No. SC98977

IN THE SUPREME COURT OF MISSOURI

MARIA ORDINOLA VELAZQUEZ,

Plaintiff/Appellant

v.

UNIVERSITY PHYSICIAN ASSOCIATES, ET AL.,

Defendants/Respondents,

and

STATE OF MISSOURI,

Respondent-Intervenor.

Appeal from the Circuit Court of Jackson County, Missouri
Honorable John M. Torrence, Circuit Judge
Case No. 1716-CV20186

AMICI CURIAE BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AND MISSOURI STATE MEDICAL ASSOCIATION IN SUPPORT OF DEFENDANTS/RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The American Medical Association ("AMA") and Missouri State Medical Association ("MSMA") and their members have a substantial interest in the constitutionality of Missouri's medical liability statute and its commonsense limits on noneconomic damages. The statute is critical to promoting the health and welfare of Missourians by making available professional liability insurance for health care providers in the state. Without it, liability insurance costs would rise, once again making healthcare less affordable and available for Missourians across the state.

AMA is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all U.S. physicians, residents and medical students are represented in the AMA's policymaking process. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty area and in every state, including Missouri.

The Missouri State Medical Association ("MSMA") is an organization of physicians and medical students. MSMA has approximately 4,000 members and is located in Jefferson City. Founded in 1850, MSMA serves its members through the promotion of the science and art of medicine, protection of the health of the public, and betterment of the medical profession in Missouri.

The AMA and MSMA appear on their own behalves and as representatives of the AMA Litigation Center. The Litigation Center is a coalition among the AMA and the

medical societies of every state, plus the District of Columbia. The Litigation Center is the voice of America's medical profession in legal proceedings across the country. Its mission is to represent the interests of the medical profession in the courts. It brings lawsuits, files amicus briefs, and otherwise provides support or becomes actively involved in litigation of general importance to physicians. *Amici*'s participation on behalf of their physician memberships will help educate the Court on the potential impact of this case on the practice of medicine in Missouri.

CONSENT OF PARTIES

Pursuant to Missouri Supreme Court Rule 84.05(f), *amici* notified the parties on March 18, 2021, of their intent to file this *amici curiae* brief. Counsel for defendants and the State of Missouri consented to this filing, but counsel for plaintiffs withheld their consent. Therefore, *amici* file this brief pursuant to Rule 84.05(f)(3) of the Missouri Rules of Civil Procedure in conjunction with a motion for leave to file the brief.

JURISDICTIONAL STATEMENT

The Missouri Court of Appeals, Western District transferred this case to the Supreme Court of Missouri pursuant to Article V, § 11 of the Missouri Constitution because the appeal invokes the Supreme Court's exclusive appellate jurisdiction under Article V, § 3 of the Missouri Constitution by raising a real and substantial challenge to the constitutionality of § 538.210, RSMo.

STATEMENT OF FACTS

The facts are not in dispute with regard to the application of the state's medical liability statute and noneconomic damages limits, which govern all medical liability

claims in the state, to this case. Here, Ms. Ordinola alleges defendants engaged in medical negligence related to a caesarean section and post-procedure care. A jury awarded her $30,000 in economic compensatory damages and $1 million in non-economic damages. The trial court applied the state's medical liability statute, including its limits on noneconomic damages, which was $748,282 at the time of the trial, and entered a total judgment for Ms. Ordinola of $778,828. She is challenging the constitutionality of the medical liability statute and its noneconomic damages limits.

ARGUMENT IN RESPONSE TO APPELLANT'S POINT RELIED ON

I. Introduction & Summary

In an effort to ensure that Missourians have access to quality and affordable care, the Missouri General Assembly has joined a majority of states in enacting laws intended to maintain the integrity of litigation over medical malpractice claims. Among these legislative enactments is setting upper limits on noneconomic damages, which prevents excessive verdicts and enables liability insurance premiums to remain stable and affordable for physicians and, in turn, their patients. Overall, about two-thirds of the states across the country have legislative limits on noneconomic damages; sometimes the limits apply only in medical malpractice actions such as the one in Missouri, and others apply to all personal injury cases. The courts in these states have found noneconomic damage limits to be constitutional because such legal limits do not infringe on the factfinders' role or intrude on the judiciary's power of remittitur.

In Missouri, the General Assembly has enacted such upper limits on noneconomic damages for medical malpractice claims three times in the past 35 years. In 1986, it

legislated that "no plaintiff shall recover more than three hundred fifty thousand dollars per occurrence for non-economic damages from any one defendant." § 538.210, RSMo (repealed by H.B. 393, 2005). This Court, in a 6-1 majority, *upheld* the statute's constitutionality, stating it has long been understood that the Missouri constitution "does not assure that a substantive cause of action once recognized in the common law will remain immune from legislative or judicial limitation or elimination." *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 906 (Mo. 1992). This Court recognized that "the statute represents an effort by the legislature to reduce rising medical malpractice premiums and in turn prevent physicians and others from discontinuing 'high risk' practices and procedures." *Id*. at 904. Accordingly, it "is a rational response to the legitimate purpose of maintaining the integrity of health care for all Missourians." *Id.*

In 2005, the General Assembly modified this statute in several ways: it established a different monetary limit on noneconomic damages, applied the limitation to the claim as a whole, and allowed defendants to pay future noneconomic damages over time, among other reforms. *See* H.B. 393 (2005). This time, though, the Court held the entire law, not just the new provisions, unconstitutional. *See Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633 (Mo. 2012). This controversial 4-3 ruling reversed *Adams.* The Court asserted that the 1820 Missouri Constitution's statement that "the right of trial by jury as heretofore enjoyed shall remain inviolate" meant that the General Assembly does not have the authority to modify any common law claims available in 1820. *Id*. at 637 (citing Art. I Sec. 22(a)). However, courts across the country, as this Court did in *Adams*, have

broadly concluded that setting legal limits on damages does not violate the right to a jury trial. The Court should use this case to revisit *Watts*' unwise departure from *stare decisis*.

Irrespective of *Watts*, it has always been clear that the General Assembly has the authority to abrogate a common law cause of action that existed in 1820 and replace it with an alternative, statutory cause of action. *See, e.g.*, *De May v. Liberty Foundry Co.*, 37 S.W.2d 640 (Mo. 1931) (upholding the constitutionality of the workers' compensation act, which provided a remedy that was "wholly substitutional in character, and supplants all other rights and remedies, at common law or otherwise."); *Peters v. Wady Indus., Inc.*, 489 S.W.3d 784, 791 (Mo. 2016) (affirming the right of the General Assembly to enact the workers' compensation act even though it "altered the landscape of common law negligence actions against employers."). In 2015, the General Assembly responded to *Watts* by following this timeworn path. Rather than return to a medical liability crisis, it supplanted common law medical malpractice claims with a new statutory cause of action: "A statutory cause of action for damages against a health care provider for personal injury or death arising out of the rendering or failure to render health care services is hereby created, replacing any such common law cause of action." § 538.210, RSMo. This statute included the noneconomic damages limits at issue in this appeal. *See id.* The Court should uphold this statute because it is the result of longstanding legislative authority.

As this brief explains, the broad national experience has been that noneconomic damages limits are important to well-functioning health care systems. As the Court found in *Watts*, these limits control outlier awards, provide greater predictability in the medical liability system, lower insurance rates, reduce the cost of defensive medicine, and

improve access to critical specialists for local residents. *See* Ronald M. Stewart, *Malpractice Risk and Cost Are Significantly Reduced After Tort Reform*, 212 J. Am. Coll. Surg. 463 (2011). They also promote more uniform treatment of individuals with comparable injuries, facilitate settlements, and limit arbitrary awards. *Amici* respectfully urge the Court to uphold the noneconomic damages limits under § 538.210, RSMo, as well as the entire statute, as constitutional under the Missouri constitution.

II. Limits on Noneconomic Damages Provide a Rational Response to the Irrational Growth in Noneconomic Damages in the Past Few Decades.

Noneconomic damage awards are inherently subjective and unpredictable. There is "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).[1] Historically, the availability of noneconomic damages did not raise serious concern because "personal injury lawsuits were not very numerous and verdicts were not large." Philip 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). Further, prior to the 20th century, courts often reversed large noneconomic awards. *See* Ronald J. Allen & Alexia Brunet Marks, *The Judicial Treatment of Noneconomic Compensatory Damages in the Nineteenth Century*, 4. J. Empirical Legal Stud. 365, 379-87 (2007) (finding no such awards exceeding

[1] *See* 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.").

$450,000 in present dollars prior to the 20th century). Thus, the size of today's noneconomic damages were not "heretofore enjoyed" in 1820.

The average size of pain and suffering awards took its first leap after World War II, as personal injury lawyers became adept at finding ways to enlarge awards. *See generally* Melvin M. Belli, *The Adequate Award*, 39 Cal. L. Rev. 1 (1951); *see also* Merkel, 34 Cap. U. L. Rev. at 560-65 (examining post-war expansion of pain and suffering awards). In a nine-month period in 1957, for example, there were fifty-three verdicts of $100,000 or more. *See* Merkel, 34 Cap. U. L. Rev. at 568. Scholars began to question the proper role and measurements for pain and suffering. *See, e.g.*, Charles A. Wright, *Damages for Personal Injuries*, 19 Ohio St. L.J. 155 (1958); Marcus L. Plant, *Damages for Pain and Suffering*, 19 Ohio St. L.J. 200, 210 (1958) (proposing "a fair maximum limit on the award" as a viable solution). Those warnings went unheeded.

In the 1960s, plaintiffs' lawyers began the controversial (now ubiquitous) practice of summation "anchoring," suggesting to juries an extraordinary monetary value for the plaintiff's pain and suffering. *See* Joseph H. King, Jr., *Counting Angels and Weighing Anchors: Per Diem Arguments for Noneconomic Personal Injury Tort Damages*, 71 Tenn. L. Rev. 1, 13 (2003). The anchor establishes an arbitrary but powerful baseline for jurors to accept or negotiate upward or downward. *See id* at 37-40. Empirical evidence confirms that anchoring "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). "[T]he 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 Psychol. 519, 526 (1996). By the 1970s, pain and suffering in personal injury cases became "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).[2]

This upward trend has continued and worsened over the past few decades, as juries have clearly struggled when attempting to assign a monetary value 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). Some juries may be influenced by whether they relate to a plaintiff or have a bias against a party, rather than the level of the harm. *See generally* Dobbs, Law of Remedies, § 8.1(4), at 398 ("[V]erdicts vary enormously . . . invit[ing] the administration of biases for or against individual parties."). They also may award higher amounts when they have sympathy for a plaintiff, bias against a deep-pocket defendant, or desire to punish the defendant rather than compensate the plaintiff. Over the years, plaintiffs' lawyers have become highly skilled at leveraging these dynamics to generate large awards.

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[2] Scholars attribute the rise in noneconomic damages to the (1) availability of future pain and suffering damages; (2) rise in automobile ownership and personal injuries resulting from automobile accidents; (3) greater availability of insurance and willingness of plaintiffs' attorneys to take on lower-value cases; (4) 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.

The result has been substantially distorted litigation outcomes. According to the Bureau of Justice Statistics, the median damage award in medical liability jury trials in state courts, adjusted for inflation, was 2.5 times higher in 2005 ($682,000), when the Missouri General Assembly enacted the limits on noneconomic damages struck down in *Watts*, than in 1992 ($280,000). *See* Lynn Langton & Thomas H. Cohen, *Civil Bench and Jury Trials in State Courts*, 2005, at 10 tbl. 11 (Bur. of Justice Stats., Apr 9, 2009). Medical negligence awards saw the most significant hikes in noneconomic damage awards, increasing by 44% from 2001 to 2005. *See id.* at 10; *see also* Thomas H. Cohen, *Medical Malpractice Trials and Verdicts in Large Counties, 2001*, at 1 (2004) (median award in medical malpractice cases was sixteen times greater than the overall median award in all tort trials). Overall, pain and suffering awards in the United States are often more than ten times those in the most generous of other nations. Stephen D. Sugarman, *A Comparative Look at Pain and Suffering Awards*, 55 DePaul L. Rev. 399, 399 (2006).

Many states, including Missouri, have responded to these dramatic rises in noneconomic damage awards by adopting commonsense statutory ceilings on them. Today, many states limit noneconomic damages, particularly in medical negligence cases,[3] with a few states limiting *total* damages in medical negligence cases.[4] Missouri's

[3] *See, e.g.*, Alaska Stat. § 09.55.549; Cal. Civ. Code § 3333.2; Colo. Rev. Stat. § 13-64-302; Iowa Code § 147.136A; Md. Cts. & Jud. Proc. Code § 3-2A-09; Mass. Gen. Laws ch. 231 § 60H, Mich. Comp. Laws § 600.1483; Mont. Code Ann. § 25-9-411; Nev. Rev. Stat. § 41A.035; N.C. Gen. Stat. § 90-21.19; N.D. Cent. Code § 32-42-02; Ohio Rev. Code Ann. § 2323.43; S.C. Code Ann. § 15-32-220; S.D. Codified Laws § 21-3-11; Tex. Civ. Prac. & Rem. Code § 74.301; Utah Code § 78B-3-410; W. Va. Code Ann. § 55-7B-8; Wis. Stat. § 893.55.

[4] *See, e.g.*, Ind. Code Ann. § 34-18-14-3; La. Rev. Stat. § 40:1299.42; Neb. Rev. Stat. §

noneconomic damages limits are well within the mainstream. Some states have lower limits. *See* Cal. Civ. Code § 3333.2(b) ($250,000 limit in medical liability cases); Idaho Code § 6-1603 ($250,000 limit in personal injury cases adjusted for inflation to $372,865 in 2019); Nev. Rev. Stat. § 41A.035 ($350,000 limit in medical liability actions). Other states have noneconomic damage limits in the same range as Missouri.[5] These limits are a rational response to a sustained distortion of liability law; they recognize that the broader public good is served when liability remains reasonable and predictable.

III. Missouri's Medical Liability Statute, Which Includes Noneconomic Damage Limits, Addressed a Health Care Crisis in Missouri Caused by Excessive Liability.

The Missouri experience has repeatedly shown that when medical liability claims are not subject to upper limits on noneconomic damages, there can be harsh, negative consequences for patients and physicians alike. In 1986, when the General Assembly enacted its first statutory cap on noneconomic damages, there had been a dramatic increase in medical negligence claims and insurance pricing problems. That year, overall claims hit a high of nearly 2,100, tripling from 695 in 1979. *See* Mo. Dept. of Ins.,

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44-2825; Va. Code Ann. § 8.01-581.15; *see also* N.M. Stat. Ann. § 41-5-6 (limiting total damages in medical liability cases except damages for medical care or punitive damages).

[5] *See, e.g.*, Haw. Stat. § 663-8.7 ($375,000 limit in personal injury cases, subject to exceptions); 18-A Me. Rev. Stat. Ann. § 2-804(b) and 24-A Me. Rev. Stat. Ann. § 4313(9)(B) ($500,000 limit in wrongful death cases and $400,000 limit in actions against health plan); Mass. Gen. Laws ch. 231, § 60-H ($500,000 limit in medical liability actions); N.D. Cent. Code § 32-42-02 ($500,000 limit in medical liability actions); S.D. Codified Laws § 21-3-11 02 ($500,000 limit in medical liability actions); Tex. Civ. Prac. & Rem. Code Ann. § 74.301 ($250,000 limit against single healthcare provider; $500,000 limit against multiple providers); W. Va. Code Ann. § 55-7B-8 ($250,000 limit in medical liability cases rising to $500,000 in cases of catastrophic injury, which adjust for inflation but to no more than 150% of the statutory amounts).

Medical Malpractice Insurance in Missouri: The Current Difficulties in Perspective 12 (2003). The loss ratio (percentage of premiums estimated to be paid on claims) reached a record high for medical malpractice insurers. *See* Mo. Dep't of Ins., 2003 Missouri Medical Malpractice Insurance Report (2004). In 1984, the loss ratio for medical malpractice insurance was 136%. *See* MDI 2002 Report, at 12. Hospitals had posted a 188.1% figure in 1984, while physicians reached an all-time high of 131% in 1981. *See id.* Initially, the law had its expected effect of stabilizing insurance premiums and maintaining order in the delivery of healthcare.

By the late 1990s, though, a new medical liability crisis gripped Missouri and other states, as the ever-increasing damage limits and the lure of jackpot awards led the number of lawsuits to climb. In 2002, the Court of Appeals added to this crisis by weakening the 1986 damages law. *See Scott v. SSM Healthcare St. Louis*, 70 S.W.3d 560 (Mo. App. 2002). The statute stated the limits applied "per occurrence," and the court held the term could apply to each act of negligence contributing to an injury—not the occurrence of the injury itself. *Id.* at 571. As a result, health care providers became liable for a multitude of noneconomic damage caps in a single case, not just one as intended. The impact of this ruling was to undo the gains of the damages limit, leading the American Medical Association to identify Missouri as one of twenty states in crisis. *See* Am. Med. Ass'n., America's Medical Liability Crisis: A National View, Mar. 15, 2005.

The numbers bear out this designation. By 2003, gross premiums written by licensed insurers in the state nearly doubled from 1996—$94,908,930 to $186,479,369. *See* Mo. Dept. of Ins., Medical Malpractice Insurance Report, October 2005, Section I,

Medical Malpractice Insurance Licensed and Non-Admitted Premiums, 1997-2004. During that period, gross premiums written by non-admitted carriers, or "surplus lines," quadrupled from $10,010,000, or 9.5% of the market, to $40,481,669, or 17.8% of the market. *Id*. The director of the Missouri Department of Insurance reported that several large carriers withdrew from the market or became insolvent, making it difficult for physicians to find affordable professional liability insurance. *See* Mo. Dept. of Ins., 2003 Current Difficulties Report, Executive Summary. Surveys of Missouri physicians in 2002 and 2004 found an average increase of 61.2% for individual premiums from 2001 to 2002, 78% between 2002 and 2003, and 38% between 2003 and 2004. *See* Mo. State Med. Ass'n. Professional Liab. Ins. Survey (2002).

In 2005, the General Assembly held hearings on the impact runaway liability costs were having on the health care Missourians receive. The House Judiciary Committee heard from Dr. Ellen Nichols, a neurosurgeon from Joplin who was forced to close her independent practice after her malpractice insurance premiums doubled less than a year after she and another doctor were named as defendants in a lawsuit from which both were later dismissed. *See* Tim Hoover, *Doctors Push for Malpractice Limits*, The Kansas City Star, Feb. 9, 2005. Dr. Nichols testified that she was considering moving to another state: "I no longer believe that it is good enough to be a good doctor and practice good medicine. . . . I need your help." *Id.* The president of the Jefferson City Medical Group said the medical liability insurance situation was worse here than in other states, creating "difficulty replacing physicians who have retired." Kris Hilgedick, *Tort Reform Takes Shape*, Jefferson City Post-Trib., Feb. 1, 2005. In response, the General Assembly passed

new noneconomic damages limits for medical negligence cases. *See* H.B. 393 (2005).

This legislation had an immediate and beneficial impact on the state's health care environment. Prior to the new law taking effect, the number of newly opened medical liability claims "spiked sharply" to 2,425 claims, eclipsing the previous record of 2,128 claims in 1986 when the original cap was enacted. Mo. Dept. of Ins., Medical 2005 Malpractice Insurance Report, Executive Summary. After the law went into effect, the number of medical liability claims declined dramatically and remained steady at levels roughly one-third lower than they were between 2000 and 2004. *See* Dept. of Ins., Fin. Inst. & Prof. Regs., 2010 Missouri Medical Malpractice Insurance Report: Statistics Section, at vii (Aug. 2011). In 2010, the number of medical liability claims reached the lowest level since 1993. *Id.*

In addition, the average medical liability award had significantly decreased. In 2010, the average award amount was $200,765, or approximately twenty percent less than in 2005. *See id.* at vi. These manageable average awards enabled insurers to cut medical liability insurance rates. For instance, the Medical Liability Alliance, which underwrote about five percent of Missouri's medical insurance market, announced a six percent across-the-board rate reduction in July 2007; the Physicians Professional Indemnity Association, which underwrites about four percent of the market, implemented a fourteen percent base rate reduction at the beginning of 2008. *See* Terry Ganey, *Doctors vs. Lawyers*, Colum. Daily Trib., Oct. 4, 2009.

Physicians and other medical personnel also began returning to Missouri. According to the Board of Healing Arts, Missouri lost 225 physicians in the three years

leading up to 2005 reform, but by 2009 the state *added* 486 doctors. *See id.* As former Missouri Governor Matt Blunt summarized:

> Missouri's medical malpractice claims are now at a 30-year low. Average payouts are about $50,000 below the 2005 average. Malpractice insurers are also turning a profit for the fifth year in a row—allowing other insurers to compete for business in Missouri.

Matt Blunt, *How Missouri Cut Junk Lawsuits*, Wall St. J., Sept. 22, 2009, at A23. The limit worked as intended.

For these reasons, when the Court struck down this reform in its 2012 ruling in *Watts*, the General Assembly began working on a new law that would withstand constitutional muster. In 2015, in bi-partisan fashion, the General Assembly specified that it was supplanting common law medical malpractice law and replacing it with a statutory cause of action subject to noneconomic damages limits—initially $400,000 for "non-catastrophic" injuries and $700,000 for "catastrophic" injuries. The measure passed the Senate by a vote of 28-2 and the House by 125-27. Governor Nixon signed the legislation into law: "This bipartisan legislation protects patients by making sure that significant financial restitution can be sought in cases of medical malpractice, while also helping to attract and retain health care providers in our state." Marie French, *Missouri Medical Malpractice Damage Caps Signed Into Law*, St. Louis Today, May 8, 2015.

Ravi Johar, an OBGYN at Mercy Hospital in St. Louis and president-elect of the Missouri State Medical Association at the time, explained the importance of controlling insurance costs: "Physicians have to be able to keep their doors open. If you have to pay

out more, it's not like a grocery store or gas station where as their costs increase, they can pass it on. We have set reimbursement. If our costs increase and our reimbursements stay the same, you just can't keep your doors open." Ray Howze, *Caps on Medical Malpractice Lawsuits Signed Into Law*, St. Louis Public Radio, May 7, 2015.[6] The creation of a statutory cause of action for medical liability claims that includes upper limits on noneconomic damages was a thoughtful, balanced response to concerns that the high costs and decreasing availability of medical professional liability insurance would hinder the ability of Missourians to access quality and affordable health care.

IV. Reasonable Limits on Noneconomic Damages in Medical Liability Cases Safeguard Available and Affordable Health Care.

As the Missouri experience has shown, limits on noneconomic damages are effective. They lead to lower medical liability insurance premiums, higher physician supply, improved patient access to care, lower defensive medicine and health care costs, and lower claim severity and frequency. *See, e.g.*, Am. Med. Ass'n, *Medical Liability Reform NOW!*, at 11-13 (2018 ed.);[7] Mark Behrens, *Medical Liability Reform: A Case Study of Mississippi*, 118 Obstetrics & Gynecology 335 (Aug. 2011); Patricia Born et al., *The Effects of Tort Reform on Medical Malpractice Insurers' Ultimate Losses*, 76 J. Risk & Ins. 197 (2009); W. Kip Viscusi & Patricia Born, *Damages Caps, Insurability, and the Performance of Medical Malpractice Insurance*, 72 J. Risk & Ins. 23 (2005). Placing reasonable limits on subjective awards is critical for ensuring that adequate, affordable

[6]https://news.stlpublicradio.org/government-politics-issues/2015-05-07/caps-on-medical-malpractice-lawsuits-signed-into-law.

[7] https://www.ama-assn.org/sites/default/files/media-browser/premium/arc/mlr-now.pdf

health care is available to the public at large, particularly in states such as Missouri that have significant rural areas where healthcare can be scarce.

First, limits on noneconomic damages increase physician supply and access to medical care. *See* AMA, *Medical Liability Reform NOW!*, at 3-4 (discussing studies). "Many studies demonstrate that professional liability exposure has an important effect on recruitment of medical students to the field and retention of physicians within the field and within a particular state." Robert Barbieri, *Professional Liability Payments in Obstetrics and Gynecology*, 107 Obstetrics & Gynecology 578, 578 (Mar. 2006). States that limit noneconomic damages experience increases in physician supply per capita compared to states without them. *See* William Encinosa & Fred Hellinger, *Have State Caps on Malpractice Awards Increased the Supply of Physicians?*, 24 Health Aff. 250 (2005); Ronald Stewart et al., *Tort Reform is Associated with Significant Increases in Texas Physicians Relative to the Texas Population*, 17 J. Gastrointest. Surg. 168 (2013). If Missouri's medical liability climate is not stable, doctors will practice elsewhere. *See* Chiu-Fang Chou & Anthony Lo Sasso, *Practice Location Choice by New Physicians: The Importance of Malpractice Premiums, Damage Caps, and Health Professional Shortage Area Designation*, 44 Health Serv. Res. 1271 (2009).

Second, noneconomic damages limits reduce the pressure to engage in defensive medicine.[8] "[T]he fear of being sued . . . leads to an increase in the quantity of care rather

[8] *See* AMA, *Medical Liability Reform NOW!*, at 5-7 (discussing studies); Timothy Smith et al., *Defensive Medicine in Neurosurgery: Does State-Level Liability Risk Matter?*, 76 Neurosurgery 105 (Feb. 2015) (neurosurgeons are 50% more likely to practice defensive medicine in high-risk states); Manish K. Sethi et al., *Incidence and Costs of Defensive*

than an increase in the efficiency or quality of care." Scott Spear, *Some Thoughts on Medical Tort Reform*, 112 Plastic & Reconstructive Surgery 1159 (Sept. 2003). Doctors may order costly tests to ward off potential liability, not for medical reasons. Others may eliminate high-risk procedures and turn away high-risk patients. *See* Brian Nahed et al., *Malpractice Liability and Defensive Medicine: A National Survey of Neurosurgeons*, PLoS ONE, vol. 7, no. 6, at 6 (June 2012) ("Reductions in offering 'high-risk' cranial procedures have decreased access to care for potentially life-saving neurological procedures."); Mass. Med. Soc'y, *Investigation of Defensive Medicine in Massachusetts*, at 3-5 (Nov. 2008) (finding 38% of physicians in the sample reduced the number of high-risk services or procedures they performed; 28% reduced the number of high-risk patients they saw). Overall, studies have shown that noneconomic damage limits and other legal reforms that reduce pressures "lead to reductions of 5 to 9 percent in hospital expenditures without substantial effects on mortality or medical complications." Donald Palmisano, *Health Care in Crisis: The Need for Medical Liability Reform*, 5 Yale J. Health Pol'y, L. & Ethics 371, 377 (2005) (citing Daniel Kessler & Mark McClellan, *Do Doctors Practice Defensive Medicine?*, 111 Q. J. of Econ. 353 (1996)).

For example, a peer-reviewed study examined the effect of damage limits on testing and treatment decisions for coronary artery disease, the leading cause of death in

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Medicine Among Orthopedic Surgeons in the United States: A National Survey Study, 41 Am. J. Orthop. 69 (2012) (96% of orthopedic surgeons surveyed reported having practiced defensive medicine to avoid liability); Mass. Med. Soc'y, *Investigation of Defensive Medicine in Massachusetts*, at 3-5 (Nov. 2008) (finding 83% of physicians reported practicing defensive medicine and that 28% of all CT scans, 27% of MRI studies, and 24% of ultrasound studies were ordered for defensive reasons).

the United States. *See* Steven Farmer et al., *Association of Medical Liability Reform with Clinician Approach to Coronary Artery Disease Management*, 10 JAMA Cardiology E1, E2 (June 2018). After adoption of damage limits, "testing became less invasive (fewer initial angiographies and less progression from initial stress test to angiography), and revascularization through [percutaneous coronary intervention] following initial testing declined." *Id*. at E8; *see also* Daniel Kessler, *Evaluating the Medical Malpractice System and Options for Reform*, 25 J. Econ. Perspectives 93, 106 (2011) ("reforms such as caps on damages . . . reduce malpractice pressure and, in turn, defensive medicine.").

Third, these reforms reduce medical liability premiums, claim severity, and claim frequency. *See* AMA, *Medical Liability Reform NOW!*, at 11-13. One study found internal medicine premiums were 17.3% lower in states with limits on noneconomic damages than in states without such limits. Meredith L. Kilgore, Michael A. Morrisey & Leonard J. Nelson, *Tort Law and Medical Malpractice Insurance Premiums*, 43 Inquiry 255, 265 (2006). Surgeons and OB-GYNs experienced 20.7% and 25.5% lower insurance premiums, respectively, in states with damage limits compared to those without them. *Id.* at 268. "[T]here is a substantial difference in the level of medical malpractice premiums in states with meaningful caps . . . and states without meaningful caps." 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).

Finally, these limits facilitate the ability of parties to reach fair settlement. *See, e.g.*, Ronen Avraham, *An Empirical Study of the Impact of Tort Reforms on Medical Malpractice Settlement Payments*, 36 J. Legal Stud. S183, S221 (June 2007) (reporting a

study of 100,000 settled cases showing that caps on noneconomic damages "do in fact have an impact on settlement payments."). Limits on noneconomic damages work.

V. Courts Across the Country Have Upheld Noneconomic Damage Limits Similar to the Limit at Issue in This Case.

As this Court has historically done, including in *Adams*, courts across the country have overwhelmingly respected the prerogative of state legislatures to enact reasonable limits on noneconomic damage awards. These courts have upheld limits on noneconomic damages that apply to all civil claims[9] and specifically to medical liability cases.[10] Courts have also upheld laws that limit a plaintiff's total recovery against healthcare providers.[11] These states include those with constitutions similar to the Missouri Constitution.

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[9] *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. App. 1998); *Kirkland v. Blaine Cnty. Med. Ctr.*, 4 P.3d 1115 (Idaho 2000); *DRD Pool Serv., Inc. v. Freed*, 5 A.3d 45 (Md. 2010); *Green v. N.B.S., Inc.*, 976 A2d 279 (Md. 2009); *Murphy v. Edmonds*, 601 A2d 102 (Md. 1992); *Simpkins v. Grace Brethren Church of Del.*, 75 N.E. 3d 122 (Ohio 2016); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007).

[10] *See, e.g., Fein v. Permanente Med. Group*, 695 P.2d 665 (Cal 1985); *Garhart ex rel. Tinsman v. Columbia/HealthONE, L.L.C.*, 95 P.3d 571 (Colo. 2004); *Scholz v. Metro. Pathologists, P.C.*, 851 P2d 901 (Colo. 1993); *Oliver v. Magnolia Clinic*, 85 So. 3d 39 (La. 2012); *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So. 2d 517 (La 1992); *Zdrojewski v. Murphy*, 657 N.W. 2d 721 (Mich. Ct. App. 2002); *Tam v. Eighth Jud. Dist. Ct.*, 358 P.3d 234 (Nev. 2015); *Condon v. St. Alexius Med. Ctr.*, 926 NW2d 136 (N.D. 2019); *Knowles v. United States*, 544 NW 2d 183 (S.D. 1996), superseded by statute; *Rose v. Doctors Hosp.*, 801 S.W. 2d 841 (Tex. 1990); *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); *Mayo v. Wisconsin Injured Patients & Families Comp. Fund*, 914 N.W.2d 678 (Wis. 2018).

[11] *See, e.g., Garhart ex rel. Tinsman v. Columbia/HealthONE, L.L.C.*, 95 P.3d 571 (Colo. 2004); *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);

After this Court accepted this case, the Supreme Court of New Mexico upheld a statutory noneconomic damages limit where its constitution similarly stated that "[t]he right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate." *Siebert v. Okun*, --- P.3d --- (N.M. 2021). There, the noneconomic damages limit was also part of a larger medical liability statute that, as here, abrogated common law claims and imposed the same substantive elements for proving medical negligence as had existed at common law. *See id.* at *6. The court found the medical liability law and its noneconomic damages limits constitutional: "we conclude that the right to trial by jury is satisfied when evidence is presented to a jury, which then deliberates and returns a verdict based on its factual findings. The legal consequence of that verdict is a matter of law, which the Legislature has the authority to shape." *Id.* at *11.

The New Mexico court stated it was swayed by the "great weight of persuasive authority" from other states that statutory damages limits do not violate the constitutional right to a jury trial. *Id.* at *12. Indeed, courts across the country have similarly held that noneconomic damages limits do not interfere with the right to trial by jury.[12] A jury determines the facts and assesses liability, and the statute applies only after that determination. *See L.D.G., Inc. v. Brown*, 211 P3d 1110, 1131 (Alaska 2009); *DRD Pool*

Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525 (Va. 1989); *Ind. Patient's Comp. Fund v. Wolfe*, 735 N.E. 2d 1187 (Ind. App. 2000); *Bova v. Roig*, 604 N.E.2d 1 (Ind. 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).

[12] *See, e.g, Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 432 (Ohio 2007); *Etheridge v. Med. Ctr. Hosps.*, 376 S.E.2d 525, 529 (Va. 1989); *Judd v. Drezga*, 103 P.3d 135, 144 (Utah 2004).

Serv., Inc. v. Freed, 5 A.3d 45, 57 (Md. 2010). For example, the Nevada Supreme Court explained that a limit on noneconomic damages for medical negligence cases "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 v. Eighth Judicial Dist. Ct.*, 358 P3d 234, 238 (Nev. 2015).

Courts in other states have also held that legislatures have the authority to limit damages. As the Idaho Supreme Court recognized, because the legislature has the power to abolish a common law cause of action—just as in Missouri—it must be able to limit damages recoverable for that action. *See Kirkland v. Blaine Cnty. Med. Ctr.*, 4 P.3d 1115, 1119 (Idaho 2000). In fact, the Wisconsin Supreme Court overruled an earlier decision nullifying such a law—as would be appropriate here with *Watts*—stating the earlier ruling "erroneously invaded the province of the legislature." *Mayo v. Wisconsin Injured Patients & Families Comp. Fund*, 914 N.W.2d 678, 684 (Wis. 2018) (overruling *Ferdon ex rel. Petrucelli v. Wisconsin Patients Comp. Fund*, 701 N.W.2d 440 (Wis. 2005)).

These laws withstand constitutional muster because they are "rationally related to the legitimate governmental interests of ensuring that adequate and affordable health care is available" to state residents. *Tam*, 358 P3d at 239; *see also Mayo*, 914 NW 2d at 693-95 (finding noneconomic damage limits are constitutional because they support the legislature's overarching goal of "ensur[ing] affordable and accessible health care for all of the citizens of Wisconsin while providing adequate compensation to the victims of medical malpractice") (quoting legislative findings, alteration in original). Although a noneconomic damages limit may prevent some plaintiffs from obtaining the same dollar

figures they may have received prior to the effective date of the statute, a person can still recover full economic damages and substantial noneconomic damages. This Court should find, consistently with the majority of states, that Missouri's medical malpractice statute and its limit on noneconomic damages is constitutional.

CONCLUSION

For these reasons, this Court should affirm the trial court's decision that § 538.210, RSMo, is constitutional and must be applied in the case at bar.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief: (1) includes the information required by Rule 55.03; (2) complies with the requirements contained in Mo. R. Civ. P. 81.18 and 84.06; and (3) contains 8,064 words.

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