STATE OF WISCONSIN
SUPREME COURT

ASCARIS MAYO and ANTONIO MAYO,

Plaintiffs-Respondents-Cross-Appellants,

UNITED HEALTHCARE INSURANCE COMPANY and WISCONSIN STATE DEPARTMENT OF HEALTH SERVICES,

Appeal No. 2014AP2812

Involuntary-Plaintiffs,

v.

WISCONSIN INJURED PATIENTS and FAMILIES COMPENSATION FUND,

Defendant-Appellant-Cross-Respondent,

PROASSURANCE WISCONSIN INSURANCE COMPANY, WYATT JAFFE, M.D., DONALD C. GIBSON, INFINITY HEALTHCARE, INC., and MEDICAL COLLEGE OF WISCONSIN AFFILIATED HOSPITALS, INC.,

Defendants.

On Appeal from the Circuit Court of Milwaukee County
The Honorable Jeffrey A. Conen, presiding,
Circuit Court Case No. 12-CV-6272

NON-PARTY BRIEF ON BEHALF OF AMERICAN TORT REFORM ASSOCIATION, WISCONSIN CIVIL JUSTICE COUNCIL, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS IN SUPPORT OF THE PETITION FOR REVIEW

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I. INTRODUCTION AND ISSUES PRESENTED.

Fourteen years ago this Court briefly set aside the merits of a case in order to exercise its prerogative "to oversee and implement the statewide development of the law"[1] to clarify the method of statutory interpretation. *See State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis.2d 633, 681 N.W.2d 110 ("Accordingly, we now conclude that the general framework for statutory interpretation in Wisconsin requires some clarification.") In doing so, the *Kalal* Court recognized that such clarity was necessary for the Court to fulfill its proper constitutional role. *Id.* ("It is, of course, a solemn obligation of the judiciary to faithfully give effect to the laws enacted by the legislature, and to do so requires a determination of statutory meaning. Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute.")

This case presents the Court with the equivalent opportunity to clarify and define in plain terms two issues of great importance to the people of Wisconsin. Just as in *Kalal,* clarity is necessary to enable this Court and the lower courts to properly carry out their constitutional

[1] *See Cook v. Cook*, 208 Wis.2d 166, 189, 560 N.W.2d 246 (1997).

function. Here, to determine whether a duly enacted law is constitutionally infirm.

First, this Court should grant the petition to clearly define the scope of rational basis review and to expound upon its proper application. *Ferdon v. Wis. Patients Comp. Fund*, 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440, appeared to leave behind the traditional formulation and application of rational basis review in favor of what it called "rational basis with teeth, or meaningful rational basis" review. *Id.* ¶ 80. Since then, courts and parties have struggled to determine what this means, if and how it should be applied and whether *Ferdon* intended to create a new category of review that fits somewhere between traditional rational basis review and intermediate scrutiny. *See, e.g., State v. Lynch*, 2006 WI App 231, ¶ 17 n.5, 297 Wis.2d 51, 724 N.W.2d 656 ("Because *Ferdon* is the most recent supreme court opinion discussing the standard to be employed when using the rational basis test, we use *Ferdon's* formulation of that standard, not *Aicher's*."); *Bhandari v. Nilsestuen*, No. 09AP599, 2012 WL 1623501. ¶21 (Wis. Ct. App. May 10, 2012) (unpublished opinion)("The parties devote considerable energy to a debate on the question of whether *Ferdon* contemplates a new, more rigorous rational basis review standard ...").

This Court should grant the Petition to clarify the definition and application of the rational basis test.

Second, this Court should grant the Petition to clarify the scope and application of as-applied challenges. Indeed, in the present case, the circuit court and the Court of Appeals' concurrence adopted the plaintiffs' theory that an as-applied challenge can be proven simply by demonstrating that the results of the application to a particular set of facts yields a subjectively harsh result, even without a showing that the plaintiff was actually treated differently. The Court of Appeals majority expressly left this conclusion of the circuit court undisturbed. The fact that a result may be harsh, however, has never been identified as a proper basis for an as-applied challenge. Moreover, in this context, the circuit court's holding and the concurrence's reasoning is little more than a facial challenge in disguise and if let undisturbed will result in bizarre results.

II. ARGUMENT.

A. Review is Necessary to Clarify the Scope and Application of Rational Basis Review.

Similar to statutory interpretation at the time of *Kalal*, Wisconsin's rational basis "case law has evolved in something of a combination fashion, generating some analytical confusion." *Kalal,* ¶43. Accordingly, this

Court should grant review so it can supply the required "clarification." *Id.* ¶ 44.

In *Ferdon,* the Court appeared to leave behind the traditional formulation and application of rational basis review in favor of what it called "rational basis with teeth, or meaningful rational basis" review. *Ferdon,* ¶ 80. However, it does not appear that the *Ferdon* Court intended to create a new level of review above traditional rational basis review and below intermediate scrutiny. *Id.* ¶¶ 64-65 ("Neither party in the present case has argued that we should apply the intermediate level of review. We agree with the Fund that rational basis, not strict scrutiny, is the appropriate level of scrutiny in the present case.") & ¶ 80 ("Whether the level of scrutiny is called rational basis, rational basis with teeth, or meaningful rational basis, it is this standard we now apply in this case.") Likewise, the dissenting Justices in *Ferdon* where quite clear that they believed the Court had announced something new. Indeed, Justice Prosser's dissenting opinion, joined by Chief Justice Roggensack and Justice Wilcox, walked through the various differences between the historic formulation of the rational basis test and the test announced in the Majority opinion and concluded, "[t]he 'rational basis with teeth' standard is actually closer to

the 'intermediate level of scrutiny' than to rational basis review." *Id.* ¶ 215; *See also* ¶¶ 213 – 217, & ¶ 318 ("The changes wrought by the majority opinion will be profound.").

Ferdon teaches that rational basis review is no longer a limited review aimed at determining whether there exists a legitimate interest underpinning the legislation and whether the challenged classification is rationally related to that interest. Indeed, before *Ferdon* this Court often looked to *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961) for the following articulation of the standard:

> [The Equal Protection Clause] permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. 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.

A fair reading of *Ferdon* reveals that the Court departed from the analysis of whether the classification was *relevant* to the achievement of the Legislature's objective and, instead, engaged in an analysis of whether the

legislative classification was *effective* at achieving the Legislature's objective.[2] A simple example makes this clear.

In *Ferdon,* one of the stated goals of the legislation was to create a system in which reasonably priced medical malpractice insurance would be available to providers. *Ferdon,* ¶ 106. The majority *began* its analysis by observing, "[a] $350,000 cap on noneconomic damages in medical malpractice actions intuitively appears to be rationally related to the legislative objective of lowering medical malpractice insurance costs to ensure quality health care for the people of the state." *Id.* ¶ 109. Under the historic application of rational basis review this would have been the end, not the beginning of the analysis. In fact, the historic application instructs courts uphold legislation if the court can imagine a rational basis for it. *Aicher ex rel. LaBarge v. Wisconsin Patients Comp. Fund*, 2000 WI 98, ¶ 57, 237 Wis.2d 99, 613 N.W.2d 849) (" [courts] are obligated to locate or, in the alternative, construct a rationale that might have influenced the legislative determination.") For the *Ferdon* Court, however, this was only

[2] That *Ferdon* articulated a new standard seems to be accepted by both is proponents and its detractors. *See* Lawrence Friedman, *Reconsidering Rational Basis: Equal Protection Review under the Wisconsin Constitution*, 38 Rutgers L.J. 1071, 1076-80 (2011) (acknowledging that critics of *Ferdon* are correct that *Ferdon* departed from precedent and going on to argue that the departure was a positive development).

the beginning and it quickly moved on to a fact-finding process aimed at "testing the hypothesis." *Id.* at ¶ 111.

Since *Ferdon*, the lower courts and litigants have struggled to determine what "meaningful rational basis" means, if and how it should be applied, and whether *Ferdon* intended to create a new, fourth category of review between traditional rational basis review and intermediate scrutiny. *See, e.g., State v. Lynch*, 2006 WI App 231, ¶ 17 n.5, 297 Wis.2d 51, 724 N.W.2d 656 ("Because *Ferdon* is the most recent supreme court opinion discussing the standard to be employed when using the rational basis test, we use *Ferdon's* formulation of that standard, not *Aicher's*."); *Bhandari v. Nilsestuen*, No. 09AP599, 2012 WL 1623501, ¶ 21 (Wis. Ct. App. May 10, 2012) (unpublished opinion)("The parties devote considerable energy to a debate on the question of whether *Ferdon* contemplates a new, more rigorous rational basis review standard ...").[3]

Curiously, while lower courts struggle to figure out what rational basis review is supposed to look like in the post-*Ferdon* world, this Court, while often quoting the non-controversial aspects of *Ferdon's* articulation, almost never follows its analysis. For example, the recent case *Madison*

[3] A copy of this unpublished opinion is available in the Petitioner's appendix at App. 122.

Teachers, Inc. v. Walker, 2014 WI 99, ¶¶ 76-77, 358 Wis.2d 1, 851 N.W.2d 337, quotes *Ferdon* for the proposition that the Court must attempt to create its own rational basis in conducting its analysis but otherwise does not discuss *Ferdon*. Instead, the Court returned to oft-cited articulation of the test from *McGowan* quoted above. *Id.* ¶ 74-79. Indeed, even in *Metro. Assocs. v. City of Milwaukee*, 2011 WI 20, 332 Wis.2d 85, 796 N.W.2d 717, a rare instance where this Court found a statute failed the rational basis test, *Ferdon* was not cited once by the majority and was only tangentially mentioned in the dissent. Instead, the Court applied the traditional formulation of rational basis review and found the statute at issue wanting. *Id.* ¶¶ 60-74.

The time has come for this Court to exercises its prerogative "to oversee and implement the statewide development of the law" by providing much needed clarity with respect to the scope and application of rational basis review.

B. This Court Should Grant the Petition to Clarify that an As-Applied Challenge is not a Cognizable Challenge to the Damages Caps of Chapter 655.

It is true that the Court of Appeals found that the $750,000 cap on noneconomic damages was facially unconstitutional; however, the Court of

Appeals expressly stated that it was "not disturb[ing] the circuit court's findings as to that question [i.e. that the cap was unconstitutional as-applied to the plaintiffs]." (App. 2). Accordingly, in order to properly resolve this case, this Court must address both facial constitutionality and constitutionality as-applied to the plaintiffs. However, as with the issue outlined above, this Court must also clarify the law with regard to an as-applied challenge to the noneconomic damages caps. And, in doing so, this Court should clarify that no such as-applied challenge can exist.

The circuit court and the Court of Appeals' concurrence both made the same foundational and fundamental error. They allowed the as-applied challenge to proceed without a showing of disparate treatment. As recently as last year, this Court made clear that disparate treatment is a prerequisite to any as-applied equal protection challenge. *See Blake v. Jossart*, 2016 WI 57, ¶ 46, 370 Wis.2d 1, 884 N.W.2d 484. Here, not only did the plaintiffs fail to demonstrate disparate treatment, such a showing is impossible. The damages cap creates a single distinction: plaintiffs whose damages claims are less than $750,000 and who therefore may collect 100% of their damages and plaintiffs whose damages exceed $750,000 and therefore will have their damages reduced to $750,000. Plaintiffs in both categories are

treated exactly the same as all other plaintiffs in their class. Thus, it is impossible for there to be disparate treatment.[4]

Seemingly recognizing this, while not squarely addressing it, the circuit court and the Court of Appeals' concurrence focused on the size of the reduction of the noneconomic damages to find that the cap was unconstitutional as-applied. This Court should grant the petition to clarify that this is not a proper analysis. Indeed, such an analysis will create the very disparate treatment that presently does not exist.

Here, the Court of Appeals' concurrence noted that the reduction of the plaintiffs' noneconomic damages worked out to a reduction of "the award by over ninety-five percent." (App. 24, ¶ 33). The concurrence continued:

> This highlights the disparity in applying the caps to a severely injured patient such as Ascaris, as compared to applying the cap in cases where a patient is less severely injured and receives a lower award, but is able to collect the entire amount of the award because it falls under the cap's limits.

Despite being styled as such, this is not the reasoning of an as-applied challenge; it is a facial challenge. In fact, this analysis mirrors a portion of

[4] It is possible to conceptualize a third category, those plaintiffs whose noneconomic damages, when combined with the noneconomic damages of their spouse or children exceed the $750,000 cap. However, this is not really a separate category. Instead, it is just different mathematical inputs into the calculation of noneconomic damages.

the analysis that the *Ferdon* majority articulated in support of its finding that the prior cap was facially unconstitutional:

> Indeed, the burden of the cap falls entirely on the most seriously injured victims of medical malpractice. Those who suffer the most severe injuries will not be fully compensated for their noneconomic damages, while those who suffer relatively minor injuries with lower noneconomic damages will be fully compensated. The greater the injury, the smaller the fraction of noneconomic damages the victim will receive.

Ferdon, ¶ 98.

Moreover, applying this reasoning in the context of an as-applied challenge will lead to unjust results. If the cap is facially constitutional, as both the circuit court and Court of Appeals' concurrence found they are, the obvious question is at what point is the reduction so great that the otherwise constitutional cap becomes unconstitutional? In other words, how much can the Legislature reduce an award before the reduction becomes infirm? That question was left unanswered by the circuit court and the appellate court's concurrence, this Court therefore should grant the Petition and reaffirm that such a policy question is best left to the Legislature.

Based on the reasoning of the circuit court and Court of Appeals' concurrence, the noneconomic damages cap must have a gap in it. That is, all damages between $750,000 and $16.49 million may be reduced but a

reduction of any damages of $16.5 million or more renders the cap unconstitutional. A myriad of questions follows. Is $16.5 million the correct upper limit? Or is it $10 million or $5 million? What happens to the amount of money between $750,000 and the upper limit? Does the plaintiff get to recover it? Does it remain extinguished leaving only the overage available for recovery?

The reality is that the focusing on the harshness of the reduction in the context of an as-applied challenge necessarily results in the very disparate treatment of persons in the category of those with damages over $750,000 that an Equal Protection challenge is supposed to ferret out.

Such an approach is also fundamentally inconsistent with the normal workings of an as-applied challenge. While not squarely addressing this point, this Court upheld the application of the law requiring a seventeen year-old man convicted of falsely imprisoning another seventeen year-old man to register as a sex offender even though there was no dispute that the elements of the underlying crime did not require a finding of any sexual misconduct and even though it was undisputed that no sexual misconduct had occurred. *See State v. Smith*, 2010 WI 16, 323 Wis.2d 377, 780 N.W.2d 90. A harsher result of the uniform application of a law is hard to

imagine. Likewise, in *Schultz v. Natwick*, 2002 WI 125, ¶ 38, 257 Wis.2d 19, 653 N.W.2d 266, this Court rejected a challenge to a previous decision finding that an increase of the damages cap for wrongful death claims did not apply retroactively stating, "Plaintiffs merely present a variation of the facts expressly discussed in *Neiman* ... However, no change in the law is justified simply by a case with more egregious facts."

In *Smith*, this Court cautioned lower courts to be wary of challengers who "blur the lines" between facial and as-applied challenges. *Smith,* ¶ 37. Accordingly, the Court should grant the Petition and draw a clear line by expressly holding that an as-applied challenge to the cap on noneconomic medical malpractice damages based on the size of the reduction is not actionable.

III. CONCLUSION.

For all the forgoing reasons the, American Tort Reform Association, Wisconsin Civil Justice Council, and National Federation of Independent Business respectfully request that he Court grant the Petition for Review and proceed to the merits of this appeal.

Dated this 10th day of August, 2017.

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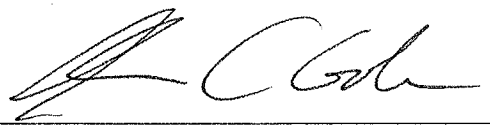
By: 

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FORM AND LENGTH CERTIFICATION

I hereby certify that this non-party brief conforms to the Rules contained in Section 809.19(8)(b) and (c) for a brief produced with a proportional serif font. This brief contains 2,795 words, as counted by our word processor.

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CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this non-party brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he has caused three true and correct copies of the foregoing non-party brief to be served upon counsel of record by via U.S. mail, as follows:

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Subscribed and sworn to before me
this 10th day of August, 2017.

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Notary Public, State of Wisconsin
My Commission expires: 5/8/21

SUZANNE K. TROTTER
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