IN THE SUPREME COURT OF NEW MEXICO
No. S-1-SC-37231

SUSAN L. SIEBERT,	:	
Plaintiff-Appellee,	:	
v.	:	**Court of Appeals No. A-1-CA-37286**
REBECCA C. OKUN, M.D. and WOMEN'S SPECIALISTS OF NEW MEXICO, LTD.,	:	
Defendants-Appellants.	:	

Appeal from the Second Judicial District Court, County of Bernalillo
The Honorable Victor S. Lopez, Division XXVII
No. D-202-CV-2013-05878

AMICI CURIAE BRIEF OF NEW MEXICO MEDICAL SOCIETY AND AMERICAN MEDICAL ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLANTS

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 12-318(G) and 12-320(D)(3) NMRA, *amici* certify that this brief complies with the limitations of Rule 12-318(F) NMRA. This brief has been prepared using a proportionally spaced type style or typeface (Times New Roman, 14 point font), and contains 7,189 words (inclusive of footnotes). This word count was obtained using Microsoft Word 2016.

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QUESTION PRESENTED

Whether the New Mexico Medical Malpractice Act's damages cap—which allows a substantial but not unlimited recovery for nonmedical damages, in addition to uncapped medical expenses and related benefits—is constitutional.

INTEREST OF *AMICI CURIAE*[1]

The New Mexico Medical Society (NMMS)[2] and American Medical Association (AMA)[3] are the largest associations representing physicians in New Mexico. The NMMS and AMA join this brief on their own behalves and as representatives of the Litigation Center of the AMA and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus the District of Columbia, whose purpose is to represent the viewpoint of organized medicine in the courts. *Amici* have a substantial interest in the constitutionality of the damages cap, NMSA 1978, § 41-5-6. The

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[1] No party or counsel for a party authored the proposed brief in whole or in part. No person or entity other than the *amici* made a monetary contribution intended to fund the preparation or submission of the brief.

[2] Founded in 1886, NMMS is the professional organization for medical and osteopathic doctors in New Mexico. The NMMS is dedicated to the advancement of medical science in order to serve New Mexico's healthcare needs.

[3] AMA is the nation's largest professional association of physicians, residents and medical students. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents, and medical students are represented in the AMA's policymaking process. The AMA promotes the science and art of medicine and the betterment of public health.

cap is critical to promoting the "health and welfare of the people of New Mexico by making available professional liability insurance for health care providers in New Mexico." NMSA 1978, § 41-5-2. Without it, liability insurance costs would rise, making healthcare less affordable and available for New Mexicans. The challenges that New Mexico faces with respect to attracting and retaining physicians would worsen.

Counsel for the parties received timely notice of our intent to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

New Mexico's Medical Malpractice Act (MMA), NMSA 1978, §§ 41-5-1 to -29, fosters a balanced medical liability environment through an approach that is unique among the many states with medical liability reforms.

Patients injured as a result of medical negligence receive uncapped, funded coverage for past and future medical expenses and related expenses. They can *also* receive a substantial recovery (up to $600,000) for nonmedical expenses such as lost wages and pain and suffering. Punitive damages are not subject to the MMA's damages cap. *See* NMSA 1978, § 41-5-6.

Health care providers are responsible for primary coverage up to $200,000 with excess coverage provided by an innovative Patient Compensation Fund. *See* NMSA 1978, § 41-5-25. This Fund is financed by health care providers who opt

into the MMA, meet insurance and other financial requirements, and pay an annual surcharge. *See id.*

This Court has recognized:

> [T]he Legislature created a balanced scheme to encourage health care providers to opt into the Act by conferring certain benefits to them, which it then balanced with the benefits it provided to their patients. "[T]he Legislature made professional liability insurance available to health care providers but conditioned availability to that insurance on a quid pro quo: health care providers could receive the benefits of the MMA only if they became qualified health care providers under the MMA and accepted the burdens of doing so."

Baker v. Hedstrom, 2013-NMSC-043, ¶ 17, 309 P.3d 1047, 1051-52 (quoting *Christus St. Vincent Reg'l Med. Ctr. v. Duarte-Afara*, 2011-NMCA-112, ¶ 10, 267 P.3d 70, 72). This system allows many of the most severely injured New Mexico patients to recover greater compensation under the MMA than they would under common law. *See id.* ¶ 19 (recognizing patients receive the ability to recover from the Fund, assurance that future medical costs will be covered, and assistance in retaining a medical expert).

The MMA promotes a positive medical liability and insurance environment. Before the Legislature adopted this system, health care providers had difficulty obtaining affordable liability insurance. The MMA has helped make New Mexico a more attractive place to practice medicine.

New Mexico is not alone in limiting damages in order to stabilize or improve the state's medical liability climate and promote access to affordable care.

As this brief will show, two-thirds of states limit noneconomic damages in medical liability actions or all personal injury cases. Others limit total damages in medical liability cases. The vast majority of state courts and all federal courts to our knowledge have found these laws to be constitutional, as statutory caps do not limit the factfinders' role or intrude on the judiciary's power of remittitur.

Overall, the MMA's nonmedical damages cap is pro-consumer. Every citizen in the state needs access to affordable health care. The MMA furthers that goal while providing a substantial recovery to the minority of patients who may be injured due to medical negligence and suffer extraordinary nonmedical loss.

This Court should reverse the decision below and find the MMA to be constitutional.

ARGUMENT

I. SUBJECTIVE AND UNPREDICTABLE AWARDS ADVERSELY AFFECT THE AFFORDABILITY OF LIABILITY INSURANCE AND WARRANT REASONABLE CONSTRAINTS ON DAMAGES

The MMA was a thoughtful and balanced response to concerns about the cost and availability of medical professional liability insurance and the impact on New Mexicans if physicians depart for states with more favorable tort laws. *See* NMSA 1978, § 41-5-2. Statutory caps provide predictability to general damages that can otherwise be highly variable, especially with respect to subjective awards for pain and suffering. Noneconomic damages have soared in the modern era.

Since "[p]ain cannot be measured in a market. . . . [t]he result is that there is almost no standard for measuring pain and suffering damages, or even a conception of those damages or what they represent." Dan B. Dobbs, *Law of Remedies* § 8.1(4), at 383 (2d ed. 1993).[4] "[J]uries are left with nothing but their consciences to guide them." Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 Cal. L. Rev. 772, 778 (1985).

As a New Mexico court recognized, "Without a doubt, the valuation of pain and suffering is a difficult, inexact undertaking at best. No one can measure another's pain and suffering; only the person suffering knows how much he or she is suffering, and even this person cannot accurately say what would be reasonable compensation for it." *Sandoval v. Chrysler Corp.*, 1998-NMCA-085, ¶ 13, 125 N.M. 292, 296, 960 P.2d 834, 838 (internal quotation and citation omitted). Such unpredictability negatively affects insurance rates.

Historically, these problems did not raise serious concerns 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 View of the Problem and the Legal Academy's First Reponses*, 34 Cap. U. L. Rev. 545, 560 (2006). Large awards were typically reversed. *See* Ronald J. Allen &

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

Alexia Brunet Marks, *The Judicial Treatment of Noneconomic Compensatory Damages in the Nineteenth Century*, 4 J. Empirical Legal Stud. 365, 379-87 (2007) (reporting that no tort case prior to the 20th century permitted a noneconomic damage award that exceeded $450,000 in current dollars).

The size of pain and suffering awards took its first leap after World War II as plaintiff lawyers became adept at increasing pain and suffering awards. *See* Melvin M. Belli, *The Adequate Award*, 39 Cal. L. Rev. 1 (1951). For example, during a nine-month period in 1957, 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).

At that time, general damage awards in New Mexico still paled in comparison to today. For example, a railroad worker who was brutally attacked in 1954, whose hand was rolled over by a train, who lost his fingers and who, after over a year of great pain, had his hand amputated, was awarded about $23,500 for his suffering—the equivalent of $220,000 today. *See Rivera v. Atchison, T. & S.F. Ry. Co.*, 1956-NMSC-072, ¶ 6, 61 N.M. 314, 317, 299 P.2d 1090, 1091.[5] A woman whose leg injuries resulted in lifelong limitations on her ability to stand

[5] The jury awarded $68,500 in damages, about $45,000 of which could be attributed to lost earnings. *Id.* ¶¶ 3. The remainder, $23,500 in 1954, is equivalent to about $220,000 in 2018 based on the Bureau of Labor Statistics CPI Inflation Calculator, https://data.bls.gov/cgi-bin/cpicalc.pl.

and do housework received $7,500 in 1959, the equivalent of $65,000 today, for pain and suffering. *Johnson v. Zia Co.*, 1959-NMSC-046, ¶¶ 21-23, 65 N.M. 463, 469, 340 P.2d 403, 406. In 1963, the Court stepped in after a $199,000 award arising out of an automobile-bus collision, $176,000 of which compensated for "severe and extremely painful injuries." *Hanberry v. Fitzgerald*, 1963-NMSC-100, ¶ 33, 72 N.M. 383, 393, 384 P.2d 256, 263. The Court found the award "grossly excessive" and ordered it reduced to $75,000, including $52,000 for pain and suffering (about $430,000 today).

As *Hanberry* reflects, 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). U.S. Circuit Court Judge Paul Niemeyer has observed, "Money for pain and suffering . . . provides the grist for the mill of our tort industry." Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 Va. L. Rev. 1401, 1401 (2004).

The MMA's limit on damages has helped healthcare professionals practicing in New Mexico avoid rising medical liability exposure. According to the Bureau of Justice Statistics, the median damage award in medical malpractice trials for plaintiff winners, adjusted for inflation, nearly doubled between 1996 ($345,000)

and 2005 ($679,000) in state courts nationwide, far exceeding inflation. *See* Thomas H. Cohen, *Tort Bench and Jury Trials in State Courts, 2005*, at 13 (2009); *see also* Lynn Langton & Thomas H. Cohen, *Civil Bench and Jury Trials in State Courts, 2005*, at 10 (2008) (finding median damages in medical malpractice trials in the nation's 75 most populous counties, adjusted for inflation, rose from $280,000 in 1992 to $682,000 in 2005). While damage awards remained stable in most types of civil cases between 2001 and 2005, medical malpractice awards were the exception, increasing by 44%. *See* Langton & Cohen, *supra*, at 10. And while the win-rate for medical malpractice plaintiffs may be lower than in other tort trials, the damages awarded in medical malpractice cases dwarf other tort claims. *See* Thomas H. Cohen, *Medical Malpractice Trials and Verdicts in Large Counties, 2001*, at 1 (2004) (finding median award in medical malpractice cases was nearly sixteen times greater than the overall median award in all tort trials).

Absent a statute that constrains damages, healthcare professionals face an extraordinary risk of liability. Outside the medical liability context, for example, the Court of Appeals recently affirmed a $165 million award to the family of a mother and daughter who died when their vehicle collided with a FedEx tractor trailer. *See Morga v. Fedex Ground Package Sys., Inc.*, 2018-NMCA-039, ¶ 31, 420 P.3d 586, 598, *cert. granted* (June 4, 2018). The trial court declined to order a new trial or use its power of remittitur. *Id.* The Court of Appeals observed that it

had "concluded time and again" that, while "frustrating," there is no standard for measuring the value of pain and suffering. *Id.* Instead, the court found that juries and judges must make such decisions based on their assessment of what is fair in each case. *Id.* Concern over the negative societal effects of excessive verdicts, the court found, is subject to "ongoing debate with the legislative branch about the American judicial system and any major policy changes in New Mexico." *Id.* ¶ 31 (citing *Sandoval*, 1998-NMCA-085, ¶ 17, 125 N.M. at 297, 960 P.2d at 839) ("Concern about excessive jury verdicts is part of the public debate currently focused on the American jury system."). In the context of medical liability, that public debate occurred and resulted in the MMA. The cap should be preserved.

II. REASONABLE LIMITS ON MEDICAL LIABILITY IMPROVE THE HEALTHCARE SYSTEM FOR DOCTORS AND PATIENTS

Damages limits are important for controlling outlier awards. They reduce and stabilize medical liability insurance rates, improve access to critical specialists for local residents, and lessen the incentive to engage in costly defensive medicine. Statutory limits also promote more uniform treatment of individuals with comparable injuries, facilitate settlements, and limit arbitrariness that may raise potential due process problems.

A. Lower Insurance Premiums, Losses, and Settlement Payments

Damages caps reduce losses on medical malpractice claims, *see* 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),[6] and stabilize or lower medical liability insurance premiums. *See* Am. Med. Ass'n, *Medical Liability Reform NOW!*, at 11-13 (2018 ed) [hereinafter AMA Rep.]; Mark Behrens, *Medical Liability Reform: A Case Study of Mississippi*, 118 Obstetrics & Gynecology 335 (Aug. 2011); William G. Hamm et al., *MICRA and Access to Health Care: By Lowering Health Care Costs, MICRA Has Improved Californians' Access to Care* (Berkeley Res. Group Jan. 2014).[7]

On average, internal medicine premiums are 17.3% less in states with limits on noneconomic damages than in states without limits. AMA Rep. at 11. Limits on damages have an even greater impact on doctors practicing in other specialties. Physicians in general surgery and obstetrics/gynecology experience 20.7% and 25.5% lower premiums, respectively, in states with damage caps compared to states without limits. *See id.*

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[6] *See also* Ronald Stewart, *Malpractice Risk and Cost are Significantly Reduced After Tort Reform*, 212 J. Am. Coll. Surg. 463 (2011).

[7] *See also* Daniel P. Kessler & Mark B. McClellan, *The Effects of Malpractice Pressure and Liability Reforms on Physicians' Perceptions of Medical Care*, 60 L. & Contemp. Probs. 81, 105 (1997); Congressional Budget Office, *Reducing the Deficit : Spending and Revenue Options* 35-36 (Mar. 2011).

As a 2006 Robert Wood Johnson literature review concludes, "the most recent controlled studies show that caps moderately constrain the *growth* of premiums." Michelle M. Mello, *Medical Malpractice: Impact of the Crisis and Effect of State Tort Reforms*, Research Synthesis Rep. No. 10, at 12 (Robert Wood Johnson Found. 2006) (emphasis added). A significant body of literature also shows that caps are associated with lower premiums and settlement payments.[8]

B. Increased Access to Care

"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 &

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[8] *See also* Leonard J. Nelson et al., *Medical Malpractice Reform in Three Southern States*, 4 J. Health & Biomed. L. 69, 84 (2008) ("It is clear . . . across a number of rigorous studies using a variety of data periods, measures and methods, damage caps have been shown to be effective in reducing medical malpractice insurance premiums."); Ronen Avraham, *An Empirical Study of the Impact of Tort Reforms on Medical Malpractice Settlement Payments*, 36 J. Legal Stud. S183, S221 (June 2007) (study of more than 100,000 settled cases showed that caps on noneconomic damages "do in fact have an impact on settlement payments"); 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."); Ronen Avraham et al., *The Impact of Tort Reform on Employer-Sponsored Health Insurance Premiums*, J. L., Econ. & Org., at 1 (Dec. 2010)(noneconomic damages caps lower premiums of employer-sponsored self-insured health plans, the "first direct evidence that tort reform reduces healthcare costs in in aggregate").

Gynecology 578, 578 (Mar. 2006); *see also* AMA Rep. at 2-4 (discussing studies); Mello, *supra*, at 11.

States that limit noneconomic damages generally experience increases physician supply per capita per capita compared to states without caps. *See* William E. Encinosa & Fred J. Hellinger, *Have State Caps on Malpractice Awards Increased the Supply of Physicians?*, 24 Health Aff. 250 (2005); Jonathan Klick & Thomas Stratmann, *Medical Malpractice Reform and Physicians in High-Risk Specialties*, 36 J. Legal Stud. 121 (June 2007); Ronald M. Stewart et al, *Tort Reform is Associated With Significant Increases in Texas Physicians Relative to the Texas Population*, 17 J. Gastrointest. Surg. 168 (2013).[9]

New Mexico is not isolated in the economy; it must compete with other states. If the state's legal climate is not competitive, doctors will practice elsewhere. *See* Chiu-Fang Chou & Anthony T. 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).[10]

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[9] *See also* Eric Helland & Mark H. Showalter, *The Impact of Liability on the Physician Labor Supply* ii (RAND Inst. for Civil Justice Apr. 2006) (10% increase in expected liability costs is associated with an almost 3% decrease in hours worked, with the effect much larger for physicians age 55 or older).

[10] *See also* Daniel P. Kessler et al., *Impact of Malpractice Reforms on the Supply of Physician Services*, 293 JAMA 2618 (June 2005); *see also* Joseph Nixon, Editorial, *Why Doctors Are Heading to Texas*, Wall St. J., May 17, 2008, at A9;

New Mexico is already viewed by plaintiff lawyers as a more friendly state to sue doctors for medical malpractice than Texas, which has more restrictive laws. *See* Martin Salazar, *Texas Doctor Can't be Sued in New Mexico, Court Rules*, Albuquerque J., Mar. 14, 2017. New Mexico residents in rural areas who lack access to specialists often travel to West Texas for treatment. *See Montaño v. Frezza*, 2017 NMSC-015, ¶ 31, 393 P.3d 700, 708 ("Numerous amici have informed this Court about the relative shortage of doctors, particularly specialists, in certain rural areas of New Mexico and the important role that state-operated health care facilities in Texas play in filling those gaps in care for many residents of the southern and eastern portions of our state.").[11] Nullifying New Mexico's damage cap and patient compensation system will provide a further disincentive for physicians to practice in the state, hurting New Mexico's ability to recruit and retain doctors and potentially exacerbating doctor shortages.

The public recognizes that constraining damage awards has significant societal value and plays an important part in safeguarding access to healthcare services. In 2014, California voters rejected a ballot initiative that primarily sought

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Ralph Blumenthal, *More Doctors in Texas After Malpractice Cap*, N.Y. Times, Oct. 5, 2007.

[11] *See also* David A. Matsa, *Does Malpractice Liability Keep the Doctor Away? Evidence from Tort Reform Damage Caps*, 36 J. Legal Stud. S143, S143 (June 2007) ("caps appear to increase the supply of frontier rural specialist physicians by 10-12 percent.").

to raise the state's $250,000 limit on noneconomic damages in medical liability cases to $1.1 million and index it to inflation. Over two-thirds of the voters said "no." Prop. 46 failed in every county of the state. *See* Cal. Sec. of State, Ballot Measures by County (Dec. 10, 2014).

C. Less Defensive Medicine

"[T]he fear of being sued . . . leads to an increase in the quantity of care rather 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); *see also* AMA Rep. at 4-7 (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); Brandon Roberts & Irving Hoch, *Malpractice Litigation and Medical Costs in Mississippi*, 61 Health Econ. 841 (2007) (finding Mississippi's more litigious counties had higher per beneficiary Medicare Part B expenditures).[12]

Defensive medicine also manifests itself in physicians eliminating high-risk procedures and turning away high-risk patients. *See* Brian V. Nahed et al.,

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[12] *See also* Katherine Baicker et al., *Malpractice Liability Costs And the Practice of Medicine in the Medicare Program*, 26 Health Aff. 841, 841 (2007) (higher malpractice awards and premiums are "associated with higher Medicare spending, especially for imaging services that are often believed to be driven by physicians' fears of malpractice.").

Malpractice Liability and Defensive Medicine: A National Survey of Neurosurgeons, PLOS ONE, Vol. 7, at 6 (2012) ("Reductions in offering 'high-risk' cranial procedures have decreased access to care for potentially life-saving neurological procedures.").

A survey of high-risk specialists in Pennsylvania found that 93% of them practice defensive medicine. *See* David M. Studdert et al., *Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment*, 293 JAMA 2609, 2609 (June 2005).[13] In Massachusetts, 83% of physicians reported practicing defensive medicine. 28% of all CT scans, 27% of MRI studies, and 24% of ultrasound studies were ordered for defensive reasons. 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. *See* Mass. Med. Soc'y, *Investigation of Defensive Medicine in Massachusetts*, at 3-5 (Nov. 2008).

Most recently, a peer-reviewed study examined the effect of damage caps on specific testing and treatment decisions for coronary artery disease, the leading cause of death in the United States. *See* Steven A. Farmer et al., *Association of Medical Liability Reform with Clinician Approach to Coronary Artery Disease*

[13] *See also* Manish K. Sethi et al., *Incidence and Costs of Defensive 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 possible malpractice liability).

Management, 10 JAMA Cardiology E1, E2 (June 2018). The authors focused on this area because diagnosing and treating coronary artery disease involves medical uncertainty, significant malpractice risk, and substantial cost. *Id.* The study compared the practices of approximately 75,000 physicians, about half of which practiced in states that had adopted damage limits between 2002 and 2005. *See id.* at E5. After adoption of caps, "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.[14]

"[M]alpractice reforms that directly reduce provider liability pressure lead to reductions of 5 to 9 percent in hospital expenditures without substantial effects on mortality or medical complications." Donald J. Palmisano, *Health Care in Crisis: The Need for Medical Liability Reform*, 5 Yale J. Health Pol'y, L. & Ethics 371,

[14] *See also* Daniel P. Kessler, *Evaluating the Medical Malpractice System and Options for Reform*, 25 J. Econ. Perspectives 93, 106 (2011) ("reforms such as caps on damages . . . that have a direct effect on awards reduce malpractice pressure and, in turn, defensive medicine."); Ronen Avraham & Max Schanzenbach, *The Impact of Tort Reform on Intensity of Treatment: Evidence From Heart Patients*, 39 J. Health Econ. 273 (Jan. 2015) (finding that use of invasive procedures (angioplasty or bypass) declined by some two percent after enactment of caps and that "tort reform is not associated with an increase in mortality from coronary heart disease; if anything mortality declines.").

377 (2005) (citing Daniel P. Kessler & Mark B. McClellan, *Do Doctors Practice Defensive Medicine?*, 111 Q. J. of Econ. 353 (1996)).[15]

III. LIMITING LIABILITY IS SOUND POLICY

To facilitate a stable, fair, and attractive medical liability environment, the New Mexico Legislature crafted a unique system that prioritizes and protects the ability of those who are injured by negligent medical care to be fully compensated for their past and future medical expenses, while limiting other forms of damages, such as subjective pain and suffering awards. Many states have limited damages in medical liability cases and the vast majority of courts have upheld such laws as a legitimate, constitutional public policy decision.

A. Numerous Courts Have Upheld Damages Limits

New Mexico is not alone in placing a reasonable limit on medical liability that fairly compensates individuals with injuries caused by medical negligence while promoting access to affordable healthcare for all citizens. Some states cap a plaintiff's total damages without any provision to uncap medical expenses and

[15] *See also* Leonard J. Nelson et al., *Medical Malpractice Reform in Three Southern States*, 4 J. Health & Biomed. L. 69, 84 (2008) (a link exists "between the adoption of malpractice reforms and the reduction in defensive medical practices").

related benefits.[16] About half of the states limit noneconomic damages in medical liability actions,[17] while others limit such awards for personal injuries in general.[18]

The vast majority of state courts have respected the prerogative of legislatures to enact reasonable limits on damages in medical liability cases, including limiting a plaintiff's total recovery[19] and limits on noneconomic

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[16] *See* Ind. Code § 34-18-14-3; La. Rev. Stat. § 40:1299.42; Neb. Rev. Stat. § 44-2825; Va. Code Ann. § 8.01-581.15.

[17] *See* Alaska Stat. § 09.55.549; Cal. Civ. Code § 3333.2; 1 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; Miss. Code Ann. § 11-1-60(2)(a); Mo. Rev. Stat. § 538.210; Mont. Code Ann. § 25-9-411; Nev. Rev. Stat. § .; N.C. Gen. Stat. § 90-21.19; N.D. Cent. Code § 32-42-02; Ohio Rev. Code § 2323.43; S.C. Code Ann. § 15-32-220; S.D. Codified Laws § 1; Tex. Civ. Prac. & Rem. Code § 74.301; Utah Code § 78B-3-410; W. Va. Code Ann. § 55-7B-8; *see also* 27 V.I.C. § 166b.

[18] *See* Alaska Stat. § 09.17.010; Colo. Rev. Stat. § 13-21-102.5; Haw. Rev. Stat. § 663-8.7; Idaho Code § 6-1603; Kan. Stat. Ann. §§ 60-19a01, 60-19a02; Md. Cts. & Jud. Proc. Code § 11-108; Miss. Code Ann. § 11-1-60(2)(b); Ohio Rev. Code Ann. § 2315.18; Okla. Stat. tit. 23, § 61.2; Tenn. Code Ann. § 29-39-102.

[19] *See Garhart ex rel. Tinsman v. Columbia/HealthONE, L.L.C.*, 95 P.3d 571 (Colo. 2004) (medical liability); *Gourley ex rel. Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43 (Neb. 2003) (medical liability); *Pulliam v. Coastal Emer. Servs. of Richmond, Inc.*, 509 S.E.2d 307 (Va. 1999) (medical liability); *Etheridge v. Med. Ctr. Hosps.*, 376 S.E.2d 525 (Va. 1989) (medical liability); *Schmidt v. Ramsey*, 860 F.3d 1038 (8th Cir. 2017) (medical liability); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989) (medical liability); *see also Samples v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 114 So. 3d 912 (Fla. 2013) (birth-related neurological injuries); *Indiana Patient's Comp. Fund v. Wolfe*, 735 N.E.2d 1187 (Ind. App. 2000) (alternative remedy program for medical liability); *Bova v. Roig*, 604 N.E.2d 1 (Ind. App. 1992); *St. Anthony Med. Ctr. v. Smith*, 592 N.E.2d 732 (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); *King v.*

damages.[20] In addition, many courts have upheld limits on noneconomic damages that apply to all personal injury,[21] product liability,[22] and other claims.[23] Courts have also upheld other restrictions on damages.[24]

Va. Birth-Related Neurological Injury Comp. Program, 410 S.E.2d 656 (Va. 1991) (alternative remedy program for birth–related neurological injuries).

[20] *See, e.g., Fein v. Permanente Med. Group*, 695 P.2d 665 (Cal. 1985); *Chan v. Curran*, 237 Cal. App. 4th 601 (2015); *Stinnett v. Tam,* 198 Cal. App. 4th 1412 (2011); *Garhart ex rel. Tinsman v. Columbia/HealthONE, L.L.C.*, 95 P.3d 571 (Colo. 2004); *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993); *Miller v. Johnson,* 289 P.3d 1098 (Kan. 2012); *Oliver v. Magnolia Clinic*, 85 So. 3d 39 (La. 2012); *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So. 2d 517 (La. 1992); *Estate of Needham ex rel. May v. Mercy Mem. Nursing Ctr.*, 2013 WL 5495551 (Mich. App. Oct. 3, 2013); *Johnson v. Henry Ford Hosp.*, 2005 WL 658820 (Mich. App. Mar. 22, 2005); *Jenkins v. Patel*, 688 N.W.2d 543 (Mich. App. 2004); *Zdrojewski v. Murphy*, 657 N.W.2d 721 (Mich. App. 2002); *Tam v. Eighth Judicial Dist. Court*, 358 P.3d 234 (Nev. 2015); *Knowles v. United States*, 544 N.W.2d 183 (S.D. 1996), *superseded by statute*; *Rose v. Doctors Hosp.*, 801 S.W.2d 841 (Tex. 1990); *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).

[21] *See 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); *Samsel v. Wheeler Transp. Servs., Inc.,* 789 P.2d 541 (Kan. 1990), *overruled in part on other grounds*, *Bair v. Peck*, 811 P.2d 1176 (Kan. 1991); *McGinnes v. Wesley Med. Ctr.*, 224 P.3d 581 (Kan. App. 2010); *DRD Pool Serv., Inc. v. Freed*, 5 A.3d 45 (Md. 2010); *Green v. N.B.S., Inc.*, 976 A.2d 279 (Md. 2009); *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992); *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722 (Minn. 1990); *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).

[22] *See Wessels v. Garden Way, Inc.*, 689 N.W.2d 526 (Mich. App. 2004); *Kenkel v. Stanley Works*, 665 N.W.2d 490 (Mich. App. 2003).

Federal courts have consistently upheld state law limits on total compensatory damages[25] and noneconomic damages in medical liability actions[26] and in civil actions generally.[27] The Supreme Court has recognized that:

> Our cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.' The 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object,' despite the fact that 'otherwise settled expectations' may be upset thereby. Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.

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[23] *See, e.g., Peters v. Saft*, 597 A.2d 50 (Me. 1991) (actions against servers of alcohol).

[24] *See, e.g., Quackenbush v. Super. Ct. (Congress of Cal. Seniors)*, 60 Cal. App. 4th 454 (1997) (actions by uninsured motorists and drunk drivers); *Yoshioka v. Superior Court*, 58 Cal. App. 4th 972 (1997); *Phillips v. Mirac, Inc.*, 685 N.W.2d 174 (Mich. 2004) (vicarious liability of automobile lessors); *Lawson v. Hoke*, 119 P.3d 210 (Or. 2005) (uninsured motorists).

[25] *See Schmidt v. Ramsey*, 860 F.3d 1038 (8th Cir. 2017) (upholding Nebraska Hospital Medical Liability Act's cap on malpractice damages and Excess Liability Fund); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989) (upholding Virginia's cap on total amount recoverable in medical malpractice action).

[26] *See Estate of McCall v. United States*, 642 F.3d 944 (11th Cir. 2011); *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513 (6th Cir. 2005); *Owen v. United States*, 935 F.2d 734 (5th Cir. 1991); *Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985); *Watson v. Hortman*, 844 F. Supp. 2d 795 (E.D. Tex. 2012); *Federal Express Corp. v. United States*, 228 F. Supp. 2d 1267, 1271 (D. N.M. 2002).

[27] *See Learmonth v. Sears, Roebuck & Co.*, 710 F.3d 249 (5th Cir. 2013); *Patton v. TIC United Corp.*, 77 F.3d 1235 (10th Cir. 1996); *Clarendon Nat'l Ins. v. Phillips*, 2005 WL 1041479 (D. Idaho Apr. 5, 2005); *Simms v. Holiday Inns, Inc.*, 746 F. Supp. 596 (D. Md. 1990); *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989).

Duke Power Co. v. Carolina Envt'l Study Group, Inc., 438 U.S. 59, 88 n.32 (1978) (internal citations omitted).

Applying this principle, the Tenth Circuit has observed, "When a legislature strikes a balance between a tort victim's right to recover noneconomic damages and society's interest in preserving the availability of affordable liability insurance, it is engaging in its fundamental and legitimate role of structuring and accommodating the burdens and benefits of economic life." *Patton v. TIC United Corp.*, 77 F.3d 1235, 1246-47 (10th Cir. 1996) (internal quotations and alterations omitted).

More recently, the Fifth Circuit upheld Mississippi's statutory limit on noneconomic damages in non-medical personal injury cases, finding the law did not violate the right to jury trial by interfering with the jury's fact-finding role or the separation of powers. *See Learmonth v. Sears, Roebuck & Co.*, 710 F.3d 249 (5th Cir. 2013); *see also Rieger v. Group Health Ass'n*, 851 F. Supp. 788, 793 (N.D. Miss. 1994) ("[T]his court is unwilling to conclude that Mississippi courts would find limits on noneconomic recovery in personal injury cases offensive and repugnant to fundamental public policy priorities.").

A few state courts have nullified noneconomic[28] and compensatory damage limits,[29] but the clear trend is to uphold such legislation. "Over the years, the scales in state courts have increasingly tipped toward upholding noneconomic damages caps." Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*, 33 J.L. Med. & Ethics 515, 527 (2005). More than twice as many state courts of last resort have upheld damages caps than have struck them down, including with respect to jury trial,[30] separation of powers,[31] or equal protection[32] challenges.

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[28] *See, e.g., Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010); *Lebron v Gottlieb Mem. Hosp.*, 930 N.E.2d 895 (Ill. 2010); *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633 (Mo. 2012); *Moore v. Mobile Infirmary Assoc.*, 592 So. 2d 156 (Ala. 1991); *N. Broward Hosp. Dist. v. Kalitan*, 219 So. 3d 49 (Fla. 2017); *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988), *superseded by constitutional amendment*, Tex. Const. art III, § 66 (amended 2003); *Brannigan v. Usitalo*, 587 A.2d 1232 (N.H. 1991); *Rains v. Stayton Builders Mart, Inc.*, 410 P.3d 336 (Or. App. 2018); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989), *amended*, 780 P.2d 260 (Wash. 1989).

[29] *See Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978) (medical liability).

[30] Courts have upheld caps on damages in right to jury trial challenges notwithstanding state guarantees that the right to jury trial shall remain "inviolate," as Article II, § 12 of the New Mexico Constitution provides. *See L.D.G., Inc. v. Brown,* 211 P.3d 1110, 1131 (Alaska 2009); *Fein*, 695 P.2d at 680; *Kirkland*, 4 P.3d at 1120; *Johnson*, 404 N.E.2d at 602; *Samsel*, 789 P.2d at 555; *DRD Pool Serv.*, 5 A.3d at 57; *Wessels*, 689 N.W.2d at 595; *Arbino*, 880 N.E.2d at 432; *Pulliam,* 509 S.E.2d at 315.

[31] *See Miller,* 289 P.3d at 670-75; *MacDonald,* 715 S.E.2d at 415; *Arbino,* 880 N.E.2d at 484; *Garhart*, 95 P.3d at 581; *Gourley*, 663 N.W.2d at 956; *Evans*, 56 P.3d at 1055-56; *Judd*, 103 P.3d at 145; *Kirkland*, 4 P.3d at 1122; *Etheridge*,

For example, when West Virginia's highest court upheld a $500,000 medical liability noneconomic damages limit, the court observed that its decision was "consistent with the majority of jurisdictions that have considered the constitutionality of caps on noneconomic damages in medical malpractice or in any personal injury action." *MacDonald v. City Hosp., Inc.,* 715 S.E.2d 405, 421 (W. Va. 2011).

With regard to the right to a jury trial, the Virginia Supreme Court has explained, "although a party has a right to have a jury assess his damages, he has no right to have a jury dictate through an award the legal consequences of its assessment." *Etheridge v. Medical Ctr. Hosps.*, 376 S.E.2d 525, 529 (Va. 1989). Once the jury "has ascertained the facts and assessed the damages . . . it is the duty of the court to apply the law to the facts." *Id.*[33] The Fifth Circuit has similarly reasoned that a limit on damages "comports with a judge's role of applying the law to the jury's factual findings—that is, converting the jury's award into 'the award of the law.'" *Learmonth*, 710 F.3d at 260 (citation omitted).

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376 S.E.2d at 532; *Pulliam,* 509 S.E.2d at 319; *McGinnes*, 224 P.3d at 592; *Wessels*, 689 N.W.2d at 533; *Zdrojewski*, 657 N.W.2d at 739.

[32] *See, e.g.*, *MacDonald*, 715 S.E.2d at 418; *DRD Pool Serv.*, 5 A.3d at 57; *Arbino*, 880 N.E.2d at 424; *Butler*, 607 So. 2d at 521; *Fein*, 695 P.2d at 683; *Rose*, 801 S.W.2d at 846; *Mayo*, 2018 WL 3132486, at *8-9.

[33] *See also Davis*, 883 F.2d at 1161 (it is not the jury's role to "determine the legal consequences of its factual findings").

Courts have also repeatedly rejected the argument that a statutory limit on damages unconstitutionally intrudes on the judiciary's power to order remittitur. "[A] statutory damages cap is not judicial-type remittitur; instead, such a limitation is a legitimate exercise of legislative power." *Garhart ex rel. Tinsman v. Columbia/HealthONE, L.L.C.*, 95 P.3d 571, 581 (Colo. 2004). The "trial court retains its authority to reduce by remittitur an award it determines to be excessive" and "the cap applies equally to all . . . plaintiffs, whereas remittitur operates on a case-by-case basis." *Id.* at 582; *see also Learmonth*, 710 F.3d at 264-65 (recognizing Mississippi's general noneconomic damages cap sets a non-discretionary limit on the permissible legal remedy; it does not impact remittitur, which permits a judge to suggest that the plaintiff accept a lower award if a verdict was influenced by "bias, passion, or prejudice," or is "contrary to the overwhelming weight of credible evidence"); *Gourley ex rel. Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43, 77 (Neb. 2003) ("[T]he damages cap does not act as a legislative remitter" because "[t]he cap does not ask the Legislature to review a specific dispute and determine the amount of damages.").

New Mexico law is consistent with its sister states. As the Court of Appeals has found, "the statutory cap limiting damage awards for anything other than punitive damages, medical care, and related benefits" does not violate the right to jury trial because the legislature established a new statutory cause of action, subject

to reasonable constraints, to respond to an insurance crisis and promote health care in the state. *Salopek v. Friedman*, 2013-NMCA-087, ¶¶ 52, 58, 308 P.3d 139, 157. Nor does a statutory limit violate of separation powers, as an across-the-board cap is different than remittitur, and does not affect the ability of a judge to require litigants to accept a reduction of a jury's verdict or undergo a new trial where there is evidence of passion or prejudice. *See id.* at ¶ 61, 308 P.3d at 157 (citing *Wachocki v. Bernalillo County Sheriff's Dep't*, 2010-NMCA-021, ¶ 49, 147 N.M. 720, 228 P.3d 504). The Legislature's decision to help ensure that New Mexico's doctors could obtain professional liability insurance coverage precludes an equal protection challenge. *Id.* ¶¶ 67-69, 308 P.3d at 159. As a federal court has found in rejecting a constitutional challenge to the MMA, the system established by this law "is rationally related to the legislative goal of ensuring a source of recovery for victims of medical malpractice and curbing the runaway costs of healthcare." *Federal Express Corp. v. United States*, 228 F. Supp. 2d 1267, 1271 (D. N.M. 2002).

B. This Court Should Adhere to its Tradition of Respecting the Legislature's Tort Policy Decisions

In New Mexico, there is a long-standing presumption that acts of the Legislature are constitutional. *City of Albuquerque v. Jones*, 1975-NMSC-025, ¶ 6, 87 N.M. 486, 488, 535 P.2d 1337, 1339. This Court "will not question the wisdom, policy, or justness of legislation," because that is the province of the

Legislature. *Madrid v. St. Joseph Hosp.*, 1996-NMSC-064, ¶ 10, 122 N.M. 524, 530, 928 P.2d 250, 256.

The MMA's system of compensation, including its limit on damages and Patient Compensation Fund, promotes sound policy objectives. The MMA not only advances the ability of patients to obtain compensation for medical expenses, it fosters a stable medical liability insurance market, reduces defensive medicine, and is a positive factor in drawing physicians to the state.

Like other courts, this Court should reject plaintiff's invitation to "second-guess the Legislature's reasoning behind passing the act." *Gourley*, 663 N.W.2d at 69; *see also C.J. v. Dep't of Corrections*, 151 P.3d 373, 381 (Alaska 2006); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 434 (Ohio 2007); *Murphy v. Edmonds*, 601 A.2d 102, 115 (Md. 1992). Most recently, the Wisconsin Supreme Court, overruling prior law invalidating a statutory limit on damages in medical malpractice actions, held that it "will not reweigh the policy choices of the legislature, because rational basis review does not allow us to substitute our personal notions of good public policy for those of" the legislature." *Mayo v. Wisconsin Injured Patients & Families Comp. Fund*, 914 N.W.2d 678, 698 (Wis. 2018) (internal citations and alterations omitted).[34]

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[34] Only one state high court in recent years has reevaluated and reweighed legislative findings to invalidate a noneconomic damage cap as lacking a rational basis. *See N. Broward Hosp. Dist. v. Kalitan,* 219 So.3d 49, 56-59 (Fla. 2017)

This Court should adhere to its tradition of respecting the legislature's authority to decide broad tort policy rules for New Mexico. *See Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 12, 137 N.M. 734, 739, 114 P.3d 1050, 1055 (recognizing that "[o]rdinarily we defer to the Legislature's judgment in enacting social and economic legislation" in ruling attorney fee cap in workers' compensation law did not violate due process or equal protection); *Cummings v. X-Ray Assocs. of N.M., P.C.*, 1996-NMSC-035, ¶ 30, 121 N.M. 821, 830, 918 P.2d 1321, 1330 (upholding three-year medical liability statute of repose for health care providers, finding it furthers the MMA's stated goal of assuring adequate malpractice insurance coverage in the New Mexico medical profession). Because of the inherent strengths of the legislative process, the legislature can carefully focus on how tort law affects the availability and cost of health care delivery.[35] It did so in enacting the MMA. The cap should be upheld for the "sake of [New Mexico] and the health of all New Mexicans." Editorial, *A Healthy NM Needs a Cap on Malpractice Verdicts*, Albuquerque J., Apr. 4, 2018.

(extending *Estate of McCall v. United States*, 134 So. 3d 894, 905-12 (Fla. 2014) (plurality opinion)).

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

CONCLUSION

For these reasons, this Court should reverse the trial court and find the Medical Malpractice Act's limit on nonmedical damages is constitutional.

Respectfully submitted,

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