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SUPREME COURT  
STATE OF WASHINGTON

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King County Superior Court Cause No. 10-2-24679 SEA

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SUPREME COURT OF  
THE STATE OF WASHINGTON

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GLEN A. McDEVITT,

Respondent

v.

HARBORVIEW MEDICAL CENTER, UNIVERSITY OF  
WASHINGTON, and THE STATE OF WASHINGTON,

Petitioners

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**PETITIONERS' REPLY IN SUPPORT OF MOTION FOR  
DISCRETIONARY REVIEW**

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## I. SUMMARY OF REPLY

The Washington Constitution expressly authorizes the Legislature to enact procedural laws concerning suits against the government. Despite this authorization, the trial court ruled that the medical malpractice notice of claim statute is unconstitutional as applied to suits against public entities because it violates the separation of powers doctrine. Notwithstanding the fact that similar notice requirements have been upheld by this Court on multiple occasions, Plaintiff/Respondent says that this ruling was correct because “it stands to reason”<sup>1</sup> that *Waples v. Yi*, 169 Wash. 2d 152, 234 P.3d 187 (2010) invalidates notice of claim requirements for suits against public entities. But Respondent never explains why it is that the Legislature’s decision to require a notice under RCW 7.70.100(1), in lieu of the procedures under RCW 4.92.100 and RCW 4.96.020, could possibly run afoul of the separation of powers doctrine. Instead, Respondent suggests that the Court’s application of the separation of powers doctrine in *Waples* effectively invalidated all governmental notice of claim requirements. Answer to Mot. Disc. Rev. at 18. This assertion, coupled with his inability to articulate a valid rationale for applying *Waples* to governmental notice requirements and the widespread uncertainty surrounding the issue, more than amply illustrates why this is an appropriate case for direct discretionary review by the Supreme Court.

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<sup>1</sup> Answer at 8.

## II. ARGUMENT

### A. **The Legislative Requirement to give Notice under RCW 7.70.100 is authorized under Art. II, § 20 of the Constitution.**

Respondent seemingly agrees that Art. II, § 20 of the Washington Constitution authorizes the Legislature to enact statutes governing court procedures in cases against the government. Answer to Mot. Disc. Rev. at 12. Also, it is undisputed that the 2009 legislation<sup>2</sup>, which specified that RCW 7.70.100(1) (rather than under the more complex procedures in Chs. 4.92 and 4.96 RCW) applies to suits against governmental health care providers, represented an exercise of the Legislature's authority under Art. II, § 20.

### B. **Application of the Separation of Powers Doctrine in this Context was Obvious or Probable Error.**

In his efforts to explain the trial court's decision, Respondent argues, without citation to authority, that the Legislature's authority under Art. II, § 20 is constrained by the doctrine of separation of powers. Answer at 12-13. But, this argument runs headlong into this Court's longstanding precedents, which hold that the Legislature's authority to

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<sup>2</sup> Laws of 2009, ch. 433, §§ 1-2.

regulate “the method of procedure”<sup>3</sup> in suits against the state is “plenary.”<sup>4</sup> Recognizing this conflict, and citing *Lacey Nursing Center, Inc. v. Department of Revenue*, 128 Wash. 2d 40, 905 P.2d 338 (1995), Respondent further suggests that the line of demarcation between the Legislature’s authority under Art. II, § 20 and the exclusive province of the courts lies between “primary” and “procedural,” rights. Answer to Mot. Disc. Rev. at 12. But this is the same boundary that exists in cases where the Constitution does not authorize the Legislature to regulate court procedures.<sup>5</sup> Consequently, to say that the Legislature’s authority under Art. II, § 20 is limited to regulation of “primary rights” is the same as saying that the Legislature has no additional power under that provision.

Further, the primary/procedural rights distinction was not mentioned in *Lacey Nursing Home*, nor has it been mentioned in any other case involving legislation enacted pursuant to Art. II, § 20. To incorporate it as a limitation on the Legislature’s authority in this arena, effectively nullifies the Legislature’s express constitutional authority and constitutes

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<sup>3</sup> *Northwestern & Pac. Hypotheek Bank v. State*, 18 Wash. 73, 75, 50 P. 586 (1897).

<sup>4</sup> *State v. Superior Court for Thurston County*, 86 Wash. 685, 688, 151 P. 108 (1915).

<sup>5</sup> *E.g., City of Fircrest v. Jensen*, 158 Wash. 2d 384, 143 P.3d 776 (2006).

an obvious or probable error warranting immediate correction by this Court.

**B. This Case is Otherwise Appropriate for Discretionary Review**

Respondent has made no showing as to how he would be prejudiced by interlocutory review in this matter. To the contrary, from any rational perspective, it makes no sense to incur the substantial expenses associated with prosecuting this case while running the risk that it will be dismissed on procedural grounds. This much is evident from the fact that neither party has initiated discovery during the seven months that this matter has been pending. Furthermore, a grant of review in this case will serve to alleviate similar risks and uncertainties for numerous plaintiffs and governmental health care providers who must deal with the uncertainty created by the trial court's extension of *Waples*.

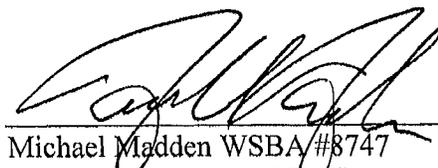
### III. CONCLUSION

For the reasons stated here and in Petitioners' Motion for Discretionary Review, the Court should grant discretionary review and reverse the trial court, directing that summary judgment be entered in favor of petitioners.

Respectfully submitted this 3rd day of February 2011.

BENNETT BIGELOW & LEEDOM, P.S.

By



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BY RONALD R. CARPENTER **DECLARATION OF SERVICE**

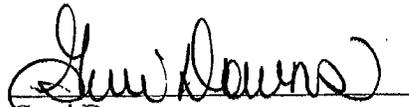
CLERK I, Gerri Downs, declare as follows:

I am a resident of the State of Washington, residing or employed in Seattle, Washington. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 1700 7<sup>th</sup> Avenue, Suite 1900, Seattle, Washington 98101.

On February 3<sup>rd</sup>, 2011, I certify under penalty of perjury under the laws of the State of Washington that I caused service of the foregoing **PETITIONERS' REPLY IN SUPPORT OF MOTION FOR DISCRETIONARY REVIEW** by causing a true and correct copy to be delivered via legal messenger as follows:

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Gerri Downs

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**Cc:** Mike Madden  
**Subject:** RE: McDevitt v. Harborview

Rec. 2-3-11

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Attached please find Petitioners' Reply in Support of Motion for Discretionary Review for filing.

Filing attorney: Michael Madden, WSBA #8747

Supreme Court No.: 853673

<<Petitioner's Reply in Support of Motion for Discretionary Review (M0291887).PDF>>

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