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COLORADO COURT OF APPEALS
Ralph L. Carr Judicial Center
2 East 14th Avenue
Denver, Colorado 80203

DISTRICT COURT, ARAPAHOE COUNTY
Honorable Elizabeth Beebe Volz
Case No. 2019CV32833

Plaintiff-Appellee/Cross-Appellant:

JACQUELINE GEBERT,

v.

Defendants-Appellant/Cross-Appellee:

SEARS, ROEBUCK & CO.

▲COURT USE ONLY▲

Case Nos.: 2022CA887

Attorneys for Amici Curiae:

Kendra N. Beckwith, #40154
Lance T. Collins, #56419
LEWIS ROCA ROTHGERBER
CHRISTIE LLP
1601 19th Street, Suite 1000
Denver, Colorado 80202
Telephone: 303-623-9000
Email: kbeckwith@lewisroca.com
lcollins@lewisroca.com

BRIEF OF AMICI CURIAE THE AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, THE AMERICAN TORT REFORM ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, COLORADO CHAMBER OF COMMERCE, COLORADO CIVIL JUSTICE LEAGUE, COLORADANS PROTECTING PATIENT ACCESS, AND NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES IN SUPPORT OF CROSS-APPELLANT SEARS ROEBUCK & CO.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d).

It contains 4,745 words (not to exceed 4,750 words).

The amicus brief applies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

Dated: April 11, 2023

LEWIS ROCA ROTHGERBER CHRISTIE LLP

/s/ *Kendra N. Beckwith*
Kendra N. Beckwith, #40154
Lance T. Collins, #56419

Attorneys for Amici Curiae

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STATEMENT OF INTEREST

The Amici Curiae identified below are committed to the preservation of a fair, consistent, and predicable tort system in Colorado, ensuring Colorado remains economically vibrant and committed to the Rule of Law. Plaintiff's cross-appeal, with heavy assistance from the Colorado Trial Lawyers Association (CTLA), directly threatens these values. Amici therefore provide this brief to aid this Court in understanding the essential role section 13-21-102.5, C.R.S., plays in preserving those values and the paramount importance of upholding it.

STATEMENTS OF IDENTITY

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 more than three decades, ATRA has filed amicus curiae briefs in cases involving important liability issues.

The American Property Casualty Insurance Association (APCIA) is the primary national trade association for home, auto and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's members, which range from small companies to the largest insurers with global operations, represent 63% of the U.S. property and casualty marketplace. On issues of importance to the property and casualty industry and marketplace, APCIA advocates sound public policies on behalf of its members in legislative and regulatory forums at the state and federal levels and files amicus curiae briefs in significant cases before federal and state courts.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the

Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

Colorado Chamber of Commerce is a private, non-profit, member-funded organization. Its mission is to champion a healthy business climate in Colorado. The four key objectives of that mission include: (1) maintaining and improving the cost of doing business; (2) advocating for a pro-business state government; (3) increasing the quantity of educated, skilled workers; and (4) strengthening Colorado's critical infrastructure (roads, water, telecommunications, and energy). The Colorado Chamber is the only business association that works to improve the business climate for all sizes of business from a statewide, multi-industry perspective.

Colorado Civil Justice League (CCJL) is a nonpartisan organization consisting of large and small businesses, trade associations, individual citizens, and private attorneys. It is dedicated solely to improving Colorado's civil justice system through public education and outreach, legal advocacy, and legislative initiatives.

CCJL supports efforts to improve the Colorado civil justice system and facilitate litigation rules that are usable, reasonable, and fair.

Coloradans Protecting Patient Access is a coalition of healthcare organizations focused on the importance of access to quality healthcare throughout Colorado. The coalition works to ensure that Colorado continues to be one of the best places to receive safe, quality, and affordable healthcare**.**

National Association of Mutual Insurance Companies (NAMIC) consists of more than 1,500 member companies, including seven of the top ten property/casualty insurers in the United States. NAMIC supports local and regional mutual insurance companies on main streets across America as well as many of the country's largest national insurers. NAMIC member companies write $357 billion in annual premiums and represent 69% of homeowners, 56% of automobile, and 31% of the business insurance markets. Through its advocacy programs NAMIC promotes public policy solutions that benefit member companies and the policyholders they serve and fosters greater understanding and recognition of the unique alignment of

interests between management and policyholders of mutual companies.

ARGUMENT

I. THIS COURT SHOULD REJECT PLAINTIFF'S INVITATION TO INCORPORATE THE SEVENTH AMENDMENT AGAINST THE STATES.

Plaintiff's argument that Colorado's statutory noneconomic damages limitation violates the Seventh Amendment rests on the premise that the Seventh Amendment applies to civil jury trials in state court. That premise is wrong.[1]

The United States and Colorado Supreme Courts have squarely and repeatedly held that the Seventh Amendment does not apply to the States. That long line of high-court decisions binds this Court. Nothing in the U.S. Supreme Court's recent incorporation cases suggests otherwise. And even assuming, for argument's sake, that the Seventh Amendment were incorporated against the States, section 13-21-102.5 does not violate it.

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[1] Plaintiff's conclusory argument merely incorporates CTLA's brief without further development. (Am. Op.-Ans. Br., pp. 39-41.) Such tactics are generally rejected. *See Castillo v. Koppes-Conway*, 148 P.3d 289, 291 (Colo. App. 2006); *see also Fisher v. State Farm Mut. Auto. Ins. Co.*, 2015 COA 57, ¶ 18 (holding this Court generally declines to address conclusory arguments).

A. Binding precedent holds that the Seventh Amendment does not apply to the States.

The U.S. Supreme Court has long held that the Seventh Amendment right to a jury trial "does not in any manner whatever govern or regulate trials by jury in state courts, or the standards that must be applied concerning the same." *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916) (emphasis added). The Seventh Amendment right to a jury trial is one of the "handful of the Bill of Rights protections [that] remain unincorporated." *McDonald v. City of Chicago, Ill.,* 561 U.S. 742, 765 (2010); *accord Osborn v. Haley*, 549 U.S. 225, 252 n.17 (2007); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 719 (1999); *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432 (1996); *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974); *Chicago, R.I. & P.R. Co. v. Cole*, 251 U.S. 54, 56 (1919); *Walker v. Sauvinet*, 92 U.S. 90, 92–93 (1875); *Edwards v. Elliott*, 88 U.S. 532, 548 (1874).

As this long line of cases requires, the Colorado Supreme Court and divisions of this Court have repeatedly recognized that "[t]he United States Constitution's guarantee of a civil jury trial provided for

in the seventh amendment does not apply to the states." *Firelock Inc. v. Dist. Ct. In & For the 20th Judicial Dist. of State of Colo.*, 776 P.2d 1090, 1096 (Colo. 1989); *accord City of Steamboat Springs v. Johnson*, 252 P.3d 1142, 1145 (Colo. App. 2010); *Marquardt v. Perry*, 200 P.3d 1126, 1130 (Colo. App. 2008); *Faucett v. Hamill*, 815 P.2d 989, 991 (Colo. App. 1991).

This Court, "like any other state or federal court, is bound by [the U.S. Supreme] Court's interpretation of federal law." *James v. City of Boise*, 577 U.S. 306, 307 (2016) (per curiam); *see also Bernal v. Lumbermens Mut. Cas. Co.*, 97 P.3d 197, 203 (Colo. App. 2003) (holding this Court is "bound by decisions of the Colorado Supreme Court"). As a result, CTLA's and Plaintiff's argument fails.

Despite the mountain of contrary, binding precedent, CTLA and Plaintiff still invite this Court to incorporate the Seventh Amendment against the States because the contrary precedent is supposedly "antiquated" and therefore inapplicable. (Amicus Br., pp. 11.) They argue that these cases are inconsistent with "the mandatory modern criteria … for evaluating whether incorporation applies to Seventh

Amendment Rights[,]" allowing this Court to reach a different conclusion. (*Id.*) Even assuming some tension with the U.S. Supreme Court's modern incorporation cases, this precedent remains binding on this Court.

Old precedent remains just as binding as new. "[It] is [the U.S. Supreme] Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). And on-point precedent remains binding even if it appears in some tension with later cases. "If a precedent of [the U.S. Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to [the U.S. Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989); *accord Agostini v. Felton*, 521 U.S. 203, 237 (1997). "Until the [U.S. Supreme] Court explicitly overrules its own precedent," this Court is "not at liberty to infer otherwise." *People v. Phillips*, 2012 COA 176, ¶ 53.

So even assuming some tension with prior cases, the reasoning of

the U.S. Supreme Court's more recent incorporation cases does not allow this Court to disregard the long line of federal and state cases expressly refusing to incorporate the Seventh Amendment against the States.

B. Modern incorporation cases do not implicitly hold that the Seventh Amendment applies to the States.

For over a century, judges and scholars have hotly debated whether (and to what extent) the Fourteenth Amendment incorporates the Bill of Rights against the States. While most of the Bill of Rights has been selectively incorporated, the U.S. Supreme Court has consistently rejected any theory of automatic, total incorporation. Indeed, the Court has repeatedly confirmed that the Seventh Amendment does not apply to the States. CTLA wrongly suggests that this line of cases "no longer holds sway" given the Supreme Court's "modern test" for incorporation. (Amicus Br., p. 17.)

To be sure, the incorporation standard has evolved over time. Under *McDonald*'s modern standard, the Fourteenth Amendment incorporates against the States rights that are either "fundamental to

our scheme of ordered liberty" or "deeply rooted in this Nation's history and tradition." 561 U.S. at 767 (citing *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968), and quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

Relying on this standard, CTLA argues that *McDonald*, *Timbs v. Indiana*, 139 S. Ct. 682 (2019), and *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), imply that the Seventh Amendment binds the States. These recent incorporation decisions imply no such thing.

In those cases, the Supreme Court continued its longstanding approach of selective incorporation, extending some additional provisions of the Bill of Rights to the States. But the Supreme Court expressly reaffirmed that total incorporation has not been achieved and that the Seventh Amendment remains unincorporated.

In *McDonald*, the Court explicitly observed that among the "rights not fully incorporated are … the Seventh Amendment right to jury trial in civil cases." *McDonald*, 561 U.S. at 765 n.13 (emphasis added). *McDonald* emphasized the modern incorporation standard, *id.* at 778, but the Court hardly endorsed total incorporation. Even where a "Bill of

Rights guarantee is fundamental from an American perspective," the Court explained, such a right is not incorporated where "stare decisis counsels otherwise[.]" *Id*. at 784.

Writing in dissent on other grounds, Justice Stevens agreed that the Court has "never accepted a 'total incorporation' theory of the Fourteenth Amendment, whereby the Amendment is deemed to subsume the provisions of the Bill of Rights en masse." 561 U.S. at 867 (Stevens., J., dissenting). He further noted that the Supreme Court has "declined to apply several provisions to the States in <u>any measure</u>," including the Seventh Amendment. *Id*. (citing *Bombolis*, 241 U.S. 211) (emphasis added).

McDonald's explanation of the modern "required inquiry" for analyzing incorporation thus does not implicitly overrule the U.S. Supreme Court's extensive precedent refusing to incorporate the Seventh Amendment against the States. (*Contra* Amicus Br., p. 18.)

Applying the *McDonald* standard, the Court in *Timbs* held that the Fourteenth Amendment incorporates the Eighth Amendment's Excessive Fines Clause against the States. 139 S. Ct. at 690-91. But the

Court reaffirmed that, among the provisions of the Bill of Rights, there remain "'a handful' of exceptions" to incorporation that do not apply to the States. *Id.* at 687 (citing *McDonald*, 561 U.S. at 764-65 & nn.12-13). In doing so, the Court directly cited the provision of *McDonald* observing that the Seventh Amendment is excluded from incorporation. The Court thus once again explicitly declined to endorse total incorporation, making clear that the recognized exceptions to incorporation such as the Seventh Amendment are not automatically incorporated under the modern standard.

Ramos does not prove otherwise. To be sure, *Ramos* incorporated the Sixth Amendment's requirement of a unanimous jury verdict against the States, overruling a prior decision that held otherwise. 140 S. Ct. at 1402. But the Court did not disturb its well-established precedent rejecting total incorporation. On the contrary, the Court in *Ramos* consciously corrected a uniquely untenable constitutional anomaly that resulted from "an unusual division among the Justices." *McDonald*, 561 U.S. at 766 n.14. As the Court explained, "[w]e have an admittedly mistaken decision, on a constitutional issue, an outlier on

the day it was decided, one that's become lonelier with time." *Ramos*, 140 S. Ct. at 1408. CTLA does not—and could not credibly—characterize the century's worth of cases expressly declining to incorporate the Seventh Amendment against the States as such "mistaken decisions" or "outliers." Further, it is beyond this Court's jurisdiction to identify or attempt to correct any similar anomaly in U.S. Supreme Court precedent.

C. Even if the Seventh Amendment meets the modern standards for incorporation, section 13-21-102.5 does not violate it.

Assuming, without conceding, that the Fourteenth Amendment incorporates the Seventh Amendment against the States, section 13-21-102.5's noneconomic damages limitation does not violate it.

The Seventh Amendment has two parts. The Preservation Clause provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." And the Reexamination Clause further provides that "no fact tried by a jury, shall be otherwise reexamined in any court…than according to the rules of the common law."

Section 13-21-102.5 does not interfere with the jury's preserved power to decide any "particular issues, or analogous ones, [that] were decided by…jury in suits at common law at the time the Seventh Amendment was adopted." *City of Monterey*, 526 U.S. at 718 (citing *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 384 (1996)).

Section 13-21-102.5 merely determines the substantive legal consequence of a jury's factual findings regarding damages—a finding of noneconomic damages that exceeds $642,180 (the present limitation), as a matter of law, creates legal liability for a defendant only up to the statute's limit.

The statute thus reflects a constitutional legislative policy judgment about the appropriate remedy. It does not interfere with the jury's procedural role as factfinder because "it is not the role of the jury to determine the legal consequences of its factual findings." *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989); *see Siebert v. Okun*, 485 P.3d 1265, 1277-78 (N.M. 2021) (ruling a nonmedical damages limitation merely restricts the scope of the available remedy, rejecting argument that it infringes on the state's "inviolate" right to trial by

jury); *see also Horton v. Oregon Health & Sci. Univ.*, 376 P.3d 998, 1037 (Or. 2016); *Tam v. Eighth Judicial Dist. Ct.*, 358 P.3d 234, 238 (Nev. 2015); *L.D.G., Inc. v. Brown*, 211 P.3d 1110, 1131-32 (Alaska 2009); *cf. Schwartz v. People*, 104 P. 92, 102 (1909). Indeed, the General Assembly is free to exercise its constitutional authority to modify the common law. *See Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 50 (1912) (collecting cases); C.R.S. § 2-4-211.

CTLA relies on *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998), and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001), which hold that a jury is entitled to assess compensatory damages. Neither case suggests that the Seventh Amendment's procedural right prohibits legislatures from enacting substantive limits on available remedies. To be sure, tort cases, including personal-injury actions, generally were tried to juries before the Seventh Amendment was adopted. *City of Monterey*, 526 U.S. at 716. But under section 13-21-102.5, the jury remains solely responsible for finding the amount of the plaintiff's damages. This satisfies the jury's role of making factual determinations of "the extent

of the plaintiff's injury." *Cooper*, 532 U.S. at 432. Statutory damages limitations have thus been upheld under *Feltner*. *See Boyd*, 877 F.2d at 1196; *David v. Omitowoju*, 883 F.2d 1155, 1162 (3d Cir. 1989).

Section 13-21-102.5's damages limitation does not, as CTLA argues, empower courts to improperly reexamine a jury's factual findings. (Amicus Br., pp. 23-25.) The jury's role is to determine only the extent of the injuries, not their legal effect. *Accord Smith v. Botsford Gen. Hosp.*, 419 F.3d 513, 519 (6th Cir. 2005) (holding Michigan's malpractice damages limitation does not violate the Seventh Amendment).

Section 13-21-102.5 is also materially different from a remittitur. (Amicus Br., pp. 22-23.) A remittitur reduces a jury's damages award based on a judicial determination that the evidence cannot justify that award. *See Hetzel v. Prince William Cnty., Va.*, 523 U.S. 208, 211 (1998) (per curiam).

That is not what section 13-21-102.5 does. On the contrary, the statute leaves intact the jury's findings (indeed, they may serve as the "clear and convincing" basis for doubling the award under the statute).

See C.R.S. § 13-21-102.5(3)(a). The statute simply provides that, as a matter of law, any finding of damages above $642,180 has no legal significance. The statute's substantive legal effect does not interfere with the procedural right to trial by jury.

II. GUARDRAILS ON NONECONOMIC DAMAGES ARE NECESSARY AND EFFECTIVE AT CURBING UNPREDICTABILITY AND IRRATIONALITY IN THE TORT SYSTEM.

Statutory guardrails on noneconomic damages are not only perfectly constitutional, they are sound public policy helping ensure a predictable and fair civil-justice system.

A. Noneconomic damages awards have continued to grow larger and more unpredictable.

Historically, the availability of noneconomic damages and factfinders' inability to objectively measure pain and suffering did not raise concern. This was because "personal injury lawsuits were not very numerous and verdicts were not large." Phillip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective Review of the Problem and the Legal Academy's First Responses*, 34 Cap.U.L.Rev. 545, 560 (2006). Prior to the twentieth century, large noneconomic

awards were often reversed. *See* Ronald J. Allen & Alexia Brunet Marks, *The Judicial Treatment of Noneconomic Compensatory Damages in the Nineteenth Century*, 4 J. Empirical Legal Stud. 365, 369 (2007) (detailing rise of noneconomics damages awards).

The size of pain and suffering awards increased shortly after World War II, as personal injury lawyers became adept at enlarging these awards. *See* Marvin M. Belli, *The Adequate Award*, 39 Cal.L.Rev. 1 (1951); Merkel, *supra*, at 560-65 (examining post-war expansion of pain and suffering awards).

In the late 1950s and 1960s, plaintiffs' lawyers' began the controversial, and now ubiquitous, practice of summation "anchoring"—suggesting to juries an extraordinary monetary value or formula for a person's pain and suffering, giving the jurors a powerful baseline to accept or negotiate upward or downward.[2] Joseph H. King, Jr., *Counting Angels and Weighing Anchors: Per Diem Arguments for Noneconomic Personal Injury Tort Damages*, 71 Tenn.L.Rev. 1, 13, 37-

[2] Plaintiff's counsel "anchored" in closing—"asking for 2-$3 million on the noneconomics." The jury awarded $2 million. (10.1.21 TR 146:15-16.)

40 (2003). Research indicates that "the more you ask for, the more you get." Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts*, 10 Applied Cognitive Psychology 519, 526 (1996). Empirical evidence confirms this technique "dramatically increases" noneconomic damage awards. John Campbell et al., *Time is Money: An Empirical Assessment of Non-Economic Damages Arguments*, 95 Wash.U.L.Rev. 1, 28 (2017).

This strategy worked. By the 1970s, "in personal injuries litigation the intangible factor of 'pain, suffering, and inconvenience' constitute[d] the largest single item of recovery, exceeding by far the out-of-pocket 'specials' of medical expenses and loss of wages." *Nelson v. Keefer*, 451 F.2d 289, 294 (3d Cir. 1971).

In 2004, Judge Paul V. Niemeyer of the United States Court of Appeals for the Fourth Circuit observed a trifecta of problems surrounding these awards. First, there "seem[ed] to be no rational, predictable criteria for measuring those damages." Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 Va.L.Rev. 1401, 1401 (2004). Second, that lack of predictable

criteria meant there was a lack of rational criteria for appellate review, undermining the tort law's "rationality and predictability[.]" *Id.* And third, that "irrationality" provides "the grist for the mill of our tort industry" (which at the time he approximated to have grown to $200 billion, exceeding the "entire economy of Turkey, or Austria, or Denmark). *Id.*; Stephen D. Sugarman, *A Comparative Look at Pain and Suffering Awards*, 55 DePaul L.Rev. 399, 399 (2006) (noting pain and suffering awards in the United States are nearly ten times those in most other nations).

Noting that he was not "suggesting abandoning awards for pain and suffering[,]" he continued:

> because the size of such awards has grown without any rational basis, if we wish to continue to embrace a rule of law whose fabric is rationality and predictability, we should be concerned by this pocket of irrationality. Addressing the irrationality of civil awards for pain and suffering must, therefore, be at the heart of any tort reform …

Niemeyer, *supra* at 1405. This irrationality "threatens the system's rational method of redressing torts." *Id.*

The push for higher pain and suffering awards has increased in the past two decades. U.S. Chamber of Commerce Institute for Legal

Reform, *Nuclear Verdicts: Trends, Causes, and Solutions* (Cary Silverman and Christopher E. Appel, eds. Sep. 2022), Exhibit A, p. 25; Shawn Rice, *Nuclear Verdicts Drive Need for Insurers' Litigation Change*, Law360, Sept. 8, 2021 (reporting that between 2010 and 2018, the average size of verdicts exceeding $1 million rose nearly 1,000% from $2.3 million to $22.3 million, most of which "encompass awards where the noneconomic damages are extremely disproportionate").

Many of these verdicts are "comprised primarily of an award of noneconomic damages such as pain and suffering." Ex. A, p. 25 (noting "Plaintiffs' lawyers ability to manipulate juror determinations of this inherently subjective component of damages has led to a transformative increase in these awards.").

This irrationality persists today, particularly in state courts. Ex. A, p. 12.

B. Excessive verdicts inflict real harm.

Excessive verdicts inflict at least three kinds of harm. First, they can increase the costs of goods and services and inhibit job growth and new investment in business and industry. Ex. A, p. 34; *see*

Understanding the Impact of Nuclear Verdicts on the Trucking Industry, Am. Transportation Research Inst. (June 2020), at 9, 13, 50 (noting large trucking-accident verdicts led to increases in insurance costs, which in turn either put carriers out of business or get passed on).

In healthcare, inflated damages awards make it more costly to offer medical services, causing patients to "bear higher costs and increased volatility as opposed to what they reasonably expect to pay" for medical services. Ex. A, p. 34. They create insurability problems generally, introducing unexpected costs, premium increases, and distorting reasonable risk analysis. *Id*.

This in turn drives business from jurisdictions. A state's litigation climate is likely to impact important business decisions. This includes where to locate headquarters or do business, in turn directly affecting a state's economy and job market. *2019 Lawsuit Climate Survey: Ranking the States*, U.S. Chamber Inst. for Legal Reform (Sept. 2019), at 3 (noting 89% of respondents agree litigation environment will impact important business decisions).

Second, the subjective nature of noneconomic damages awards

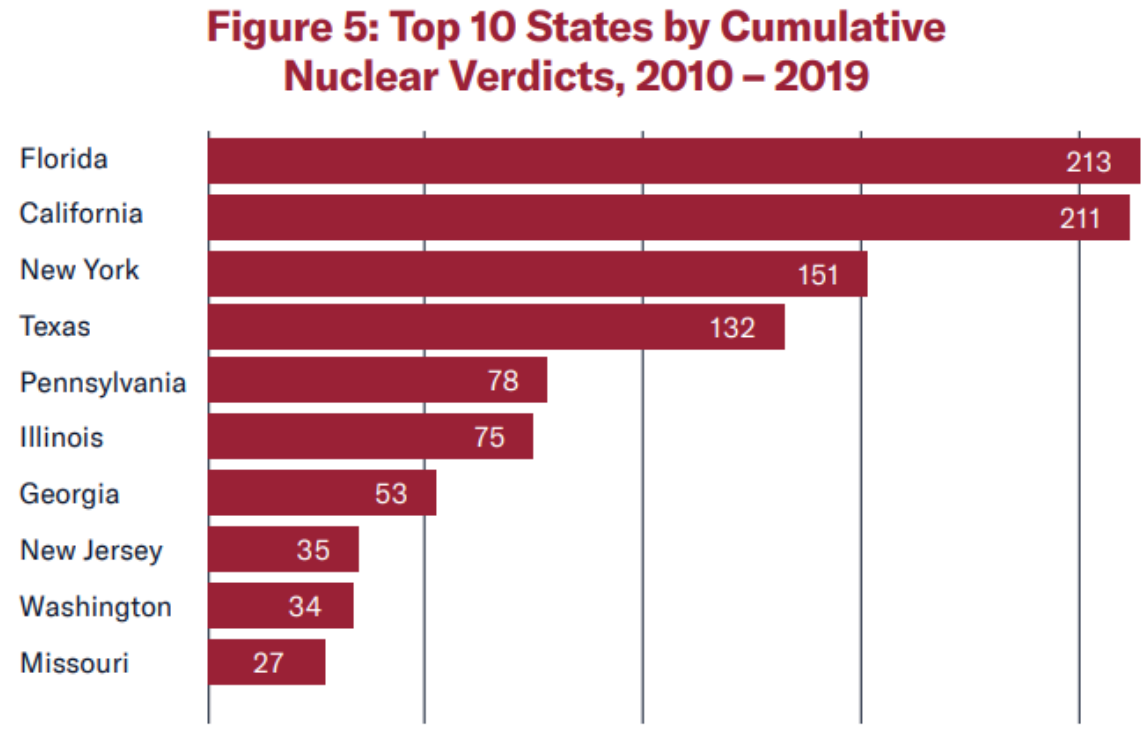
makes them "highly variable, unpredictable, and abjectly arbitrary." Joseph H. King, *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU.L.Rev. 163, 185 (2004). The lack of readily defined criteria for such awards makes them susceptible to conscious or subconscious biases for or against a party, rather than calibrated to the level of harm. *See generally* Dan B. Dobbs & Robert L. Caprice, Law of Remedies, § 8.14, at 683 (3d ed 2018) ("[V]erdicts vary enormously, raising substantial doubts as to whether the law is evenhanded in the administration of damages awards or whether it merely invites the administration of biases for or against individual parties.").

Third, these awards threaten the Rule of Law. The general expectation of the American jurisprudence system is that defendants will be subjected to liability and damages in a fair, consistent, and predictable manner. Ex. A p. 38. When a defendant is made to pay radically different sums for the same or substantially similar injury, it undermines these principles with irrationality and unpredictability. Niemeyer, *supra* at 1405 ("if we wish to continue to embrace a rule of law whose fabric is rationality and predictability, we should be

concerned by this pocket of irrationality"—noneconomic damages); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (holding due process prizes predictability in the legal system). "The American legal system is not a lottery to dole out jackpot awards[.]" Ex. A, p. 38.

C. Guardrails prevent this harm.

Judge Niemeyer's call for tort reform to address this "irrationality" has been answered. Eight states (including Colorado) have guardrails on noneconomic or total damages awards in personal injury cases. Importantly, none of those eight states are among the top ten states for nuclear verdicts:



(Ex. A, p. 14.)

D. Colorado's guardrails are enforceable and work.

Section 13-21-102.5 was enacted as part of tort reform legislation in 1986 "in response to concerns about dramatic increases in the cost of insurance and the difficulties people and businesses experienced obtaining insurance." *Gen. Elec. Co. v. Niemet*, 866 P.2d 1361, 1364 (Colo. 1994). Colorado's General Assembly recognized the "civil actions for noneconomic losses or injuries often unduly burden the economic, commercial, and personal welfare of persons in this state[.]" C.R.S. § 13-

21-102.5(1). It thus enacted section 13-21-102.5 "for the protection of the public peace, health, and welfare[.]" *Id*. That protection must be upheld.

It is because of section 13-21-102.5 that Colorado has not joined the ranks of the top ten nuclear verdict states. Colorado remains a great place to do business, with high economic vitality, strong employment, and a receptive environment for innovation. *Toward a More Competitive Colorado 2022*, Denver Metro Chamber of Commerce, Exhibit B, pp. 8-11. Insurance premiums and healthcare costs remain relatively affordable, in large part because the predictability damages guardrails provide[3], allowing for the effective allocation of risk and premium rates. *See* U.S. Dep't of Health & Human Servs, *Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs by Fixing Our Medical Liability System* 15 (2002) ("[T]here is a substantial difference in the level of medical malpractice premiums in states with meaningful caps … and states without meaningful caps.").

[3]Similar damages guardrails in Colorado's Health Care Availability Act are constitutional. *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901, 905-07 (Colo. 1993).

Section 13-21-102.5 remains an effective tool "balanc[ing] the concern over insurance affordability and predictability with concern for fairness to seriously injured people." *Niemet*, 866 P.2d at 1365. Its adjusted limitation of $642,180, which upon clear and convincing evidence may be increased to a maximum of $1,284,360, is well within the mainstream amount for noneconomic damages limitations elsewhere. *See* Alaska Stat. Ann. § 09.17.010 (the greater of $400,000 or life expectancy multiplied by $8,000); Haw. Rev. Stat. Ann. § 663-8.7 ($375,000); Idaho Code Ann. § 6-1603 ($430,740.03); Md. Code Ann., Cts. & Jud. Pro. § 11-108 ($920,000); Miss. Code. Ann. § 11-1-60(2)(B) ($1 million); Ohio Rev. Code Ann. § 2315.18 (greater of $250,000 or three times the economic loss with a maximum of $350,000 per plaintiff or $500,000 per occurrence); Tenn. Code Ann. § 29-39-102 ($750,000).

Section 13-21-102.5's presumptive application to all noneconomic damages awards is not, as CTLA mischaracterizes, "arbitrary" but rather intentional. (Amicus Br., p. 26.) It helps to eliminate the bias inherent in a jury's verdict and ensures relatively equal treatment of plaintiffs entitled to noneconomic damages across Colorado. That, in

turn, ensures that defendants do not face inconsistent liability landscape with regard to noneconomic damages. Section 13-21-102.5's articulable standard for exceeding the cap promotes rationality and certainty in damages awards. *Pisano v. Manning*, 2022 COA 22, ¶ 30 (noting that "in the thirty-five years since the legislature enacted section 13-21-102.5(3)(a), courts have consistently relied on a case's exceptional circumstances to justify the decision to exceed the cap.").

All this, in turn, ensures public confidence in the American legal system and Rule of Law. This is particularly important at a time when public trust and confidence in the judicial system is in peril.

CONCLUSION

Amici respectfully request that this Court leave section 13-21-102.5 untouched, allowing Colorado to remain economically vibrant and committed to the fair, consistent, and predicable resolution of personal injury lawsuits.

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LEWIS ROCA ROTHGERBER CHRISTIE LLP
/s/ *Kendra N. Beckwith*
Kendra N. Beckwith, #40154
Lance T. Collins, #56419

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on April 11, 2023 a true and accurate copy of the foregoing was filed using the Colorado Courts E-filing System and served on all counsel of record.

David J. Crough
Jessica L. Breuer
Stephen J. Burg
Burg Simpson Eldridge Hersh and Jardine PC

Counsel for Plaintiff-Appellee/Cross-Appellant

Frederick R. Yarger
Meghan Frei Berglind
Wheeler Trigg O'Donnell LLP

Counsel for Defendant-Appellant/Cross-Appellee

/s/ Kendra N. Beckwith