IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Case No. 114,301

JAMES TODD BEASON and DARA BEASON,

Plaintiffs-Appellants,

v.

I.E. MILLER SERVICES, INC.,

Defendant-Appellee.

Honorable Patricia Parrish, Trial Judge
District Court of Oklahoma County, Oklahoma
District Court Case No. CJ-2012-4758

AMICI CURIAE BRIEF OF AMERICAN TORT REFORM ASSOCIATION, NFIB SMALL BUSINESS LEGAL CENTER, AND COALITION FOR LITIGATION JUSTICE, INC. IN SUPPORT OF DEFENDANT-APPELLEE

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Other Sources

Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*, 33 J.L. Med. & Ethics 515 (2005) 11

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QUESTION PRESENTED

Whether Okla. Stat. tit. 23, § 61.2 (2011) is constitutional.

INTEREST OF *AMICI CURIAE*

Amici curiae American Tort Reform Association, NFIB Small Business Legal Center, and Coalition for Litigation Justice, Inc. file this brief in accordance with Okla. Sup. Ct. Rule 1.12 upon consent of all parties.[1] As organizations representing a wide range of Oklahoma businesses and their insurers, *amici* have an interest in ensuring that Oklahoma's civil litigation environment is fair, predictable, and reflects sound policy. These goals are furthered by Okla. Stat. tit. 23, § 61.2 (2011), which generally allows up to $350,000 in noneconomic damages in personal injury cases. *Amici* have a substantial interest in the constitutionality of the statute and would be adversely impacted if it is nullified.

Amici do not intend to simply duplicate others' arguments. Instead, we offer our broad perspective to explain how other courts have addressed the question presented here.

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[1] Founded in 1986, the American Tort Reform Association (ATRA) is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus* briefs in cases that have addressed important liability issues.

The NFIB Small Business Legal Center, a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. The approximately 325,000 members of NFIB own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

The Coalition for Litigation Justice, Inc. is a nonprofit association that files *amicus* briefs in cases that may have a significant impact on the toxic tort litigation environment. It includes Century Indemnity Company; Great American Insurance Company; Nationwide Indemnity Company; San Francisco Reinsurance Company, Resolute Management, Inc., a third-party administrator for numerous insurers; and TIG Insurance Company.

INTRODUCTION

Noneconomic damages awards are highly subjective and inherently unpredictable. There is "no market for pain and suffering," Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective View of the Problem and the Legal Academy's First Reponses*, 34 Cap. U. L. Rev. 545, 549 (2006), and "almost no standard for measuring pain and suffering damages, or even a conception of those damages or what they represent." Dan B. Dobbs, *Law of Remedies* § 8.1(4), at 383 (2d ed. 1993).[2] Juries are "left with nothing but their consciences to guide them." Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 Cal. L. Rev. 772, 778 (1985). One commentator noted the difficulty expressed by jurors in putting a price on pain and suffering:

> Some roughly split the difference between the defendant's and the plaintiff's suggested figures. One juror doubled what the defendant said was fair, and another said it should be three times medical[s]. . . . A number of jurors assessed pain and suffering on a per month basis. . . . Other jurors indicated that they just came up with a figure that they thought was fair.

Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 Duke L.J. 217, 253-54 (1993).

Historically, unpredictable and unlimited noneconomic damages did not raise serious concerns because "personal injury lawsuits were not very numerous and verdicts were not large." Merkel, 34 Cap. U. L. Rev. at 560. In the modern era, however, "in personal injuries litigation the intangible factor of 'pain, suffering, and inconvenience constitutes the largest single item of recovery, exceeding by far the out-of-pocket 'specials' of medical expenses

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[2] *See also* Restatement (Second) of Torts § 903 cmt. a (1965) ("There is no scale by which . . . suffering can be measured and hence there can only be only a very rough correspondence between the amount awarded as damages and the extent of the suffering.").

and loss of wages." *Nelson v. Keefer*, 451 F.2d 289, 294 (3d Cir. 1971).[3]

As Judge Paul Neimeyer of the U.S. Court of Appeals for the Fourth Circuit has observed, "Money for pain and suffering . . . provides the grist for the mill of our tort industry." Paul Neimeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 Va. L. Rev. 1401, 1401 (2004); *see also* Stephen D. Sugarman, *A Comparative Look at Pain and Suffering Awards*, 55 DePaul L. Rev. 399, 399 (2006) (U.S. pain and suffering awards are over ten times those in the most generous of other nations).

Oklahoma is one of many states that have made a rational policy judgment to place a ceiling on noneconomic damages in civil cases to reduce outlier awards and foster predictability in the law, facilitate settlements, promote economic growth, and further other societal interests, such as access to affordable healthcare. *See generally* Ronald M. Stewart, *Malpractice Risk and Cost Are Significantly Reduced After Tort Reform*, 212 J. Am. Coll. Surg. 463 (2011); Mark A. Behrens, *Medical Liability Reform: A Case Study of Mississippi*, 118 Obstetrics & Gynecology 335 (Aug. 2011). Limits on noneconomic damages also limit arbitrariness that may raise due process problems.[4]

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[3] Scholars largely attribute the rise in noneconomic damages to (1) the availability of future pain and suffering damages; (2) the rise in automobile ownership and personal injuries resulting from automobile accidents; (3) the greater availability of insurance and willingness of plaintiffs' attorneys to take on lower-value cases; (4) the rise in affluence of the public and a change in public attitude that "someone should pay"; and (5) better organization by the plaintiffs' bar. *See* Merkel, 34 Cap. U. L. Rev. at 553-66; Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. Rev. 163, 170 (2004).

[4] *See Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 400 n.22 (Mich. 2004) ("A grossly excessive award for pain and suffering may violate the Due Process Clause even if it is not *labeled* 'punitive.'"); Mark Geistfeld, *Due Process and the Determination of Pain and Suffering Tort Damages*, 55 DePaul L. Rev. 331, 333 (2006) ("the [Supreme] Court in *State Farm*...identified four different constitutional 'concerns' that justify constraining [punitive damages] as a matter of due process. Each of these concerns also applies to pain-and-suffering damages....").

The legislature drew a careful balance when it enacted Okla. Stat. tit. 23, § 61.2. Recoveries for past and future medical expenses, rehabilitation expenses, lost wages, or other economic damages were left uncapped. The legislature also chose a substantial, but not unlimited, remedy for the distinct minority of Oklahomans who may find themselves as plaintiffs seeking extraordinary noneconomic losses. Overall, the subject law is pro-consumer despite negative impacts to a few.

Okla. Stat. tit. 23, § 61.2 should be upheld.

ARGUMENT AND AUTHORITIES

PROPOSITION ONE: THE VAST MAJORITY OF COURTS HAVE UPHELD LIMITS ON NONECONOMIC DAMAGES

Approximately half of the states limit noneconomic damages. A number of states, including Oklahoma, have adopted an upper limit that extends to all personal injury claims.[5] Many other states limit noneconomic damages in healthcare liability actions.[6]

Most courts have respected the prerogative of legislatures (*see* Okla. Stat. tit. 12, § 2) to enact reasonable limits on awards for pain and suffering. State appellate courts have upheld limits on noneconomic damages that apply to all civil claims[7] and medical liability cases.[8] In addition, federal courts have consistently upheld state limits on noneconomic

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5 *See* Alaska Stat. § 09.17.010; Colo. Rev. Stat. § 13-21-102.5; Haw. Rev. Stat. § 663-8.7; Idaho Code § 6-1603; Kan. Stat. Ann. § 60-19a02(b); Md. Cts. & Jud. Proc. Code § 11-108; Miss. Code §11-1-60(2)(b); Ohio Rev. Code § 2315.18; Okla. Stat. tit. 23, § 61.2; Or. Rev. Stat. § 31.710(1); Tenn. Code § 29-39-102.

6 *See* Alaska Stat. § 09.55.549; Cal. Civ. Code § 3333.2; Colo. Rev. Stat. § 13-64-302; Ind. Code § 34-18-14-3; La. Rev. Stat. § 40:1299.42; Md. Cts. & Jud. Proc. Code § 3-2A-09; Mass. Gen. Laws ch. 231 § 60H, Mich. Comp. Laws § 600.1483; Miss. Code §11-1-60(2)(a); Mo. Rev. Stat. § 538.210 (2015 Mo. S.B. 239); Mont. Code § 25-9-411; Neb. Rev. Stat. § 44-2825; Nev. Rev. Stat. § 41A.035; N.M. Stat. Ann. § 41-5-6; N.C. Gen. Stat. § 90-21.19; N.D. Cent. Code § 32-42-02; Ohio Rev. Code § 2323.43; S.C. Code § 15-32-220; (Footnote continued on next page)

damages.[9] Courts have also upheld laws that limit a plaintiff's *total* recovery against healthcare providers,[10] as well as caps that apply to various other types of claims or entities.[11]

S.D. Codified Laws § 21-3-11; Tex. Civ. Prac. & Rem. Code § 74.301; Utah Code § 78B-3-410; Va. Code § 8.01-581.15; 27 V.I.C. § 166b; W. Va. Code § 55-7B-8; Wis. Stat. § 893.55.

[7] *See, e.g., C.J. v. Dep't of Corrections*, 151 P.3d 373 (Alaska 2006); *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002); *Scharrel v. Wal-Mart Stores, Inc.*, 949 P.2d 89 (Colo. Ct. App. 1998); *Samsel v. Wheeler Transp. Servs., Inc.*, 789 P.2d 541 (Kan. 1990), *overruled in part on other grounds*, *Bair v. Peck*, 811 P.2d 1176 (Kan. 1991); *McGinnes v. Wesley Med. Ctr.*, 224 P.3d 581 (Kan. Ct. App. 2010); *DRD Pool Serv., Inc. v. Freed*, 5 A.3d 45 (Md. 2010); *Green v. N.B.S., Inc.*, 976 A.2d 279 (Md. 2009); *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007).

[8] *See, e.g., Fein v. Permanente Med. Group*, 695 P.2d 665 (Cal. 1985); *Lora v. Lancaster Hosp. Corp.*, 2015 WL 4477952 (Cal. Ct. App. July 22, 2015); *Chan v. Curran*, 237 Cal. App. 4th 601 (2015); *Rashidi v. Moser*, 2015 WL 1811971 (Cal. Ct. App. Apr. 20, 2015); *Stinnett v. Tam*, 198 Cal. App. 4th 1412 (2011); *Jimena v. Wong*, 2013 WL 820492 (Cal. App. Mar. 6, 2013); *Van Buren v. Evans*, 2009 WL 1396235 (Cal. App. May 20, 2009); *Yates v. Pollock*, 194 Cal. App. 3d 195 (1987); *Garhart ex rel. Tinsman v. Columbia/HealthONE, L.L.C.*, 95 P.3d 571 (Colo. 2004); *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993); *Kirkland v. Blaine Cnty. Med. Ctr.*, 4 P.3d 1115 (Idaho 2000); *Miller v. Johnson*, 289 P.3d 1098 (Kan. 2012); *Oliver v. Magnolia Clinic*, 85 So. 3d 39 (La. 2012); *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So. 2d 517 (La. 1992); *Sibley v. Bd. of Sup'rs of La. State Univ.*, 462 So. 2d 149 (La. 1985), *rejected on other grounds*, 624 So. 2d 874 (La. 1993); *Monistere v. Engelhardt*, 896 So. 2d 1105 (La. App. 2005); *Ruiz v. Oniate*, 806 So. 2d 81 (La. App. 2001); *Miller v. S. Baptist Hosp.*, 806 So. 2d 10 (La. App. 2001); *Williams v. State*, 703 So. 2d 579 (La. 1997); *Moody v. United Nat'l Ins. Co.*, 657 So. 2d 236 (La. App. 1995); *LaMark v. NME Hosps., Inc.*, 542 So. 2d 753 (La. App. 1989); *Batson v. S. La. Med. Ctr.*, 727 So. 2d 613 (La. App. 1998), *rev'd on other grounds*, 750 So. 2d 949 (La. 1999); *Williams v. Kushner*, 524 So. 2d 191 (La. App. 1988); *Estate of Needham ex rel. May v. Mercy Mem. Nursing Ctr.*, 2013 WL 5495551 (Mich. App. Oct. 3, 2013); *Green v. Knazik*, 2003 WL 21771268 (Mich. App. July 31, 2003); *Jenkins v. Patel*, 688 N.W.2d 543 (Mich. App. 2004); *Johnson v. Henry Ford Hosp.*, 2005 WL 658820 (Mich. App. Mar. 22, 2005); *Zdrojewski v. Murphy*, 657 N.W.2d 721 (Mich. Ct. App. 2002); *Tam v. Eighth Judicial Dist. Court*, 358 P.3d 234 (Nev. 2015); *Knowles v. United States*, 544 N.W.2d 183 (S.D. 1996), *superseded by statute*; *Rose v. Doctors Hosp.*, 801 S.W.2d 841 (Tex. 1990); *Prabhakar v. Fritzgerald*, 2012 WL 3667400 (Tex. App.-Dallas Aug. 24, 2012); *Judd v. Drezga*, 103 P.3d 135 (Utah 2004); *MacDonald v. City Hosp., Inc.*, 715 S.E.2d 405 (W. Va. 2011); *Estate of Verba v. Ghaphery*, 552 S.E.2d 406 (W. Va. 2001); *Robinson v. Charleston Area Med. Ctr.*, 414 S.E.2d 877 (W. Va. 1991).

[9] *See, e.g., Learmonth v. Sears, Roebuck & Co.*, 710 F.3d 249 (5th Cir. 2013); *Estate of McCall v. United States*, 642 F.3d 944 (11th Cir. 2011); *Smith v. Botsford Gen. Hosp.*, 419

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For example, the Nevada Supreme Court in *Tam v. Eighth Judicial Dist. Court*, 358 P.3d 234 (Nev. 2015), rejected an equal protection challenge to Nevada's $350,000 medical malpractice noneconomic damages cap. The court found the cap to be "rationally related to the legitimate governmental interests of ensuring that adequate and affordable health care is available to Nevada's citizens." *Id.* at 239.

F.3d 513 (6th Cir. 2005); *Patton v. TIC United Corp.*, 77 F.3d 1235 (10th Cir. 1996); *Owen v. United States*, 935 F.2d 734 (5th Cir. 1991); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989); *Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985); *Watson v. Hortman*, 844 F. Supp. 2d 795 (E.D. Tex. 2012); *Federal Express Corp. v. United States*, 228 F. Supp. 2d 1267 (D. N.M. 2002); *Simms v. Holiday Inns, Inc.*, 746 F. Supp. 596 (D. Md. 1990); *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989).

[10] *See, e.g., Garhart*, 95 P.3d at 571; *Gourley ex rel. Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43 (Neb. 2003); *Pulliam v. Coastal Emer. Servs. of Richmond, Inc.*, 509 S.E.2d 307 (Va. 1999); *Etheridge v. Med. Ctr. Hosp.*, 376 S.E.2d 525 (Va. 1989); *Salopek v. Friedman,* 308 P.3d 139 (N.M. App. 2013); *Indiana Patient's Comp. Fund v. Wolfe*, 735 N.E.2d 1187 (Ind. Ct. App. 2000); *Bova v. Roig*, 604 N.E.2d 1 (Ind. Ct. App. 1992); *Johnson v. St. Vincent Hosp.*, 404 N.E.2d 585 (Ind. 1980), *overruled on other grounds by In re Stephens*, 867 N.E.2d 148 (Ind. 2007).

[11] *See, e.g., Quackenbush v. Super. Ct. (Congress of Cal. Seniors)*, 60 Cal. App. 4th 454 (1997) (uninsured motorists, intoxicated drivers, and fleeing felons); *Samples v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 114 So. 3d 912 (Fla. 2013) (birth-related neurological injuries); *King v. Va. Birth-Related Neurological Injury Comp. Program*, 410 S.E.2d 656 (Va. 1991) (birth-related neurological injuries); *Peters v. Saft*, 597 A.2d 50 (Me. 1991) (servers of alcohol); *Phillips v. Mirac, Inc.*, 685 N.W.2d 174 (Mich. 2004) (lessors of motor vehicles); *Wessels v. Garden Way, Inc.*, 689 N.W.2d 526 (Mich. Ct. App. 2004) (product liability actions); *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722 (Minn. 1990) (loss of consortium damages); *Sanders v. Ahmed*, 364 S.W.3d 195 (Mo. 2012) (wrongful death); *Horton v. Oregon Health & Science Univ.*, 359 Or. 168, - P.3d - (Or. 2016) (state tort claims); *Greist v. Phillips*, 906 P.2d 789 (Or. 1995) (statutory personal injury and wrongful death actions without common law underpinnings); *Hughes v. Peacehealth,* 178 P. 3d 225 (Or. 2008) (wrongful death); *Lawson v. Hoke*, 119 P.3d 210 (Or. 2005) (uninsured motorists); *Oliver v. Cleveland Indians Baseball Co., LP*, 915 N.E.2d 1205 (Ohio 2009) (political subdivisions).

The Ohio Supreme Court has recognized that a generally applicable limit on noneconomic damages in tort actions –

> bears a real and substantial relation to the general welfare of the public. The General Assembly reviewed evidence demonstrating that uncertainty related to the existing civil litigation system and rising costs associated with it were harming the economy. It noted that noneconomic damages are inherently subjective and thus easily tainted by irrelevant considerations. The implicit, logical conclusion is that the uncertain and subjective system of evaluating noneconomic damages was contributing to the deleterious economic effects of the tort system.

Arbino v. Johnson & Johnson, 880 N.E.2d 420, 435-36 (Ohio 2007). The Alaska Supreme Court has recognized that statutory limits on noneconomic damages "bear[ ] a fair and substantial relationship to a legitimate government objective." *C.J. v. Dep't of Corrections*, 151 P.3d 373, 381 (Alaska 2006).[12]

Furthermore, with respect to right to jury trial challenges, courts from Maryland to Alaska have found that a legislative limit on noneconomic damages does not disturb a jury's fact-finding function.[13] Courts generally distinguish the fact-finding function of the jury in assessing a plaintiff's losses from the law-applying role of the courts in arriving at a judgment. *See Arbino*, 880 N.E.2d at 432 (caps "do not alter the findings of facts themselves, thus avoiding constitutional conflicts").

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12 *See also Patton*, 77 F.3d at 1246-47 ("When a legislature strikes a balance between a tort victim's right to recover noneconomic damages and society's interest in preserving the availability of affordable liability insurance, it is engaging in its fundamental and legitimate role of structuring and accommodating the burdens and benefits of economic life.") (internal quotations and alterations omitted).

13 Courts have upheld limits on noneconomic damages in states such as Idaho, Maryland, Nevada, and Nebraska, where the state constitution provides that the right to trial by jury shall remain "inviolate." *See Kirkland*, 14 P.3d at 1120; *Freed*, 5 A.3d at 57; *Tam*, 358 P.3d at 238; *Gourley*, 663 N.W.2d at 75. As the U.S. Court of Appeals for the Fifth Circuit recognized, "'[i]nviolability' simply means that the jury right is protected absolutely (Footnote continued on next page)

For example, the Nevada Supreme Court concluded that Nevada's $350,000 medical malpractice noneconomic damages cap satisfies the "inviolate" right to a jury trial under the Nevada Constitution. The court concluded that the cap "does not interfere with the jury's factual findings because it takes effect only after the jury has made its assessment of damages, and thus, it does not implicate a plaintiff's right to a jury trial." *Tam*, 358 P.3d at 238.

Likewise, the Virginia Supreme Court explained that "although a party has a right to have a jury assess his damages, he has no right to have a jury dictate through an award the legal consequences of its assessment." *Etheridge v. Med. Ctr. Hosps.*, 376 S.E.2d 525, 529 (Va. 1989). Once the jury "has ascertained the facts and assessed the damages . . . it is the duty of the court to apply the law to the facts." *Id.* The Idaho Supreme Court has said that a noneconomic damages cap "does not violate the right to a jury trial because the statute does not infringe upon the jury's right to decide cases. The jury is still allowed to act as the fact finder in personal injury cases. The statute simply limits the legal consequences of the jury's finding." *Kirkland v. Blaine Cnty. Med. Ctr.*, 4 P.3d 1115 (Idaho 2000). The Alaska Supreme Court has also held: "A damages cap does not intrude on the jury's fact-finding function because the cap represents a policy decision that is applied after the jury's determination." *L.D.G., Inc. v. Brown*, 211 P.3d 1110, 1131 (Alaska 2009).

A statutory limit on noneconomic damages does not impede a plaintiff's ability to present his or her case or hamper the jury's ability to assess the factual extent of the plaintiff's damages. *See Zdrojewski v. Murphy*, 657 N.W.2d 721, 737 (Mich. Ct. App.

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in cases where it applies; the term does not establish what that right encompasses." (Footnote continued on next page)

2002); *see also DRD Pool Serv., Inc. v. Freed*, 5 A.3d 45, 57 (Md. 2010); *Judd v. Drezga*, 103 P.3d 135, 144 (Utah 2004).

Federal courts have reached similar results both when applying the Seventh Amendment to the United States Constitution and when interpreting the right to jury trial provided by various state constitutions.[14] Most recently, the Fifth Circuit Court of Appeals held that Mississippi's generally applicable limit on noneconomic damages did not violate the right to jury trial, recognizing that "a court's judgment is based on, but separate from, factual findings." *Learmonth v. Sears, Roebuck & Co.*, 710 F.3d 249, 259 (5th Cir. 2013). The Third and Fourth Circuits have found that it is not the jury's role to determine the legal consequences of its factual findings. *See Davis v. Omitowoju*, 883 F.2d 1155, 1161 (3d Cir. 1989); *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989).

In addition, courts have rejected claims that noneconomic damages caps run afoul of the separation of powers. For example, the Ohio Supreme Court has explained:

> The argument that [a noneconomic damages cap] infringes on the judicial power to decide damages lacks merit. It is certainly a judicial function to decide the facts in a civil case, and the amount of damages is a question of fact. However, that function is not so exclusive as to prohibit the General Assembly from regulating the amount of damages available in certain circumstances.

Arbino, 880 N.E.2d at 438. The Idaho Supreme Court has also said that the legislature "has the power to limit remedies available to plaintiffs without violating the separation of

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Learmonth, 710 F.3d at 263.

[14] The United States Supreme Court has recognized that the federal constitution "does not forbid the creation of new rights, or the abolition of old one recognized by the common law" and that "statutes limiting liability are relatively commonplace and have consistently been enforced by courts." *Duke Power Co. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978).

powers." *Kirkland*, 14 P.3d at 1122. Michigan appellate courts agree. *See Zdrojewski v. Murphy*, 657 N.W.2d at 739 ("Because [noneconomic damages caps] are substantive in nature, rather than procedural, they do not infringe the Supreme Court's rulemaking authority.").

State constitutional provisions protecting access to courts or the right to a remedy are satisfied too. *See Arbino*, 880 N.E.2d at 477 (stating that while a noneconomic damages cap prevents some plaintiffs from obtaining the same dollar figures they may have received prior to the effective date of the statute, that "does not violate the right to a remedy or the right to an open court" because the person can still recover full economic damages, substantial noneconomic damages, and possibly punitive damages); *Judd*, 103 P.3d at 144 (noting that while a noneconomic damages cap may deprive "a few badly injured plaintiffs of full recovery," it "is also "constitutionally reasonable"); *MacDonald*, 715 S.E.2d at 422 (upholding noneconomic damages cap placed West Virginia "squarely with the majority of jurisdictions in holding that caps on noneconomic damages in medical malpractice cases are constitutional").

Courts have also held that caps on noneconomic damages do not constitute prohibited special legislation. *See, e.g., Kirkland*, 14 P.3d at 1121; *MacDonald*, 715 S.E.2d at 420 ("no merit" to argument noneconomic damages cap constituted prohibited special legislation).

In comparison, only a few state high courts have invalidated limits on noneconomic damages.[15] "Over the years, the scales in state courts have increasingly tipped toward

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[15] *See Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014); *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010) (right to a jury trial); *Lebron v Gottlieb Mem. Hosp.*, 930 N.E.2d 895 (Ill. 2010); *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633 (Mo. 2012) (right to a jury trial); *Moore v. Mobile Infirmary Assoc.*,
(Footnote continued on next page)

upholding noneconomic damage caps." Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*, 33 J.L. Med. & Ethics 515, 527 (2005); *see also MacDonald*, 715 S.E.2d at 421 (finding decision upholding $500,000 limit on noneconomic damages in medical liability case to be "consistent with the majority of jurisdictions that have considered the constitutionality of caps on noneconomic damages in medical malpractice or in any personal injury action").

Finally, support for the law is found in the separation of powers and the inherent strengths of the legislative process. Tort law impacts go far beyond a particular case. The legislature can focus more broadly on how tort law, including unbounded and growing pain and suffering awards, impacts consistency and predictability in the civil justice system, insurance rates, and the broader economic climate. The legislature has the unique ability to weigh and balance the many competing societal, economic, and policy considerations involved.

Legislatures are uniquely well equipped to reach fully informed decisions about the need for broad public policy changes in the law. Through the hearing process, the legislature is the best body equipped to hold a full discussion of the competing principles and controversial issues of tort liability, because it has access to broad information, including the ability to receive comments from persons representing a multiplicity of perspectives and to

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592 So. 2d 156 (Ala. 1991); *Brannigan v. Usitalo*, 587 A.2d 1232 (N.H. 1991); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988), *superseded by* Tex. Const. art III, § 66 (2003); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989); *Ferdon ex rel. Petrucelli v. Wisconsin Patients Comp. Fund*, 701 N.W.2d 440 (Wis. 2005) (prior statute); *see also Lakin v. Senco Prods., Inc.*, 987 P.2d 463 (Or. 1999) (older common law actions); *but see Mobile Infirmary Med. Ctr. v. Hodgen*, 884 So. 2d 801 (Ala. 2003) (noting erosion of support for *Moore* decision in Alabama).

use the legislative process to obtain new information. If a point needs further elaboration, an additional witness can be called to testify or a prior witness can be recalled. This process allows legislatures to engage in broad policy deliberations and to formulate policy carefully:

> The legislature has the ability to hear from everybody — plaintiffs' lawyers, health care professionals, defense lawyers, consumers groups, unions, and large and small businesses. . . . [U]ltimately, legislators make a judgment. If the people who elected the legislators do not like the solution, the voters have a good remedy every two years: retire those who supported laws the voters disfavor. These are a few reasons why, over the years, legislators have received some due deference from the courts.

Victor E. Schwartz, *Judicial Nullifications of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law*, 31 Seton Hall L. Rev. 688, 689 (2001).

A similar point was made by Justice Harlan Stone, who cautioned that "the only check upon [the Court's] exercise of power is [the Court's] own sense of self-restraint. For the removal of unwise laws from the statute books *appeal lies, not to the courts, but to the ballot and to the processes of democratic government.*" *United States v. Butler*, 297 U.S. 1, 79 (1936); *see also* Victor E. Schwartz, Mark A. Behrens & Monica Parham, *Fostering Mutual Respect and Cooperation Between State Courts and State Legislatures: A Sound Alternative to a Tort Tug of War*, 103 W. Va. L. Rev. 1 (2000).

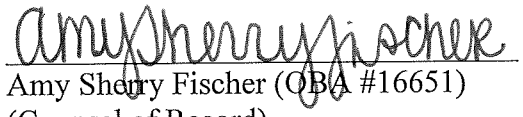
Legislative development of tort law also gives the public advance notice of significant changes affecting rights and duties, and the time to comport behavior accordingly. As the Supreme Court noted in a landmark decision regarding punitive damages, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive *fair notice* . . . of the conduct that will subject him to [liability]. . . ." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) (emphasis added).

Courts, on the other hand, are uniquely and best suited to adjudicate individual disputes concerning discrete issues and parties. This is an essential part of the tripartite structure of our system of government. The Founding Fathers recognized this when they drafted the United States Constitution to give the judiciary jurisdiction to decide "cases and controversies." This advantage also has its limitations: the focus on individual cases does not provide comprehensive access to broad scale information, and judicial changes in tort law may not provide prospective "fair notice" to everyone potentially affected.

CONCLUSION

For these reasons, the Court should uphold Okla. Stat. tit. 23, § 61.2.

Respectfully submitted,



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