bus stop in violation of RCW 69.50.401(a), and excuses the State from having to prove *mens rea* or that children were present. The *Coria* court held that strict scrutiny did not apply because the allegedly discriminatory statutory classification affected neither a suspect class nor a fundamental right, rejecting the defendants’ argument that the statute implicated their right to personal liberty. *Coria*, 120 Wn.2d at 169-70. The court went on to hold that the statute was rationally related to the goals of keeping drug dealers away from children and away from school bus stops when children are present. *Id.* at 172-75.

supporting authority and is just wrong. In any number of decisions, the Washington Supreme Court has applied rational basis scrutiny for purposes of Equal Protection and/or state privileges-and-immunities analysis while undertaking *de novo* review. *E.g.*, *Madison v. State*, 161 Wn.2d 85, 163 P.3d 757 (2007).⁷

4. “Independent” analysis under Const. art. I, § 12 does not lead automatically to strict scrutiny of a challenged statute.

When a statute is challenged under Const. art. I, § 12, the Court applies the standards and tests developed in jurisprudence applying the Fourteenth Amendment’s Equal Protection Clause *unless* the challenged statute implicates a particular right of which the state constitution is more protective than the federal constitution. *Madison*, 161 Wn.2d at 97-98. A statute implicates a particular right of which the state constitution’s privileges and immunities clause is more protective if the statute “involve[s] a grant of favoritism.” *Id.* at 96. Favoritism is different from discrimination.

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 that of the equal protection clause, is undue favoritism, not discrimination,

⁷ See also, *e.g.*, *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 143 P.3d 571 (2006); *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005); *Philippides v. Bernard*, 151 Wn.2d 376, 88 P.3d 939 (2004); *Campbell v. Dep’t of Soc. & Health Servs.*, 150 Wn.2d 881, 83 P.3d 999 (2004); *Willoughby v. Dep’t of Labor & Indus.*, 147 Wn.2d 725, 57 P.3d 611 (2002); *DeYoung*, 136 Wn.2d 136.

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.

Andersen v. King County, 158 Wn.2d 1, 16, 138 P.3d 963 (2006); *see also Am. Legion Post 149*, 164 Wn.2d at 606 (the primary purpose of the Equal Protection clause is to prevent discrimination; the state privileges and immunities clause is concerned not only with preventing discrimination, but also with “avoiding favoritism”) and 607 (“Our jurisprudence indicates that a ‘privilege’ normally relates to an exemption from a regulatory law that has the effect of benefiting certain businesses at the expense of others”).

Despite this recent jurisprudence grounding Const. art. I, § 12 in special concern about “favoritism,” no decision has yet identified an actual statutory grant of “favoritism” or provided an analytic method for telling “favoritism” and discrimination apart. Applying “rational basis” scrutiny, this Court in *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004) (“*Grant County IP*”), in *Anderson*, and in *Madison*, concluded that the statutes at issue did *not* involve grants of favoritism.

Undeterred by the absence of helpful precedent, Schroeder argues that RCW 4.16.190(2) works a “grant of favoritism” because it “favors

those who would possibly be named as defendants in medical malpractices [sic] claims – licensed health care providers, employers of licensed health care providers, and medical malpractice insurance providers” who constitute what he proclaims to be “a small class of persons and corporations with considerable economic and political clout” at the expense of other kinds of tortfeasors by eliminating their risk of being forced to defend malpractice claims brought by persons after reaching adulthood for injuries sustained as minors. *App. Br. at 11, 13*. But that is merely argument by tautology: the statute grants favoritism because it favors those who Schroeder says benefit from it. *Port of Seattle v. Lexington Ins. Co.*, 111 Wn. App. 901, 915, 48 P.3d 334 (2002) (dismissing argument as tautological); *Pres. Our Islands v. Shoreline Hearings Bd.*, 133 Wn. App. 503, 518-19, 137 P.3d 31 (2006), *rev. denied*, 162 Wn.2d 1008 (2008) (same). Schroeder’s “favoritism” arguments also are fraught with misconceptions and are too facile for responsible constitutional analysis.

5. Schroeder’s “favoritism” arguments fail to make a case for “strict” scrutiny of RCW 4.16.190(2).

- a. The statute was not the result of interest-group pressure from health care providers and medical malpractice insurers.

Schroeder asserts, *App. Br. at 13*, that RCW 4.16.190(2) was intended to favor “a small class of persons and corporations with considerable economic and political clout.” Schroeder evidently is

unaware, or has forgotten, that Laws of 2006, ch. 8 – of which RCW 4.16.190(2) was an integral part – was a compromise negotiated by (among others) the Washington State Trial Lawyers’ Association and the Washington State Medical Association and was jointly endorsed by both organizations. *See Waples v. Yi*, 169 Wn.2d 152, 168, 234 P.3d 187 (2010) (J.M. Johnson, J., concurring) (chapter 8 was a “complicated legislative compromise reached by our legislators, governor, *trial lawyers, physicians, hospital administrators*, and government staff in 2006 – after two initiatives on the subject were defeated [*italics added*]”); *2SHB 2292 Senate Bill Report (Feb. 22, 2006) at 7* (identifying, as among those testifying “Pro” the bill that enacted RCW 4.16.190(2), “John Budlong, Washington Trail [*sic*] Lawyers Association”). That endorsement may not make the statute constitutional, but it does mean that the legislature hardly was steamrolled by an economic and political clout-wielding health care business lobby seeking “favoritism.”

- b. The statute does not “favor” medical malpractice defendants.

Although Schroeder seeks to characterize RCW 4.16.190(2) as “favoring” a class of defendants, RCW 4.16.190(2) actually *withdrew* a grant of favoritism from some of those – minors – to whom the grant was previously made. Until mid-2006, RCW 4.16.190 favored those plaintiffs

who, while previously incompetent because of minority or mental disability, had gone without a parent or guardian asserting a tort claim on their behalf by tolling the statutes of limitation to which anyone else's tort claim is subject. Such incompetent persons thus had legally favored status, in that any claims they had *could* be asserted *for* them, but if their claims weren't asserted for them, they had a much longer time than the ordinary adult tort claimant to sue and force the defendant to defend.⁸ RCW 4.16.190(2) *un*-favored minors who have unasserted causes of action for medical malpractice, shrinking the favored class of tort plaintiffs.⁹ Thus, "favoritism" analysis undermines, rather than advances, Schroeder's effort to subject RCW 4.16.190(2) to strict scrutiny.

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 cost. Stated another way, more

⁸ Until June 2006, when RCW 4.16.190(2) was enacted and RCW 4.16.350(3)'s eight-year repose period was re-enacted, a person injured on "day one" of life was subject to no statute of limitations or repose until his or her 18th birthday. At that point, RCW 4.16.350(3)'s three-year-from-act-or-omission limitations period began to run. If "discovery" had not already occurred, the person still had the one-year-from-discovery limitations period of RCW 4.16.350(3) in which to sue – regardless of how long it took for discovery to occur.

⁹ If RCW 4.16.190(2) "favors" that now-smaller class of potential plaintiffs in the privileges-and-immunities sense, the remedy would be to strike down RCW 4.16.190(1), not RCW 4.16.190(2), as unconstitutional, but that is an issue for another case.

people need to deal directly and personally with, and should be able to have access to, physicians and nurses than with, say, architects and engineers. Thus, it is not self-evident 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 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 that tend to change comparatively rapidly over time. The rules of the road and of general interpersonal conduct change comparatively more slowly than advances in medical technology, particularly in the field of diagnostic imaging, which Schroeder’s claim implicates. As Massachusetts’ highest court explained in rejecting an Equal Protection challenge to a statute that did not guarantee that someone injured by medical malpractice as a minor would be able to sue upon reaching the age of majority:

The problem of defending stale medical malpractice claims is further exacerbated by the fact that the standard of care is itself subject to rapid and dramatic change, fueled by advances in medical science and technology. From a defendant’s perspective, demonstrating the standard of care of many years past, and that the defendant’s treatment of the plaintiff did not deviate from it, can be very difficult when, by modern standards, the same care would represent a major deviation.

Harlfinger v. Martin, 754 N.E.2d 63 n. 8, 69 (Mass. 2001).¹⁰ In view of such scientific and technological realities, it should not be sufficient for someone arguing that a statute should be subject to strict scrutiny to rely on charges of “favoritism” as facile as Schroeder’s are.¹¹

c. Schroeder’s “favoritism” arguments define the allegedly “favored” class too haphazardly.

If elimination of tolling for minors in medical malpractice cases “favors” a class of defendants, it is a class chosen far too haphazardly for the statute to be of a kind with which the state “privileges and immunities” clause is concerned. Schroeder neglects to take into account that parents or guardians may, and often do, sue on an injured child’s behalf.¹² The Supreme Court has granted review over the years in numerous cases in

¹⁰ Mass. Ann. Laws ch. 231, § 60D (1986), the statute at issue in *Harlfinger*, provided:

[A]ny claim by a minor against a health care provider stemming from professional services or health care rendered, whether in contract or tort, based on an alleged act, omission or neglect shall be commenced within three years from the date the cause of action accrues, except that a minor under the full age of six years shall have until his ninth birthday in which the action may be commenced, but in no event shall any such action be commenced more than seven years after occurrence of the act or omission which is the alleged cause of the injury upon which such action is based except where the action is based upon the leaving of a foreign object in the body.

¹¹ Schroeder also ignores, or is dismissive of, the legislature’s stated purpose of helping, and thus favoring, consumers of health care by holding down increases in the cost of health care and thus making it more affordable.

¹² Indeed, Schroeder argues (as a basis for his separate Equal Protection argument), *App. Br. 32*, that the number of claims affected by RCW 4.16.190(2) is “small.” *See also Pittman v. United States*, 341 F.2d 739, 741 (9th Cir. 1965) (“it may be assumed that it is a rather rare case with the government as an especially choice defendant where the minor’s rights are not vindicated in a timely fashion,” and “[w]e would be blind if we didn’t know that when there is money around that just about all of the claims will get to court through guardians ad litem”).

which parents or guardians have asserted tort claims on behalf of minors,¹³ and more than a few such cases have been medical malpractice cases.¹⁴ Parents make or omit to make myriad decisions for a child with which the child is stuck upon reaching adulthood, but Schroeder offers no reasoned argument why our state constitution should protect the child from a parental decision not to bring a medical malpractice lawsuit. The child is not protected from a parental decision to sue if the parent loses the case, or fails to pursue all potentially available elements of damages, or settles the case (with court approval) on terms the child later deems unfavorable. If the parent prevails in a medical malpractice action on the child's behalf,

¹³ E.g., *Ashley v. Hall*, 138 Wn.2d 151, 978 P.2d 1055 (1999); *Soproni v. Polygon Apt. Partners*, 137 Wn.2d 319, 971 P.2d 500 (1999); *Young v. Key Pharms., Inc.*, 130 Wn.2d 160, 922 P.2d 59 (1996); *Degel v. Majestic Home Manor, Inc.*, 129 Wn.2d 43, 914 P.2d 728 (1996); *Scott v. Pac. West Mtn. Resort*, 119 Wn.2d 484, 834 P.2d 6 (1992); *Ayers v. Johnson & Johnson, Inc.*, 117 Wn.2d 747, 818 P.2d 1337 (1991); *Baughn v. Honda Motor Co., Ltd.*, 107 Wn.2d 127, 727 P.2d 625 (1986); *Carabba v. Anacortes Sch. Dist. No. 103*, 72 Wn.2d 939, 435 P.2d 936 (1967); *Thomas v. Housing Auth. of Bremerton*, 71 Wn.2d 69, 426 P.2d 836 (1967); *Taradiff v. Shoreline Sch. Dist.*, 68 Wn.2d 164, 411 P.2d 889 (1966); *Hanson v. Freigang*, 55 Wn.2d 70, 345 P.2d 1109 (1959); *Mail v. M.R. Smith Lumber & Shingle Co.*, 47 Wn.2d 447, 287 P.2d 877 (1955).

¹⁴ E.g., *Backlund v. Univ. of Wash.*, 137 Wn.2d 651, 975 P.2d 950 (1999); *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 956 P.2d 312 (1998); *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997); *Gilbert v. Sacred Heart Med. Ctr.*, 127 Wn.2d 370, 900 P.2d 552 (1995); *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 864 P.2d 921 (1993); *Lewis v. Bours*, 119 Wn.2d 667, 835 P.2d 221 (1992); *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989); *Merrigan v. Epstein*, 112 Wn.2d 709, 773 P.2d 78 (1989); *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 757 P.2d 507 (1988); *Pederson v. Dumouchel*, 72 Wn.2d 73, 431 P.2d 973 (1967); *Crippen v. Pulliam*, 61 Wn.2d 725, 380 P.2d 475 (1963); *Seattle-First Nat'l Bank v. Rankin*, 59 Wn.2d 288, 367 P.2d 835 (1962); *Young v. Liddington*, 50 Wn.2d 78, 309 P.2d 761 (1957).

the defendant cannot obtain a rematch when the child turns eighteen.¹⁵ However many defendants there may be who find themselves sued for medical malpractice by adults who claim to have been injured as children, and whoever those defendants turn out to be, the process by which they are selected is arbitrary and random. Because Schroeder does not account for any of those considerations, his “favoritism” argument is not a sharp enough analytical tool to demonstrate that RCW 4.16.190(2) is unconstitutional beyond any reasonable doubt under Const. art I, § 12.

d. Strict scrutiny does not follow from independent analysis of Const. art I, § 12.

Even if a challenged statute does implicate a right of which our state constitution is more protective, independent state constitutional analysis does not mean that strict scrutiny, rather than rational basis scrutiny, has to be applied. That a statute is subject to state constitutional analysis “independent” of Fourteenth Amendment analysis means only

¹⁵ Schroeder cites and quotes from *Cook v. State*, 83 Wn.2d 599, 521 P.2d 725 (1974), *App. Br. at 27*, but that case involved a medically incapacitated victim and a distinction that a “nonclaim” statute created between minors with tort claims generally and minors with tort claims against the State. The statement Schroeder quotes is *dictum* outside that context. Schroeder also cites *Scott v. Pac. W. Mtn. Resort*, 119 Wn.2d 484, 834 P.2d 6 (1992), for the proposition that a parent may not waive a child’s *future* cause of action based on another’s negligence. *App. Br. at 27*. That is beside the point. No one has argued that Schroeder’s parents waived any claim against Dr. Weighall before the 2001 MRI. A parent or guardian *ad litem* may *release* an alleged tortfeasor from liability to his or her child in settling a lawsuit brought on the child’s behalf (if SPR 98.16W is complied with), or may *lose* the child’s claim by suing and having the case dismissed summarily or losing at trial.

that the state constitution may provide *some* measure of protection to rights not protected under the Fourteenth Amendment.

Thus, in *Madison*, the court held that *Grant County II* had settled the question and Const. art. I, § 12 is indeed subject to analysis independent of the Fourteenth Amendment's Equal Protection Clause. *Madison*, 161 Wn.2d at 94-95. But, the *Madison* court held that it still had to determine whether the particular right – in that case the right to vote – that allegedly was being infringed is a “privilege or immunity” protected by Const. art. I, § 12. *Id.* at 95. Even after answering *that* question in the affirmative, the *Madison* court still had to apply the *Gunwall* factors to determine “the extent of the protection [that Const. art. I, § 12] provides [to the right to vote] *in a particular context* [emphasis added].” *Id.* at 95-96. The court ultimately held that Const. art. I, § 12 *does* provide greater protection to voting rights than the Fourteenth Amendment does, but *not* greater protection of voting rights of *felons*. Thus, independent state constitutional analysis got the challengers in *Madison* only so far. Fourteenth Amendment “rational basis” scrutiny ended up being applied anyway. *Id.* at 97-98. Schroeder makes no attempt to explain what makes this case different from *Madison* in that regard.

6. Minors are not a suspect class and there is no fundamental right to pursue a tort claim or to have a statute of limitation tolled during minority.

As Schroeder correctly notes, *App. Br. at 17*, “strict” scrutiny is applied to a challenged statute if the statute affects a “suspect class” or threatens a “fundamental right.” Schroeder does not argue that minors are a suspect class for purposes of constitutional analysis. Nor *are* minors a suspect class. A classification based upon age is subject to rational basis review. *Campbell v. Dep’t of Soc. & Health Svcs.*, 150 Wn.2d 881, 900, 83 P.3d 999 (2004). Juveniles are neither a suspect nor semi-suspect class for purposes of equal protection analysis. *Tunstall v. Bergeson*, 141 Wn.2d 201, 226, 5 P.3d 691 (2000); *State v. Cornejo (In re Boot)*, 130 Wn.2d 553, 572-73, 925 P.2d 964 (1996); *State v. Shawn P.*, 122 Wn.2d 553, 560, 859 P.2d 1220 (1993); *State v. Schaaf*, 109 Wn.2d 1, 19, 743 P.2d 240 (1987).

Schroeder never clearly defines the specific right that he contends is both fundamental and threatened but, setting aside for the time being his reliance on a kind of free-floating right of “access to courts,” the specific claimed right appears to be a right to have a full twelve months, and not a “mere” ten months, after turning eighteen in which to assert a medical malpractice tort claim that his parent(s) or guardian did not assert for him while he was a minor.

Any such right is non-fundamental. *DeYoung*, 136 Wn.2d at 142 (“pursuit of a tort claim” is not among the rights enumerated in our state constitution and thus is not a fundamental right). Indeed, “[u]ntil 1969, when the court adopted the discovery rule for medical malpractice actions in *Ruth v. Dight*,¹⁶ . . . a cause of action could accrue and the statute of limitations expire without a patient’s knowing of injury,” which means that under state law preexisting adoption of the discovery rule “there [was] no bar to absolutely foreclosing a cause of action where one has been injured by medical malpractice,” *DeYoung*, 136 Wn.2d at 143. Inasmuch as it is not unconstitutional for one’s claim to expire before one knows one has it, it was incumbent on Schroeder to explain *why* eliminating tolling of the statute of limitations on minors’ medical malpractice claims offends the constitution. Although the points quoted above from *DeYoung* were made in the context of an equal protection challenge to a different statute – the 1976 repose provision in RCW 4.16.350(3) – they discredit the notion that Schroeder had a *fundamental* right to have at least twelve months after turning eighteen in which to assert a medical malpractice claim that could have been, but was not, asserted for him while he was a minor.

No provision is made in our state constitution for tolling of statutes of limitation. Tolling has always been a creature of statute. The

¹⁶ *Ruth v. Dight*, 75 Wn.2d 600, 453 P.2d 631 (1969).

legislature has never ceded to the judicial branch the authority to enact, amend, or repeal either statutes of limitation or tolling provisions. This Court held more than a century ago that it is “indisputable” that the legislature has the power to enact statutes of limitation that run against minors. *Schlarb v. Castaing*, 50 Wash. 331, 338, 97 P. 289 (1908).

Thus, as a matter of *stare decisis*, tolling of claims due to minority confers a special but constitutionally *permissible* exemption from the limitations periods that the Legislature has the power and authority to impose for asserting tort and other causes of action. See *1000 Virginia Ltd. P’ship v. Vertecs*, 158 Wn.2d 566, 582, 146 P.3d 423 (2006) (“the legislature has the authority to enact statutes of limitations and the authority to determine whether a discovery rule should apply in a particular context”),¹⁷ and *Stephens v. Stephens*, 85 Wn.2d 290, 295-96, 534 P.2d 571 (1975) (“Collateral *policies* [not constitutional guarantees], unrelated to capacity to bring suit,” *may justify* tolling, and “[t]he tolling of the statute [of limitations, through legislative enactment of RCW 4.16.190, because of minority] was a *permissible* recognition of the need for special protection of minor plaintiffs before 1970, even though such

¹⁷ See also *Condo Ass’n v. Apartment Sales Corp.*, 144 Wn.2d 570, 582, 29 P.3d 1249 (2001) (“We adopt the view of the Supreme Court of Oregon that ‘[i]t has always been considered a proper function of legislatures to limit the availability of causes of action by the use of statutes of limitation so long as it is done for the purpose of protecting a recognized public interest’”) (quoting *Josephs v. Burns*, 491 P.2d 203, 207-08 (Or. 1971)).

minors could bring suit through a guardian ad litem [emphases supplied]”); *see also Duke v. Boyd*, 133 Wn.2d 80, 88, 942 P.2d 351 (1997) (“If the Legislature dislikes the impact of the [tolling] statute as it enacted it, the Legislature, *and not this court*, has the responsibility to change it [emphasis added]”). Schroeder simply has not demonstrated that RCW 4.16.190(2) affects a fundamental right so as to call for strict scrutiny.

7. Application of RCW 4.16.190(2) to Schroeder’s claim does not implicate the opportunity to do discovery on which the right of “access to courts” recognized in *Putman* was predicated.

Schroeder repeatedly asserts that RCW 4.16.190(2) violates or infringes upon a state constitutional guarantee of “access to courts.” He is wrong. *Putman*, 166 Wn.2d 974, is not on point because it dealt with RCW 7.70.150, the certificate of merit requirement, not RCW 4.16.190(2). *Putman* does not hold or suggest that a litigant who sues too late is denied “access to courts” for purposes of Const. art. I, § 10.¹⁸

The *Putman* court invalidated RCW 7.70.150 because it required a medical malpractice plaintiff, at the time of filing suit, to have in hand not only a complaint but also a sworn certificate of merit. *Putman* held that

¹⁸ *See Rohrabach v. Wagoner*, 413 N.E.2d 891, 893 (Ind. 1980) (rejecting argument that statute of limitation barring medical malpractice claims after allowing a reasonable time for filing them, and that applies to children as well as adults and does not necessarily enable persons injured as children to sue after reaching majority, violates a fundamental right under the United States or Indiana constitutions to seek redress in the courts).

“[r]equiring plaintiffs *to submit evidence supporting their [medical malpractice] claims prior to the discovery process* violates the plaintiffs’ right of access to courts.” *Putman*, 166 Wn.2d at 979 (emphasis supplied).¹⁹ RCW 4.16.190(2), unlike RCW 7.70.150, does not require submission of any evidence, much less submission of evidence supporting the *merits* of a medical malpractice claim.

Putman did not announce a fully elaborated right of “access to courts.” The right’s contours remain to be defined. But merely because one’s right of “access to courts” may be “fundamental” does not mean that any right a plaintiff claims falls under the penumbra of “access to courts” must also be regarded as fundamental.²⁰ *Putman* does not hold, and its stated reasoning does not suggest, that a trial court may not entertain or grant any kind of defense motion to dismiss before plaintiff has been afforded an opportunity to do discovery. For example, *Putman* does not suggest that a plaintiff must have a chance to do discovery before responding to a defense motion to dismiss his or her claim for lack of

¹⁹ *Putman* also struck down RCW 7.70.150 under separation-of-powers analysis based on conflicts with court rules. *Putman*, 166 Wn.2d at 979-85. Schroeder makes no claim that RCW 4.16.190(2) violates separation of powers or conflicts with any court rule.

²⁰ As the court noted in *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 782, 819 P.2d 370 (1991), “[t]he right of access [to courts] is necessarily accompanied by those rights accorded litigants *by statute*, court rule or the inherent powers of the court, *for example*, service of process, RCW 4.28, or *statutes of limitation*. RCW 4.16 may be in aid of or limitation of a particular cause of action.” (Emphases added.) See also *Herr v. Schwager*, 133 Wash. 568, 573, 234 P. 446 (1925) (“the legislature has power to remove the bar of the statute of limitations after it has fully vested [and] may remove it as to pending actions as well as to actions instituted subsequent to the removal”).

jurisdiction, or for insufficiency of service of process, or for any number of other reasons independent of the merits of the claim. *Putman* does not make “access to courts” a set of magic words that, when invoked by a plaintiff, requires strict scrutiny review of any statute the application of which results in dismissal of plaintiff’s complaint. Yet, that is essentially how Schroeder attempts to use *Putman* and the term “access to courts.”

Even if *Putman* did stand for the proposition that a plaintiff’s right of “access to courts” requires that a plaintiff have an opportunity to discover evidence bearing on the grounds upon which a defendant has moved for dismissal, Schroeder has never complained that he was deprived of an opportunity to do discovery that might have yielded him *evidence* to show that his claim was not time-barred.²¹ Schroeder admits that his claim *is* time-barred unless RCW 4.16.190(2) is unconstitutional. Surely the right of “access to courts” recognized in *Putman* does not entail immunity from summary judgment when the right to engage in discovery is not implicated, and Schroeder offers no rationale for why it should.²²

²¹ If anything, discovery might have revealed that, in light of Schroeder’s alleged continued neurologic symptoms after the 2001 MRI, his mother “discovered” enough *before* November 19, 2009 to trigger RCW 4.16.350(3)’s one-year limitations period.

²² As the court noted in *Stenberg v. Pac. Power & Light Co.*, 104 Wn.2d 710, 714, 709 P.2d 793 (1985) (citations omitted):

In Washington, the goals of our limitation statutes are to force claims to be litigated while pertinent evidence is still available and while witnesses retain clear impressions of the occurrence . . . Our policy is one of repose; the goals are to eliminate the fears and burdens of threatened

8. Schroeder's "access to courts" argument, if accepted, would make any and all statutes of limitation unconstitutional.

Schroeder asserts that, *App. Br. at 20*, application of RCW 4.16.190(2), "prevented [his] claim from being tolled during his minority," "subjected [his] claim to the statutes of limitations contained in RCW 4.16.350(3)," and violated his "right to access the courts and seek redress for injuries he suffered as a minor." Similarly, he asserts, *App. Br. at 24*, that application of RCW 4.16.190(2) will always "unconstitutionally allow the statute of limitations to run on a minors [sic] claim before they reach the age of majority and strip them of their right to access the courts." If, as Schroeder seems to suggest, the right of "access to courts" precludes the running of statutes of limitation, then no statute of limitation— and probably no affirmative defense — is constitutional. No decision of this Court has ever suggested that possibility. To the contrary, this Court has expressly recognized the legislature's authority to enact both statutes of limitation and tolling provisions. *1000 Virginia Ltd. P'ship*, 158 Wn.2d at 582; *Stephens*, 85 Wn.2d at 295-96; *Schlarb*, 50 Wash. at 338..

Schroeder has failed to demonstrate beyond a reasonable doubt that RCW 4.16.190(2) denied him a right of "access to courts," or that it is subject to strict scrutiny under Const. art. I, § 12, or that it would fail

litigation and to protect a defendant against stale claims . . . A statute of limitation, in effect, deprives a plaintiff of the opportunity to invoke the power of the courts in support of an otherwise valid claim.

strict-scrutiny review if it were subject to it. Rational-basis scrutiny therefore applies.

C. Schroeder Has Not Demonstrated that RCW 4.16.190(2) Fails “Rational Basis” Scrutiny under either Const. art. I, § 12 or U.S. Const. amend. XIV, § 1.

Well into his brief, and only in connection with his claim that RCW 4.16.190(2) infringed upon his ability to access courts under the Fourteenth Amendment’s Equal Protection clause, Schroeder argues that the relationship between the statute and the legislature’s purpose(s) in enacting it is too attenuated. *App. Br. at 32-33 (citing DeYoung, 136 Wn.2d at 149)*. A “too attenuated” argument is part of “rational basis” scrutiny.²³ Under “rational basis” scrutiny:

[a] legislative enactment survives a constitutional challenge under minimum scrutiny analysis if “(1) . . . the legislation applies alike to all members within the designated class; (2) . . . there are reasonable grounds to distinguish between those within and those without the class; and (3) . . . the classification has a rational relationship to the proper purpose of the legislation.” *Griffin [v. Eller]*, 130 Wn.2d [58] at 65[, 922 P.2d 788 (1996)] (quoting *Convention Ctr. Coalition v. City of Seattle*, 107 Wn.2d 370, 378-79, 730 P.2d 636 (1986)). 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 objective. *Seeley v. State*, 132 Wn.2d [776] at 795[, 940 P.2d 604 (1997)]. “The rational relationship test is the most relaxed and tolerant

²³ Indeed, Schroeder concedes, *App. Br. at 30*, that rational basis review must be applied to his claim that RCW 4.16.190(2) runs afoul of the Fourteenth Amendment’s Equal Protection clause.

form of judicial scrutiny under the equal protection clause.” *State v. Heiskell*, 129 Wn.2d 113, 124, 916 P.2d 366 (1996) (quoting *Omega Nat’l Ins. Co. v. Marquardt*, 115 Wn.2d 416, 431, 799 P.2d 235 (1990)).

DeYoung, 136 Wn.2d at 144. Indeed, the legislature does not need to back up its legislative decision with data supporting distinctions made between statutory classes because the rational basis standard “may be satisfied where the ‘legislative choice... [is] based on rational speculation unsupported by evidence or empirical data.’” *DeYoung*, 136 Wn.2d at 148 (quoting *F.C.C. v. Beach Comms., Inc.*, 508 U.S. 307, 315, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993)).

As this Court explained in *State v. Coria*, 120 Wn.2d at 173: “The rational basis test requires only that the statute’s means is rationally related to its goals, not that the means is the best way of achieving that goal.” The *Coria* court added:

One might disagree with this on policy grounds, but such disagreement is not a proper basis for finding the statute irrational. One who challenges a statute under the rational basis test “must do more than merely question the wisdom and expediency of the statute.” *Yakima Cy [Deputy] Sheriff’s Ass’n [v. Bd. of Comm’rs]*, 92 Wn.2d 831] at 836[, 601 P.2d 936 (1979)].

Coria, 120 Wn.2d at 174. Similarly, this Court has recognized in *Am. Legion Post No. 149*, 164 Wn.2d at 609-10:

In reviewing the statute, “the court may assume the existence of any conceivable state of facts that could provide a rational basis for the classification.” *Andersen [v.*

King County], 158 Wn.2d [1] at 31[, 138 P.2d 963 (2006)]. The classification need not be made with “mathematical nicety,” and its application may “result[] in some inequality.” *Id.* at 32 (internal quotation marks omitted) (quoting *Heller v. Doe*, 509 U.S. 312, 321, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993)). “It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.” *O’Hartigan*, 118 Wn.2d at 124 (quoting *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 110, 69 S. Ct. 463, 93 L. Ed. 533 (1949)).

Stated another way, “a statute is not unconstitutional for failing to ‘attack every aspect of a problem.’” *Philippides v. Bernard*, 151 Wn.2d 376, 392, 88 P.3d 939 (2004) (quoting *Masunaga v. Gapasin*, 57 Wn. App. 624, 634, 790 P.2d 171 (1990)); *see also Masunaga*, 57 Wn. App. at 633 (“State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it”) (quoting *McGowan v. Maryland*, 366 U.S. 420, 425-26, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961)).

1. Contrary to Schroeder’s assertions, the court’s analysis in *DeYoung* as to the constitutionality of the repose provision enacted in 1976 does not render RCW 4.16.190(2) unconstitutional.

In much the same way that Schroeder erroneously relies on *DeYoung* for his assertion that “[t]he government has no compelling interest in regulating ‘fair’ medical malpractice insurance rates,” *App. Br. at 26*, Schroeder erroneously relies on *DeYoung* for his assertion in

connection with rational basis review that RCW 4.16.190(2) bears no rational relationship to any proper purpose of the legislation, *App. Br. at 31-33*. Schroeder ignores the fact that he lacks the kind of evidence that the plaintiff in *DeYoung* was able to proffer in connection with her equal protection challenge to the constitutionality of the repose provision of RCW 4.16.350(3) enacted in 1976.

The question presented by this appeal boils down to the question of whether the statutory provision at issue (here, RCW 4.16.190(2)) “rests on grounds wholly irrelevant to the achievement of a legitimate state objective.” *DeYoung*, 136 Wn.2d at 144. In *DeYoung*, based on the record in that case, the Court held that the repose provision of RCW 4.16.350(3) did so rest. It did so, however, by the slimmest of margins and only because the plaintiff had made a record that included data from the 1976 legislature’s records that the National Association of Insurance Commissioners (NAIC) had compiled shortly before the repose provision was enacted in 1976. The NAIC data established that claims based on alleged medical malpractice committed more than eight years before suit was filed had accounted for a miniscule percentage of all medical malpractice claims.

Among other documents before the [1975] 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 one-half of one percent) of the claims were those of adults reported over eight 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.

DeYoung, 136 Wn.2d at 148-49. But for that NAIC data, the *DeYoung* court's decision suggests that it would have deferred to the legislature's judgment and upheld the repose provision:

We . . . do not quarrel with defendants' contention that *the Legislature could rationally speculate that protection of the medical malpractice insurance industry was needed to alleviate or avert a malpractice insurance crisis*. When the Legislature enacted the repose provision, decreased availability of malpractice insurance and increased malpractice insurance premiums were widely viewed as a threat to the nation's health care system. Among materials before the Legislature was a 1975 report of the Washington State Medical Association Professional Liability Insurance Program to the Insurance Committee, which stated in its introduction, at 1, that although a crisis in the professional liability market in Washington had up to that time been prevented, the situation had worsened and reached a critical stage in many states . . . Also before the Legislature was a Medical Malpractice Report prepared by the Washington State Bar Association for the Board of Governors in December 1975 which noted, at vi, that premiums for specified classes of physicians had doubled and tripled between 1972 and 1976 . . . This report also noted that information from Aetna Life and Casualty Insurance Company indicated substantial increases in losses paid out between 1972 and 1974 . . . *The Legislature could rationally surmise that, even if a crisis did not then exist in Washington, one was likely*. [Emphases added.]

DeYoung, 136 Wn.2d at 148. It was at that juncture in its decision, and against that backdrop, that the *DeYoung* court turned to the NAIC report described above:

The difficulty with the legislation, however, is that materials before the Legislature [*i.e.*, the NAIC data] 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. [Emphasis added.]

DeYoung, 136 Wn.2d at 148. Thus, *the difficulty* with enactment of the repose provision in 1976 had been that the legislature ignored then-current data that enabled the plaintiff in *DeYoung*, in 1998, to carry her burden of proving the lack of what this Court would otherwise have found to be a sufficiently rational, if speculative, relationship between the repose provision and the goal of stabilizing the cost of medical malpractice insurance.

Unlike the plaintiff in *DeYoung*, Schroeder has failed to demonstrate that, when the legislature enacted the statute *he* challenges, RCW 4.16.190(2), it also was privy to data that affirmatively *disproved* a rational relationship between the statute and the legislature's stated and/or conceivable goals in enacting it. Put another way, the plaintiff in *DeYoung* had "smoking data" evidence; Schroeder does not. Schroeder provides no data of any vintage or type to accomplish, with respect to

RCW 4.16.190(2), what the plaintiff in *DeYoung* was able to do with respect to the 1976 repose statute. He baldly asserts, as if it should be determinative, that the class affected by RCW 4.16.190(2) is “small,” *App. Br. at 32*, but is never more precise than that.

The 2006 legislature’s findings, which are very much like the 1976 legislative findings that the *DeYoung* court would have found rational except for the NAIC data from the early 1970s, stand unrefuted:

The legislature finds that access to safe, affordable health care is one of the most important issues facing the citizens of Washington state. The legislature further finds that *the rising cost of medical malpractice insurance has caused some physicians, particularly those in high-risk specialties such as obstetrics and emergency room practice, to be unavailable when and where the citizens need them the most. The answers to these problems are varied and complex, requiring comprehensive solutions that encourage patient safety practices, increase oversight of medical malpractice insurance, and making the civil justice system more understandable, fair, and efficient for all the participants.*²⁴

It is the intent of the legislature to prioritize patient safety and the prevention of medical errors above all other considerations as *legal changes are made to address the problem of high malpractice insurance premiums.* Thousands of patients are injured each year as a result of medical errors, many of which can be avoided by supporting health care providers, facilities, and carriers in their efforts to reduce the incidence of those mistakes. It is also the legislature’s intent to provide incentives to settle

²⁴ Tellingly, in his explication of the legislature’s statement of its intent in enacting Laws of 2006, ch. 8, of which RCW 4.16.190(2) was a part, Schroeder omits any reference to the legislature’s intent to make “the civil justice system more understandable, fair, and efficient for all the participants.”

cases before resorting to court, and to provide the option of a more fair, efficient, and streamlined alternative to trials for those for whom settlement negotiations do not work. Finally, it is the intent of the legislature to provide the insurance commissioner with the tools and information necessary to *regulate medical malpractice insurance rates and policies so that they are fair to both the insurers and the insured.*

Laws of 2006, ch. 8, § 1 (emphases supplied). Schroeder tries to liken RCW 4.16.190(2) to the 1976 repose provision, but he proceeds by bald assertion alone. Once again, bald assertions do not make a persuasive constitutional argument when one bears the burden of proving unconstitutionality beyond a reasonable doubt.

2. Under “rational basis” scrutiny, this Court must consider both conceivable and stated reasons for the enactment of RCW 4.16.190(2).

Contrary to what Schroeder implies as he focuses solely on select portions of the legislature’s stated intent,²⁵ *App. Br. at 31*, the Court is not limited to considering only the legislature’s *stated* purposes for enacting that statute or the larger piece of legislation of which it was a part when evaluating the rationality of RCW 4.16.190(2). As this Court explained not that long ago:

“In order to defeat the legislation [on equal protection grounds], the defendant must show, beyond a reasonable doubt, that no state of facts exists *or can be conceived* sufficient to justify the challenged classification, or that the

²⁵ See footnote 24, *supra*.

facts have so far changed as to render the classification arbitrary and obsolete” [Emphasis added.]

State v. Hirschfelder, 170 Wn.2d 536, 552, 242 P.3d 876 (2010) (quoting *State v. Smith*, 93 Wn.2d 329, 337, 610 P.2d 869 (1980)); see also *Am. Legion Post No. 149*, 164 Wn.2d at 609 (“In reviewing the statute, ‘the court may assume the existence of any conceivable state of facts that could provide a rational basis for the classification’”). Schroeder makes no “changed facts” argument. Nor does he acknowledge, much less attempt to refute, justifications that courts in other jurisdictions have noted for statutes that do what RCW 4.16.190(2) does – eliminate or limit the class of persons for whom a medical malpractice statute of limitation is tolled.

3. Enacting RCW 4.16.190(2) was a rational way for the legislature to address rising medical malpractice insurance, loss of available and affordable health care, and making the civil justice system more understandable, fair and efficient.

The *DeYoung* court tacitly acknowledged (before citing the NAIC report as evidence disproving the proposition as of 1976) that even a modest reduction in the size of the population with “long-tail” medical malpractice claims is rationally related to the goal of lessening upward pressure on the cost of medical malpractice insurance and, indirectly of health care. *DeYoung*, 136 Wn.2d at 148. The 2006 legislature enacted RCW 4.16.190(2) based on such findings as “the rising cost of medical malpractice insurance has caused some physicians, particularly those in

high-risk specialties such as obstetrics and emergency room practice, to be unavailable when and where the citizens need them the most,” and that “[t]he answers to these problems are varied and complex, requiring comprehensive solutions that encourage patient safety practices, increase oversight of medical malpractice insurance, and making the civil justice system more understandable, fair, and efficient for all the participants.” *Laws of 2006, ch. 8, § 1*. The interests of fairness and efficiency, in particular, are rationally advanced by reducing the number of “long-tail” medical malpractice claims that are litigated.²⁶ Schroeder bears the burden of persuading this Court of the converse proposition, and has made no reasoned effort to do so.

Moreover, it is not only conceivable but almost self-evident that a claim that requires proof of a violation of the standard of care applicable to a particular category of medical professionals, such as the radiologist in this case, is more difficult to litigate and defend many years after the fact than ordinary negligence claims are, if only because of advances in science and technology that affect what medical professionals *can* do. Other courts have recognized that the likelihood that a claim will be litigated with the plaintiff enjoying an advantage of hindsight based on

²⁶ Indeed, as the legislature found in re-enacting the eight-year statute of repose for medical malpractice cases in 2006, concomitantly with its enactment of RCW 4.16.190(2), “compelling even one defendant to answer a stale claim is a substantial wrong.” *Laws of 2006, ch. 8, § 301*.

current technology, and on recent and publicized advances in medical science and practices, is greater when the claim is one for medical malpractice rather than one for ordinary negligence or for even other forms of professional malpractice. Claims based on breach of a *medical or scientific professional* standard of care thus become more stale more quickly than ordinary negligence claims because the standard of care in such fields changes more quickly. The rules of the road and of ordinary interpersonal conduct change much less quickly than the technology of MRIs and the standards to which the interpreters of MRIs are held.

Published decisions dating back to at least 1967 have recognized this as a basis for subjecting medical malpractice claims to statute of limitation tolling rules that are different from those that apply to other types of personal injury claims. Thus, in *Owens v. White*, 380 F.2d 310, 316 (9th Cir. 1967), the court predicted that the Idaho Supreme Court would decline to recognize a discovery rule for medical malpractice cases based on claims of misdiagnosis, explaining:

Extension of the discovery rule to encompass a case of the type involved here would subject physicians to the possibility of liability, or at least to the embarrassment and expense of litigation, upon claims of mistaken diagnosis of any illness, however great may have been the lapse of time between the date of cessation of the doctor-patient relationship and the formal prosecution of the claim. The danger of "fraudulent and stale" claims . . . is obviously enhanced when the claim of medical malpractice is

predicated upon alleged misdiagnosis. In such a case, . . . not even the fact of injury can always be clear. Even in its present stage of advanced development, medicine is not an exact science. Symptoms and diseases thought at one time, even recently, to fall into one category are later discovered, through the evolution of the science, to fall into another. If the trier of fact should be convinced, upon the basis of new knowledge, that a mistaken diagnosis was made, the defendant's task of establishing that his conduct did not fall below the standard of care which prevailed in his profession at the time and place of the alleged error could prove insurmountable in the event of sufficient lapse of time.

In *Fitz v. Dolyak*, 712 F.2d 330, 333 (8th Cir. 1983), the court cited *Owens* in rejecting an Equal Protection challenge to an Iowa statute applying a discovery rule to foreign-object medical malpractice claims, but not to other types of medical malpractice claims:

[T]he purpose of statutes of limitation is to prevent fraudulent and stale actions from arising after a great lapse of time while preserving for a reasonable period the right to pursue a claim . . . [W]e find that a distinction between foreign object cases and other malpractice cases could rationally be found to further this legislative purpose. In contrast to the propriety of a diagnosis or adequacy of treatment, the presence or absence of foreign objects inadvertently left in the body may be easily verified after the passage of time. That the distinction drawn by the legislature is not sufficiently broad or that a classification operates harshly in a particular case is not grounds for a finding that it is unconstitutional.

In *Maine Med. Ctr. v. Cote*, 577 A.2d 1173, 1176-77 (Me. 1990), the court likewise noted that “[t]he production of evidence and records”

necessary to meet medical malpractice claims “becomes progressively more difficult with time.”

Owens, Fitz and Maine Med. Ctr. were all cited just two years ago in an Eleventh Circuit decision upholding, against an Equal Protection challenge, a Georgia statute that eliminated tolling as to persons with medical malpractice claims based on foreign objects being left in their bodies,²⁷ unrepresented estates,²⁸ or persons held liable for malpractice who sue for contribution:

Defending law suits is hard; defending malpractice suits is harder; and defending old malpractice suits is harder still. These courts have reasonably concluded that being forced to defend stale malpractice suits increases the cost of liability insurance and renders the practice of medicine that much more expensive.

Deen v. Egleston, 597 F.3d 1223, 1233 (11th Cir. 2010).

Thus several courts considering the question have found, in published decisions, such distinctions rational and constitutionally permissible. Schroeder has offered no considered explanation as to why this Court should reach a different conclusion and hold that the distinction made by RCW 4.16.190(2) is *irrational*. Schroeder has not offered any

²⁷ RCW 4.16.350(3) also includes a provision for tolling of the medical malpractice statute of limitations, without regard to the plaintiff’s age, as to “foreign object” claims, as well as fraud and “intentional concealment” claims.

²⁸ Meaning there is tolling from the time of death to appointment of a legal representative of the decedent’s estate, or during the time of termination of representation of an estate and appointment of a new representative.

positive rationale for *constitutionalizing* a right to sue upon reaching the age of majority, even though there is no legal or demonstrably practical bar to assertion of claims on a minor's behalf during minority.

Schroeder, claiming that "the pertinent class is minors and incompetent/disabled adults," *App. Br. at 30*, complains that RCW 4.16.190(2) eliminates tolling of medical malpractice claims based solely on minority but retains tolling as to such claims for persons who are incompetent for reasons other than minority, *i.e.*, for mentally incompetent children or adults, *App. Br. at 31*. But, he neither acknowledges nor posits, and makes no effort to discredit, any reason(s) why the legislature chose or *conceivably may have chosen*, to treat otherwise competent minors differently from mentally incompetent persons.²⁹ Once again, the burden is not on the legislature or respondents to justify statutory distinctions; the burden was on Schroeder to show, beyond a reasonable doubt, that no state of facts exists or can be conceived that are sufficient to justify the challenged classification, or to show that the classification is

²⁹ For example, it seems not to have occurred to Schroeder that the legislature, mindful of *DeYoung*, believed that the number of claims that have been and will be asserted by persons on whose behalf no claim was asserted while they were mentally incompetent and who later become mentally competent is so tiny that eliminating tolling as to their claims would have no effect on medical malpractice insurance rates, but that medical malpractice claims of nondisabled minors are numerous enough that eliminating tolling as to their claims would materially affect such rates. That being a conceivable basis for the distinction, it was Schroeder's responsibility to refute it; it is not respondents' responsibility to justify it.

arbitrary and obsolete because the facts have changed. *State v. Hirschfelder*, 170 Wn.2d at 552. He has not carried that burden.³⁰

Schroeder has failed to “show conclusively [*i.e.*, beyond a reasonable doubt] that the classification [made by RCW 4.16.190(2)] is contrary to the legislation’s purposes.” *Yakima County Deputy Sheriff’s Ass’n v. Bd. of Comm’rs*, 92 Wn.2d 831, 836, 601 P.2d 936 (1979). As a result, his challenges to the constitutionality of RCW 4.16.190(2) should be rejected.

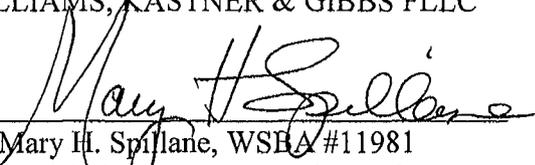
V. CONCLUSION

For the foregoing reasons, this Court should affirm the trial court’s order dismissing Jaryd Schroeder’s complaint.

RESPECTFULLY SUBMITTED this 15th day of August, 2012.

WILLIAMS, KASTNER & GIBBS PLLC

By


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Attorneys for Respondents

³⁰ Citing *Gilbert v. Sacred Heart Med. Ctr.*, 127 Wn.2d 370, 375, 900 P.2d 552 (1995), for the propositions that the legislature did not “expressly repeal the operation of the tolling statute, RCW 4.16.190, when it imputed parental knowledge to minors in its 1986 and 1987 amendments to RCW 4.16.350,” and that implicit repeal of a statute is “strongly disfavored,” *App. Br. at 22-23*, Schroeder incomprehensibly leaps to the conclusion that the *Gilbert* court was expressing the view that “a repeal of RCW 4.16.190, whether express or implicit, would violate the right of every individual to seek redress for injuries suffered as a minor.” *App. Br. at 23*. The *Gilbert* court certainly did not so hold. It did not resolve any constitutional issue raised in that case.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 15th day of August, 2012, I caused a true and correct copy of the foregoing document, "Brief of Respondents," to be delivered in the manner indicated below to the following counsel of record:

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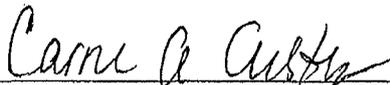
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Subject: Schroeder v. Weighall / Supreme Court No. 87207-4

Dear Clerk of Court,

Attached for filing in .pdf format is the Brief of Respondents in *Schroeder v. Weighall*, Supreme Court Cause No. 87207-4. The attorney filing this brief is Mary Spillane, WSBA No. 11981, (206) 628-6656, e-mail: mspillane@williamskastner.com.

Respectfully submitted,

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