IN THE SUPREME COURT OF OHIO

AMANDA BRANDT,	:	
	:	
Appellant,	:	Case No. 2020-0031
	:	
v.	:	
	:	
ROY POMPA,	:	On Appeal from the Cuyahoga County
	:	Court of Appeals, Eighth Appellate
Appellee.	:	District, Case No. 109517

MERIT BRIEF OF AMICUS CURIAE OHIO ALLIANCE FOR CIVIL JUSTICE IN SUPPORT OF APPELLEE

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INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE

A. Amici's Current Interest

The Ohio Alliance for Civil Justice ("OACJ" or "*amicus*") is a group of small and large businesses, trade and professional associations, professionals, non-profit organizations, local government associations and others.[1] OACJ members support a balanced civil justice system that not only awards fair compensation to injured persons, but also imposes sufficient safeguards to ensure that defendants are not unjustly penalized and plaintiffs not unjustly enriched. OACJ also supports stability and predictability in the civil justice system in order that Ohio's businesses and others may know what risks they assume as they carry on commerce in this state.

The OACJ strongly supported the comprehensive tort reform measures contained in Amended Substitute Senate Bill 80 ("S.B. 80"), including the limitations on noneconomic damages, codified in R.C. 2315.18, which were critical to the General Assembly's 2005 tort reform effort. The noneconomic damage limitations in R.C. 2315.18 are presently before the Court in this case in which Appellant, Amanda Brandt ("Brandt"), argues that the statutory limits are unconstitutional as applied to her. The OACJ filed amicus briefs in support of S.B. 80 when several of its provisions were challenged as being facially unconstitutional in *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420 and when the noneconomic damage cap was challenged as unconstitutional as applied in *Simpkins v. Grace Brethren Church of Delaware, Ohio*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122 ¶ 49 . In both cases, the constitutionality of R.C. 2315.18's noneconomic damage cap was upheld.

[1] The OACJ leadership includes members from the NFIB Ohio, the Ohio Chamber of Commerce, the Ohio Society of Certified Public Accountants, the Ohio Hospital Association, the Ohio State Medical Association, the Ohio Manufacturers' Association, the Ohio Council of Retail Merchants, other organizations, businesses and professionals.

For the reasons set forth herein, the OACJ urges the Court to follow its sound reasoning in *Arbino*, as affirmed in *Simpkins*, to declare R.C. 2315.18 constitutional as applied in this case.

B. Background of the Noneconomic Damage Caps

The OACJ, which includes thousands of Ohio businesses, employers, and professionals has been a proponent of reasonable civil justice reform measures in Ohio for decades. The OACJ strongly supported S.B. 80, a comprehensive tort reform bill that became effective on April 7, 2005. S.B. 80 included the statute creating the noneconomic damage limitation at issue. After considering weeks of testimony and multiple economic and other studies, the General Assembly found that Ohio law was sorely in need of a "fair system of civil justice" that balanced the rights of tort claimants with the rights of those who have been sued. S.B. 80, Section 3(A)(2); *see Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 53-55.

The General Assembly identified runaway noneconomic damages as a major impediment to establishing a fair system of civil justice. Noneconomic damages, which are by their nature inherently subjective, incapable of measure, and unpredictable, had been inflated in the civil tort system by, among other factors, "the improper consideration of evidence of wrongdoing." S.B. 80, Section 3(A)(6)(d).

These "inflated damage awards" create an "improper resolution of civil justice claims," which in turn, increase the cost of litigation. *Id.* These increased litigation costs are ultimately borne by the general public "through higher prices for products and services" – the so-called "litigation tax." *Id.*

In order to address this statewide problem, the General Assembly enacted a comprehensive package of reform measures that included R.C. 2315.18's statutory limitations on certain

noneconomic damages.[2] In enacting R.C. 2315.18 the General Assembly sought to strike an appropriate balance between the rights of those injured by the negligent acts of others, the rights of defendants, and the rights of Ohio's citizenry by allowing full recovery of economic damages and limiting noneconomic damages in cases where the injured person did not suffer a severe permanent physical injury as defined in the statute.

Ultimately, the General Assembly designed R.C. 2315.18 to limit noneconomic damages to "the greater of two hundred fifty thousand dollars or an amount that is equal to three times the economic loss, as determined by the trier of fact, of the plaintiff * * * to a maximum of three hundred fifty thousand dollars for each plaintiff" or $500,000 “for each occurrence” that is the basis of a tort action. These limitations do not apply to persons who sustain tort injuries involving permanent and substantial physical deformity, loss of use of a limb or bodily organ system, or for an injury that deprives a person of independently caring for herself and performing life-sustaining activities.[3] *See* R.C. 2315.18(B)(3).

Brandt contends that these noneconomic damage caps, as applied to her, violate multiple provisions of the Ohio Constitution – namely the right to trial by jury (Article I, Section 5), due course of law (Article I, Section 16), equal protection (Article I, Section 2), and open courts (Article I, Section 16). She also asserts that this Court’s decision finding R.C. 2315.18 to be facially constitutional “must be overruled.”

This Court has already upheld the constitutionality of R.C. 2315.18 against each of these challenges, first in *Arbino*, which involved a facial challenge to the constitutionality of the statute,

[2] Ohio is not unique in enacting limits on noneconomic damages. At the time R.C. 2315.18 was adopted, more than 20 states had already adopted some form of a limitation on noneconomic damages, and some had limited total damages, including economic damages.

[3] The injuries which are exempt from R.C. 2315.18’s noneconomic damage caps are sometimes referred to as “catastrophic” injuries, but that term is not used in the statute.

and later in *Simpkins*, which involved an as applied challenge. *Arbino* has been a crucial, stabilizing component of Ohio tort law. There is no reason for the Court to now minimize *Arbino's* effect by accepting Brandt's expansive "as-applied" challenge and set aside the statute, especially since her arguments are substantively the same as those in *Arbino* and in *Simpkins*.

Although Brandt claims to challenge the constitutionality of the statute "as applied" to her, it is apparent that she is attempting to create a new exception to the statute or expand R.C. 2315.18's severe permanent physical injury exception to include persons who have not suffered injuries as defined in the statute – all in an attempt to avoid the statutory limitations on noneconomic damages in this and future cases. Regardless of whether Brandt seeks to create a new exception or to expand the current exception, her efforts should be rejected as there is no reason for the Court to deviate from the statute in this case. As with all "as applied" constitutional challenges, the Court should decide this case on narrow grounds based on the record facts. *See Yajnik v. Akron Dept. of Health*, 101 Ohio St.3d 106, 2004-Ohio-357, 802 N.E.2d 432.

STATEMENT OF THE CASE AND FACTS

Amicus defers to the Statement of the Case and Facts of Appellee, which it incorporates herein by reference.

ARGUMENT

How much money does it take to make a victim of serial, childhood rape "whole"? Twenty million dollars? One-hundred million? Fifty billion? The answer, of course, is that there is no sum, because such a victim cannot be "made whole" with an award of money damages at all. The nature of the psychological trauma suffered is not, in fact, measurable or compensable in terms of dollars in the first place. *See, generally*, Joseph H. King, *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. Rev. 163, 171-180 (2004). Yet, "[w]e have come to accept almost without question the monetary evaluation of the immeasurable perturbations

of the spirit. But why should the law measure in monetary terms a loss which has no monetary dimension? * * * To put a monetary value on the unpleasant emotional characteristics of experience is to function without any intelligible guiding premise." Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 Law & Contemp. Probs. 219, 222 (1953). It is precisely this incoherence—and the significant and compelling practical and jurisprudential problems to which it gives rise—that the General Assembly properly addressed when it passed the noneconomic damages cap in R.C. 2315.18.

Black's Law Dictionary defines "noneconomic damages" as "[d]amages that cannot be measured in money." 11th ed. 2019, Damages, "noneconomic damages." Yet, as this Court has recognized and as Brandt herself acknowledges, "it is a rule of universal application in a tort action, that the measure of damages is that which will compensate and make the plaintiff whole." *Pryor v. Webber*, 23 Ohio St.2d 104, 107, 263 N.E.2d 235 (1970) (citing *Lawrence v. Cobb*, 35 Ohio St. 94 (1878) and *Mahoning Valley Ry. Co. v. DePascale*, 70 Ohio St. 179, 71 N.E. 633 (1904)); Merit Brief of Appellant Amanda Brandt ("AB"), p. 8. Thus, compensatory, noneconomic damages are those damages monetarily sufficient to fully compensate a tort victim for damages suffered that cannot be measured in money. In short, the entire concept is a category mistake. *See, e.g., Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 930, fn. 21 (9th Cir. 2004) (citing Gilbert Ryle, *The Concept of Mind* 15 (1949) (a category mistake treats a concept "as if [it] belonged to one logical type or category. . ., when it actually belongs to another")).

While Brandt asserts that there is nothing "subjective about the [noneconomic, psychological] harm caused to child victims of sexual abuse,"—no one disputes the *reality* of such harm—"one cannot deny that" the law's category mistake renders any attempt to assign a monetary value to such harm for purposes of compensation "*inherently* subjective," as this Court has

repeatedly recognized. *See Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, ¶ 69 (emphasis added); *Simpkins v. Grace Brethren Church of Delaware, Ohio*, 149 Ohio St.3d 307, ¶ 49.

Brandt insists that the severity of her trauma and the egregiousness of the tortious conduct that produced it makes her argument against Ohio's noneconomic damages cap stronger, at least as the law has been applied in her case. AB, p. 12. But the truth is, the nature of what Brandt suffered is a *legal* argument *for* the statutory damages cap. After all, how can a juror tell the victim of serial childhood abuse that any sum of money is too much for emotional and psychological wounds when there is no objective standard against which to measure the award in the first place? *See* King at 175 ("At what point then have we awarded enough when more can still, we are told, possibly yield more psychic benefit?"). It is precisely for that reason that the issue in this case, as in every case of noneconomic damages, is not one of degree but rather one of kind. For it is in exactly this circumstance—where the injury is caused by reprehensible conduct, yet is utterly impervious to objective economic measurement—that the consequences of the law's category mistake are most apparent. Without "any intelligible guiding premise" there is nothing other than sentiment to inform the jury. Jaffe at 222. And without legislative action capping such an award, there is no upper limit to what could be perceived as appropriate.

Brandt acknowledges the inherent subjectivity of such awards when criticizing the cap, asserting that there is no "nonarbitrary, rational basis [upon which] a legislature [could] determine that an award of $250,000.00 is adequate to compensate a minor" who experienced what she did. AB, p. 17. But the same is true of a jury's determination that $20 million is adequate. Merely observing *who* decides is not an answer to the inherent arbitrariness and unpredictability of *what* is being decided. Brandt's entire position rests on a wholly irrational treatment of the jury's equally subjective and unavoidably arbitrary determination of noneconomic damages not only as

sacrosanct, but as somehow objectively correct, *i.e.*, as the true measure of "full compensation." AB, p. 14, 18. Yet the jury in the proceedings below was charged with the responsibility not only to assign an amount of money to "[d]amages that cannot be measured in money," but to monetize on purely subjective terms, an irreparable harm to begin with. *See State v. Buchhold*, 727 N.W.2d 816, 826, 2007 S.D. 15, ¶ 40 (S.D. 2007) (child sex abuse causes irreparable harm). Legislatively limiting the consequences of such incoherence does not "defeat the very purpose of tort law," as Brandt claims (AB, p. 22)—it helps to restore it. R.C. 2315.18 is a narrowly tailored solution to the litany of practical and jurisprudential problems that emerge when inherently subjective awards of noneconomic damages are left entirely unconstrained by the law.

Once the General Assembly decided to permit the assignment of monetary value to unmonetizable injuries, though only up to a certain amount, the permanent and disabling physical injury exceptions were necessary and appropriate to ensure that those with the most objectively severe injuries do not bear the entire burden of the cap. *See Morris v. Savoy*, 61 Ohio St.3d 684, 576 N.E.2d 765 (1991). But that accommodation is not a refutation of the underlying category mistake, nor is it a critique of the compelling interest in mitigating the deleterious impact uncapped awards have on our state's civil justice system and economy. The fact that such legislative compromise includes exceptions only for awards compensating the most debilitating *physical* injuries—awards that are demonstrably both less subjective and less prone to caprice than those for purely emotional and psychological injuries—is only an illustration of how R.C. 2315.18 is, indeed, narrowly tailored to achieve its compelling objectives. Brandt's argument is simply to double down on the error by ignoring altogether the problem of subjectivity, and instead emphasizing the harrowing nature of her experience—precisely the kind of affective appeal to sentiment that justifies the damages cap in the first place.

Ohio's decision to cap the recovery of damages that, by definition, have been awarded "without any intelligible guiding premise" restores the compensatory function of our tort system, rather than undermining it. The philosophical incoherence of noneconomic damages alone is a compelling interest worthy of legislative attention—but that incoherence also produces real world consequences that justify the law that is being challenged before this Court, yet again. Because both the statutory noneconomic damage cap and its carefully crafted exceptions are narrowly tailored to achieve those compelling state interests, the statute should be upheld. This Court should conclude—once again—that R.C. 2315.18 was and is a constitutional exercise of legislative power, even as applied to Brandt. Those who would have our state embrace a different policy should bring their arguments to the policy-making branch of our representative government, where such disputes belong.[4]

Proposition of Law No. 1:

> **R.C. 2315.18, as applied to minor victims of sexual abuse that suffer severe and permanent injuries, violates constitutional right of due process of law, equal protection of the laws, trial by jury, and open courts and a remedy as guaranteed by the Ohio Constitution.**

A. Standard of Review

All statutes enjoy "a strong presumption" that they are constitutionally sound. *Arbino* at ¶ 25 (citing *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 418-419, 633 N.E.2d 504 (1994)). Indeed, in order to reach the conclusion that a statute is unconstitutional, this Court must conclude that, "beyond a reasonable doubt[,] [ ] the legislation and constitutional provisions are clearly incompatible." *Id*. (citing *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59, 57 O.O. 1134, paragraph one of the syllabus). To invalidate a statute on its face, a plaintiff must

[4] Even now, modifications to the law are being considered to address some of the policy concerns Brandt raises in her brief. *See, e.g.*, H.B. 199.

show that there is "no set of circumstances in which [the] statute would be valid." *Id.* at 473. When a statute is challenged "as-applied," a plaintiff "must prove by clear and convincing evidence that the statute is unconstitutional when applied to [plaintiff's] set of facts." *Simpkins* at ¶ 22 (citing *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 181)).

In her First Proposition of Law, Brandt purports to bring an as-applied challenge to R.C. 2315.18, specifically arguing that the noneconomic damages cap is unconstitutional "as applied to minor victims of sexual abuse who suffer severe and permanent [non-physical] injuries." AB, p. 12. Thus, she "bears the burden of presenting clear and convincing evidence of a presently existing set of facts that make the statute[ ] unconstitutional and void when applied to those facts." *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, ¶ 38 (citing *Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St. 329, 55 N.E.2d 629, 28 O.O. 295 (1944), paragraph four of the syllabus)).

Generally, laws that do not implicate fundamental rights are reviewed only under a rational basis test. *Arbino* at ¶ 49. Such statutes will be upheld as constitutional, so long as they are "reasonably related to a legitimate government interest" (*State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 18), that is, they "bear[ ] a real and substantial relation to the public health, safety, morals or general welfare of the public and [are] not unreasonable or arbitrary." *Arbino* at ¶ 49. However, even if a law infringes upon a fundamental right, it still may be constitutionally permissible, so long as it can survive "strict scrutiny." *Harrold* at ¶ 39 (citing *Sorrell* at 423). A law passes strict scrutiny if it is "narrowly tailored to promote a compelling governmental interest." *Id.*

B. Both the noneconomic damages cap and the exception for permanent, physical deformity or disability survive even the strictest scrutiny, making a constitutional analysis unnecessary

The noneconomic damages cap—and the statutory exception for certain categories of permanent, debilitating, physical injury—are narrowly tailored to serve compelling governmental interests. Although the proper standard to apply to R.C. 2315.18 is mere rationality review, the law's survival of even strict scrutiny renders any dispute over the correct standard moot. That is, even if the Court were to conclude that the statute impinges upon one or more of Brandt's constitutional rights, the law survives her challenge.

1. R.C. 2315.18's noneconomic damages cap survives strict scrutiny

a. The noneconomic damages cap serves compelling governmental interests

A compelling state interest has been defined generally as an "'interest[ ] of the highest order,' [an] 'overriding state interest,' [or an] 'unusually important interest." *Republican Party of Minn. v. White*, 416 F.3d 738, 749 (8th Cir. 2005) (internal citations omitted). Ultimately, it is an interest that is "important enough to justify the restriction" at issue, and will be viewed as more or less compelling depending on the nature of the interest and the degree to which the law in question effectively vindicates that interest. *Id*. (collecting cases). The noneconomic damages cap serves a litany of compelling state interests, all of which are derived in some measure from the inherent subjectivity of unlimited noneconomic damages awards.

i. The cap minimizes the subjectivity inherent in noneconomic damage awards, which is its own compelling interest

Removing or at least moderating the inherent subjectivity in monetary awards for noneconomic injuries is itself a compelling interest of the state, because the entire function of such awards in the tort system is compensation. *Pryor* at 107. If the system is failing to achieve justice in that regard, by awarding something other than "the measure of damages [ ] that [ ] will

compensate and make the plaintiff whole," (*id.*), then the state certainly has an interest in addressing a form of damages that is distorting the civil justice system's ability to achieve its foundational objective. This is not merely an observation that "subjectivity is bad," but rather that it is diametrically opposed to how awards of compensatory damages in our system of civil justice are supposed to function. As this Court has observed, "[o]rdinarily, the injured party must be able to prove not only that he suffered a particular type of injury, but also the pecuniary value thereof." *Columbus Finance, Inc. v. Howard*, 42 Ohio St.2d 178, 184, 327 N.E.2d 654 (1975). However, "the existence and value of damages attributable to mental anguish and humiliation are notoriously difficult to prove * * * and practically impossible to value." *Id.*

Because noneconomic damage awards are "inherently subjective," their amount is left to the unfettered and arbitrary discretion of juries in the absence of a legislative damages cap. *Arbino* at ¶ 69. Black's Law Dictionary defines "subjective" as that which is "[b]ased on an individual's perceptions, feelings, or intentions, *as opposed to externally verifiable phenomena*," (emphasis added), yet "actual damages" are quite emphatically those which can be *proved* with evidence. Black's Law, Subjective; Damages: "actual damages"; Prove. By definition, there is literally no standard of measurement pursuant to which noneconomic damages can be objectively "proved," but rather only "perceptions, feelings, or intentions" according to which such damages can be intuited. *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 348, fn. 5 (1988), (noneconomic damages "are established through the subjective discretion of the jury") (Blackmun, J. concurring); *Long v. East Coast Waffles, Inc.*, 762 Fed. Appx. 869, 872 (11th Cir. 2019) (declining to question the jury's determination precisely because "the harm is subjective and evaluating it depends considerably on the demeanor of the witnesses," not the factual substance of their testimony); *Taken Alive v. Litzau*, 551 F.2d 196, 198 (8th Cir. 1977) ("the jury should not

pick a figure out of the air…," and acknowledging that "exact compensation for pain and suffering is *impossible*.") (emphasis added). The state has a compelling interest in addressing the "arbitrary indeterminateness" in our tort system that deforms its compensatory function by requiring jurors to answer an unanswerable question predicated on feelings and not facts. *See* King at 174-175.

ii. The cap minimizes the influence of improper factors in noneconomic damage awards and restores faith in the justice system

Precisely because of their inherent subjectivity and arbitrariness, awards for noneconomic damages often are improperly influenced by impermissible factors not related to compensation in any way. *Arbino* at ¶ 54. After all, if there is no "intelligible guiding premise" (Jaffe at 222) to constrain juries in the task of measuring monetarily "damages that cannot be measured in money," (Black's Law, "noneconomic damages") then it should come as no surprise that considerations other than compensation enter into juries' considerations. Indeed, Brandt offers a litany of examples of her own inability to justify such awards on a truly compensatory basis. For example, Brandt asserts that the jury awarded her $20 million, not as compensation for her injuries, but as "recognition and deterrence…"; she frames her attack on the physical injury exceptions according to what it "tells perpetrators" rather than how it affects compensation for prevailing plaintiffs; and she emphasizes the egregiousness and intentionality of the tortious conduct at issue in a manner more befitting a discussion of punitive—not compensatory—damages. *See* AB, pp. 13, 16, 31-32. These arguments are an acknowledgment that the noneconomic damages that the jury awarded Brandt are punitive, symbolic,[5] or some combination of the two, neither of which is a proper basis

[5] Notably, to the extent such damages are symbolic, permitting the jury to make an award prior to application of the caps, as the statute clearly mandates, is sufficient. Whether the damages are recovered is irrelevant to whether the severity of Brandt's injuries have been "recognized" by the jury in rendering its award. *See also*, jury trial discussion, *infra*, regarding the dynamic between the jury's fact-finding function of injury and the court's legal function with respect to remedies.

for an award of *compensatory* damages. *Digital & Analog Design Corp. v. North Supply Co.*, 9th Dist. Lorain No. 90CA004809, 1990 WL 190359, *2 (Nov. 28, 1990) ("punitive damages do not serve a compensatory purpose"); *Zanakis-Pico v. Cutter Dodge, Inc.*, 98 Hawai'i 309, 329, 47 P.3d 1222, 1224 (2002) ("the distinction between "nominal damages," a symbolic award, and compensatory damages that are of a small amount, should be maintained").

The state has a compelling interest in preventing this adulteration of the compensatory function for a number of reasons. To begin with, such an approach is facially improper. If the state has no interest in ensuring that the civil justice system's mechanism for awarding compensatory damages actually serves its compensatory function, then it is unclear what governmental interest could ever be compelling. In addition, permitting improper influences in jury awards can result in double awards for the same injury or for the same conduct, since punitive damages are also separately awarded by the jury. Ohio's noneconomic damage cap specifically prohibits the jury from considering evidence of the defendant's guilt or wrongdoing or any evidence offered for the purpose of punishment, rather than compensation. R.C. 2315.18(C). But, as Brandt's own arguments show, it is virtually impossible to prevent such contamination in practice. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003) (observing that noneconomic damages for emotional harms frequently include a punitive element precisely because "there is no clear line of demarcation" thereby often resulting in "duplicat[ion]" (citing Restatement (Second) of Torts, sec. 908)); *see* King at 176, fn. 90.

Thus, not surprisingly, subjective noneconomic damages awards undermine faith in the justice system itself. Subjective and capricious awards lead the public to view the justice system as unprincipled and arbitrary, "foster[ing] the perception" that a claimant's ultimate recovery "depends primarily on the political or ideological inclinations of [reviewing] judges" rather than

on the actual facts of the plaintiff's case. Paul DeCamp, *Beyond State Farm: Due Process Constraints on Noneconomic Compensatory Damages*, 27 Harv. J. L. & Pub. Pol'y 231, 267 (2003) (growth in awards without objective criteria for review "leads to both arbitrary results and the perception that the process is unprincipled"). The state's interest in preserving faith in our system of justice cannot be overstated. As this Court has held in other contexts, "enhance[ing] respect for, and confidence in, the judiciary" are interests that "are compelling," and "public confidence in the judiciary," in particular, is a "state interest of the highest order." *In re Judicial Campaign Complaint Against O'Toole*, 141 Ohio St.3d 355, 2014-Ohio-4046, 24 N.E.3d 1114, ¶ 25-26 (citations omitted). Indeed, the "compelling interest" of faith in the judicial system prevails, even when it prevents an aggrieved party from pursuing any civil redress at all. *See Imbler v. Pachtman*, 424 U.S. 409, 430 (1976) (discussing rationale for prosecutorial immunity from civil liability)).

iii. The cap provides an objective standard for judicial review of noneconomic damages awards

Relatedly, the subjectivity of noneconomic damages awards plagues not only the jury's fact-finding process, but also produces a complete lack of any controlling, reviewing principle for excessiveness (or inadequacy) as a matter of law, by judges charged with that responsibility.[6] *See, e.g., Larrissey v. Norwalk Truck Lines*, 155 Ohio St. 207, 98 N.E.2d 419 (1951) (review for excessiveness); *Staley v. Allstate Property Cas. Ins. Co.*, 10th Dist. Franklin No. 12AP-1085, 2013-Ohio-3424 (review for inadequacy). "Just as it is unclear exactly what a jury ought to do in awarding damages for intangible injuries, it is nearly as unclear just what a court ought to do in reviewing such awards." DeCamp at 264. While some have suggested that examining factually

[6] *See* jury trial discussion, *infra*, for the historical role of judges in reviewing verdicts and damages awards.

similar cases can help to bring objectivity to the process of judicial review of such awards, the argument only further illustrates the underlying problem. For one thing, it constitutes an admission that the facts of a plaintiff's own case cannot supply adequate evidentiary material according to which an award can be reviewed. For another, it simply pushes the problem of arbitrariness and subjectivity back a step in the analysis: On what basis are the comparator awards for similar injuries any less subjective or any more "accurate"? By comparison to yet earlier awards? In the end, it is turtles all the way down.

iv. The cap eliminates or minimizes unlawfully discriminatory awards for noneconomic damages

The process of comparison among cases and awards does reveal one of the more pernicious consequences of an uncapped, noneconomic damages regime: The problem of irrationally discriminatory awards. When juries possess no "intelligible guiding principle" according to which they must monetarily evaluate a non-monetary injury, it should come as no surprise that they frequently render disparate awards to prevailing plaintiffs who suffer similar injuries. This Court has already noted such arbitrary disparities as posing their own constitutional problem. *See Sorrell* at 425. But even more than that, research has shown that the differences in awards are not merely random. Indeed, there is evidence that the disparities tend to fall rather glaringly along racial lines as well. *See, e.g.*, Erik J. Girvan & Heather Marek, *Psychological and Structural Bias in Civil Jury Awards*, 8 J. Aggression, Conflict, & Peace Res. 247-57 (2016) (observing up to a 40% racial disparity in noneconomic damages awards due to their subjective and discretionary nature); King at 176, fn. 84 (noting the improper influence of "race, gender, and social and physical attractiveness" in such awards). And as this Court has stated unequivocally, the "[t]he government clearly has a compelling interest in avoiding racial discrimination." *Ritchey Produce Co., Inc. v. Ohio Dept. of Adm. Serv.*, 85 Ohio St.3d 194, 200, 707 N.E.2d 871, 877 (1999).

v. The cap eliminates the deleterious economic impact of unpredictable, runaway noneconomic damages awards

The damages cap also serves important, economic interests of the state. As documented by fellow *amici*, the inherent subjectivity of noneconomic damages has historically generated both unpredictable and, in recent decades, extravagantly high awards in the absence of statutory caps. *See, e.g.*, Brief of Amici Curiae Chamber of Commerce of the United States of America, et al., at 9-13 (describing the exponential increase in award sizes since the 1950's). And as this Court recognized in *Arbino*, the legislature relied on documented, data-driven research showing how the "uncertainty related to the [then-]existing civil litigation system and rising costs associated with it were harming the economy," including with respect to employment, productivity, and output, as well as the business climate in Ohio more generally. *Arbino* at ¶ 53. While Brandt does not completely ignore the economic justifications for the cap, her only response is to observe that, according to U.S. News & World Report's 2021 Economy Rankings, there are states without caps that "out-perform" Ohio economically—whatever that means. AB, p. 31. What it certainly does not mean is that the caps have proven a failure in serving the specific and laudatory economic objectives that the General Assembly cited, with evidence, when it passed the law in 2004.

Each of the foregoing is independently sufficient to satisfy the compelling interest requirement of strict scrutiny. In the aggregate, it is beyond reasonable dispute that the non-economic damages cap serves state interests of the utmost importance.

b. The noneconomic damages cap is narrowly tailored to its objectives

"A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *State v. Burnett*, 93 Ohio St.3d 419, 429, 755 N.E.2d 857, 866 (2001) (quoting *Frisby v. Schultz*, 487 U.S. 474, 485, 108 S.Ct. 2495, 2503, 101 L.Ed.2d 420, 432 (1988)).

Ohio's noneconomic damages cap is narrowly tailored to serve the compelling interests identified above.

Indeed, apart from outright elimination of noneconomic damages, a cap is the only mechanism that can address the philosophical, constitutional, jurisprudential and economic problems that justify the law's enactment. A process plagued by "inherent subjectivity" that operates without "any intelligible guiding premise," cannot be redeemed by legislation—its effects can only be mitigated or eliminated, as the cap has done for Ohio. So, a cap is as narrowly tailored as it gets.

Moreover, the mere fact that Ohio law only mitigates and does not entirely eliminate all of the problems (*e.g.*, by still allowing substantial but not unlimited noneconomic damages awards or by allowing certain, carefully delineated exceptions to the cap altogether) is not a basis to conclude that the statute is not narrowly tailored to achieve its objectives. A law that does not perfectly accomplish all of its goals is not the same as one that "targets and eliminates…*more than*" what is necessary to advance those objectives. *Burnett* at 485 (emphasis added). Rather, the cap represents a legislative compromise that acknowledges the reality of noneconomic injury without letting the paradoxical—or at least wholly subjective—monetization of such injury go entirely unconstrained. "A statute is not absurd if it could reflect the sort of compromise that attends legislative endeavor." *Robbins v. Chronister*, 435 F.3d 1238, 1243 (10th Cir. 2006).

Further, R.C. 2315.18 also is narrowly tailored to achieve its compelling objectives in light of the additional provisions in the statute that ensure full, actual compensation to tort victims for their monetarily measurable injuries. For example, R.C. 2315.18(B)(1) is explicit that "there shall not be any limitation" on awards for economic loss. Thus, all economic damages associated with the costs of treatment, accommodations, lifestyle changes and the like, which are objectively

measurable in monetary terms yet causally attributable to any injuries suffered as a result of the tortious conduct, must be awarded in full—just as Brandt's apparently were. By expressly precluding any limit on actual, economic damages, the General Assembly took care to ensure that the law "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Burnett* at 429.

In addition, the statute is narrowly tailored as a matter of process. As more fully articulated below, R.C. 2315.18(E) preserves *in toto* the jury's fact-finding function, leaving application of the legal limits to any noneconomic damages award until after the jury has independently—albeit arbitrarily—assigned a monetary value to the tort victim's noneconomic injuries. While Brandt repeatedly argues that a post-verdict limitation on recoverable damages constitutes a usurpation of the jury's prerogative, the statute in fact operates to preserve that function inviolate—to the extent such subjective determinations can even properly be described as "fact finding." This is especially significant in light of Brandt's own acknowledgment that the jury awarded her noneconomic damages not as compensation for her injuries, but based on a 'belief that minor victims of sexual abuse deserve recognition…through a substantial verdict…." AB, p. 13. The damages cap is narrowly tailored even to preserve the jury's capacity to grant tort victims this inherently symbolic "recognition" with a substantial verdict, because the law limits not the jury's "finding" of such damages, but rather only the amount of those awarded damages that will be legally recoverable. *See infra*.

Finally, the noneconomic damages cap is narrowly tailored in light of R.C. 2315.18(B)(3)'s exception for permanent physical deformity or dysfunction. Both for the reasons stated more fully below, and because the debilitating, physical injury exception itself reveals the General Assembly's conscious decision to ensure that the cap both satisfy *Savoy* and apply to "no more

than the exact source of the 'evil' it seeks to remedy," (*Burnett* at 429), it is difficult to conceive of a more targeted approach to the problems created by unlimited noneconomic damages. Notably, Brandt's only (implicit) argument for a more narrowly tailored solution is to expand the exception(s) to include purely emotional injuries of childhood victims of sexual abuse. AB, p. 19. But such a statutory scheme would not be more narrowly tailored to its compelling objectives—it simply would abandon its compelling objectives altogether for a particular subset of emotionally sympathetic tort victims whose injuries, nonetheless, are emblematic of the very conundrum the statute seeks to address. While the legislature is free to make that choice as a matter of public policy, it is not what strict scrutiny requires.

2. The exception for permanent, physical deformity or dysfunction survives strict scrutiny

Perhaps appreciating that R.C. 2315.18's damages cap is eminently defensible on its face, Brandt directs her ostensible, "as-applied" challenge primarily at the *exception* to the noneconomic damages cap, rather than at the cap itself. Although she acknowledges the propriety of the exception for what are sometimes called "catastrophic" injuries, she argues that limiting that exception to only "catastrophic" *physical* injuries is irrational and serves no legitimate purpose. AB, p. 18. According to Brandt, she and other childhood victims of sexual assault who suffer "catastrophic" emotional and psychological trauma, but no permanent physical injuries and little or no economic injury, are entitled to the full amount of what a jury awards them for their pain and suffering. However, Brandt has no standing to challenge the physical injury criterion of the exception, because the record is clear that her psychological injuries are not, in fact, functionally "equivalent" to the types of physical injuries set forth in the statute. Moreover, even if they were, limiting the cap exception to especially severe *physical* injuries still is narrowly tailored to serve the compelling interests that justify the damages cap in the first place.

3. Brandt's challenge to the physical injury criterion of the cap exception is moot

Despite Brandt's assertions of "equivalence," the record simply does not support her claim that "emotional injuries…rise to the level of physical injuries excepted from the damage caps by R.C. 2315.18(B)(3)…"—a "situation" this Court indicated *might* someday present a constitutional, due process question in need of resolution. *Simpkins* at ¶ 42; AB, p. 8. Pursuant to the statute, only two classes of permanent, especially disabling or severe physical injury are excepted from the caps: (a) deformity, loss of use of a limb or loss of a bodily organ system; or (b) functional injury that prevents the tort victim from being able to independently care for herself and perform life-sustaining activities. R.C. 2315.18(B)(3). Brandt repeatedly insists that her injuries clearly meet the "extreme qualifications" of the statute apart from the physical injury requirement—but the record quite plainly demonstrates that none of her emotional and psychological injuries satisfies either of the two statutory criteria, regardless of whether or not they are physical in nature. As a result, deciding the constitutionality of the physical injury requirement will not affect Brandt's entitlement to relief, and is therefore moot. *State v. Corp. for Findlay Market*, 135 Ohio St.3d 416, 422, 2013-Ohio-1532, ¶ 25.

Indeed, Brandt identifies her noneconomic injuries roughly as follows: anxiety, anger issues, community disengagement, lack of motivation, screaming fits and outbursts of tears, difficulty sleeping, declining school grades, PTSD, difficulty being around groups of people, noise sensitivity, panic attacks, depression and mood destabilization, recurring nightmares, drug abuse, and suicide attempts. AB, pp. 3-6. However, acknowledging the nature of the abuse that Brandt suffered and the pain and disruption to her life that the abuse has caused is not enough to establish the "equivalence" that she claims. *Id.*, p. 8. Certainly nothing in the record supports the conclusion that Brandt has suffered a deformity, loss of use of limb or bodily organ system.

R.C. 2315.18(B)(3)(a). And although her abuse led to emotional and psychological consequences that have disrupted her life, nothing in the record comes close to showing that Brandt cannot care for herself independently and perform life-sustaining activities. *Id*. at (B)(3)(b).

Brandt's suggestion that the size of the jury's award means it found that her injuries met the "extreme qualifications" required for the exception to apply is flatly wrong. AB, p. 16. As an initial matter, the statute specifically precludes the court and counsel from even informing the jury of the cap. See R.C. 2315.18(F)(2). Thus, even if the jury had been instructed concerning the criteria of the exception, (which necessarily includes a physical injury requirement), it would have been impossible for the jury to have intended its award to signify a finding of "equivalence." That is, a finding of "equivalence" implies jury knowledge of the remedial significance of the comparison in the first place, which the statute forbids. Even more, the very notion of "equivalence" would—if it were a proper subject of determination in the first place—constitute a legal conclusion for the court, not a factual finding for the jury. That is, the issue of whether Brandt's non-physical, psychological and emotional injuries somehow satisfied the statutory exception nonetheless, would be a legal question according to which the facts of Brandt's injuries, as found by the jury, would have been reviewed by the Court to determine whether or not the cap should apply as a matter of law. *See* R.C. 2315.18(E)(1). *See also*, *Sheffer v. Novartis Pharma. Corp.*, No. 3:12-cv-238, 2014 WL 10293816, *2 (S.D. Ohio, Jul. 14, 2012) (application of exception is an issue for the court unless plaintiff crosses the requisite "evidentiary threshold" (citing cases)); *Weldon v. Presley*, No. 1:10-cv-1077, 2011 WL 3749469, *6-7 (N.D. Ohio, Aug. 9, 2011) (deciding as a matter of law "Weldon's scar is not equivalent" to injuries exempt from the cap, which must be "severe and objective"). As demonstrated above, that analysis yields the

clear and unequivocal answer that "the effects" of Brandt's non-physical injuries are not "equivalent" to the effects identified in and required by the exception as a matter of law.

Importantly, Brandt acknowledges the state's interest in distinguishing between "catastrophic" injuries and less severe injuries for purposes of applying the damages cap. She questions the rationality of requiring excepted injuries to be physical in nature, but does not in any way question the propriety of the functional limitations set forth in the statute (deformity, disability, dysfunction, inability of self-care, *etc.*), which must be established even for a physical injury to qualify for the exception(s). The trouble is, she herself does not qualify on either the functional or permanence dimension, and so her challenge to the exception's physical injury requirement is moot because resolving the constitutionality of the physical/non-physical distinction in R.C. 2315.18(B)(3) would not alter the outcome in this case, and thus would be little more than an advisory opinion. *Findlay Market* at ¶ 25. Because she has not established the other predicates of the statutory exception, this court should not even address Brandt's attack on the constitutionality of limiting it to physical injuries as set forth in R.C. 2315.18(B)(3). As this Court has acknowledged, "if it is not necessary to decide more, it is necessary not to decide more…." *Id*. (citations omitted).

a. The physical injury criterion of the exception serves compelling governmental interests

If the Court nevertheless undertakes to review the physical injury criterion of the damages cap exception(s), it should conclude that, like the cap itself, the exception is narrowly tailored to serve compelling state interests. In particular, limiting the "catastrophic injury" exception—which Brandt acknowledges is legitimate in principle (*see* AB, p. 18)—to only physical injuries serves all of the compelling interests that justify the damage caps generally, precisely because assignment

of a monetary value to physical injury is *less* subjective than that of purely psychological or emotional injury.

i. The physical injury requirement ensures unlimited noneconomic damages only for the most objectively severe injuries

As this Court observed when evaluating even the attribution of objective, economic losses to psychological injuries, the reality is that "[p]sychology and psychiatry are imprecise disciplines. Unlike the biological sciences, their methods of investigation are primarily subjective and most of their findings are not based on physically observable evidence." *State ex rel. Kroger Co. v. Indus. Comm.*, 82 Ohio St.3d 231, 234, 694 N.E.2d 1353, 1355 (1998) (citing *Tyson v. Tyson*, 107 Wash.2d 72, 78, 727 P.2d 226, 229 (1986)); *Addington v. Texas*, 441 U.S. 418, 430 (1979). In other words, in addition to the subjectivity of a noneconomic damage award, the injury being compensated by that award can be more or less subjective as well. The noneconomic harm associated with the physical pain and functional limitations due to the loss of an arm is qualitatively different from—*i.e.*, more objective and concrete than—the emotional pain and life-altering disruptions caused by the memory of a traumatic experience. *Simpkins* at ¶ 41 (citing *Arbino* at ¶ 71).

Distinguishing between the physical and non-physical, therefore, mitigates the overall problem of subjectivity of uncapped awards for the most severely injured by limiting the exception to the most objective forms of injury to which otherwise subjective damage amounts must be tethered. In doing so, the exception limits the degree to which improper considerations are likely to enter into the jury's determination of damages. *Id.* The tendency to include symbolic or punitive amounts in an award will be greater if a jury is being asked to monetize loss from the intangible trauma of an experience, which necessarily includes consideration of the tortious conduct itself. But that tendency will be lessened substantially if the jury is charged only with monetizing loss

associated with the concrete, physical consequence of the experience, which is limited to the plaintiff's bodily injury. The physical injury requirement also renders discriminatory awards less likely, racial or otherwise, because the jury is charged not with assessing the subjective value of a subjective experience of the plaintiff, but with the subjective value of the objective and universal physical characteristics of concrete and definite bodily harm. Moreover, for each of these reasons, limiting the exception to physical injury serves the compelling interest of restoring and preserving some measure of faith in the justice system itself by reducing the arbitrariness of noneconomic damages awards generally.

ii. The physical injury requirement minimizes the risk of runaway verdicts

The physical injury requirement also serves to minimize the likelihood of runaway verdicts and the economic consequences they produce. In her attempt to trivialize the interests served by the physical injury requirement, Brandt points to the absurdity of valuing a scarred thumb at $19,750,000.00. AB, p. 19. But her illustration only reveals the error in her own argument. In pointing out the excessiveness of compensating a scarred thumb with nearly $20 million, Brandt affirms the comparative objectivity of physical injury over that of emotional/psychological injury. She implicitly acknowledges that, despite the difficulty in placing a value on injuries not measurable in monetary terms, physical injury nonetheless contains within it a degree of objectivity that will constrain noneconomic damages awards. We may not know precisely what a scarred thumb is worth, but we know it is not $19,750,000.00. The vagaries of memory and the idiosyncrasies of human experience, however, do not provide such clarity when it comes to valuing the purely emotional anguish of exclusively psychological trauma.

iii. The physical injury requirement is not an open door to unlimited, purely psychological damages as Brandt suggests

Brandt also completely misunderstands the operation of the statutory exception's physical injury requirement. That is, Brandt conceives of the physical injury criterion as a *gateway* to unlimited damages for emotional and psychological injury caused by the tortious conduct that also produced the permanent and disabling physical injury at issue. AB, pp. 14, 19 (if Brandt had suffered a scar as a result of Pompa's abuse, then "she would have received the full $20,000,000.00 awarded to her"). Such an approach would effectively amount to a partial, legislative codification of the common law, contemporaneous physical injury rule that circumscribed negligent infliction claims in Ohio for seventy-five years, before this Court overruled the doctrine as a matter of judicial policy. *See Schultz v. Barberton Glass Co.*, 4 Ohio St.3d 131, 447 N.E.2d 109 (1983).[7] But that is not what the statute at issue does.

Instead, the statute declares that there is no limit on damages "for injury or loss to person or property *if the noneconomic losses…are for*" permanent and disabling physical injury of the kinds listed. R.C. 2315.18(B)(3) (emphasis added). For example, if a person who was tortured by having excessively loud music blasted into their holding cell ultimately succumbed to deafness as a result, that individual could recover unlimited damages for their loss of hearing ("[p]ermanent…loss of a bodily organ system"), but their noneconomic damages for psychological

[7] Notably, this Court's decision in *Schultz* only rejected the "fraudulent claims" rationale for the contemporaneous, physical injury rule, but did not address—much less refute—the inherent subjectivity of the valuation of wholly emotional injuries for purposes of awarding damages. *See Schultz* at 134-135. Moreover, even if R.C. 2315.18 did codify the contemporaneous, physical injury rule in some form, it would be an entirely proper exercise of legislative power to statutorily enact a common law doctrine that had been eliminated by the judiciary on grounds of policy. *See, e.g., Haynes v. Franklin*, 95 Ohio St.3d 344, 2002-Ohio-2334, 767 N.E.2d 1146, ¶ 9 (recounting the General Assembly's reinstatement of sovereign immunity for municipal corporations in Revised Code Chapter 2744 after this Court's abolishment of the common law doctrine in *Enghauser Mfg. Co. v. Erikson Engineering Ltd.*, 6 Ohio St.3d 31, 451 N.E.2d 228 (1983)).

injuries caused by the experience of the torture itself would still be capped under the statute. Physical injury under R.C. 2315.18(B)(3) does not open the door to unlimited recovery for all purely emotional and psychological harms attributable to the underlying tortious conduct.

b. The physical injury criterion of the exception is narrowly tailored to its objectives

The physical "catastrophic" injury exception is narrowly tailored to its compelling objectives. As an initial matter, two observations must inform the analysis. The first is that Brandt acknowledges the propriety of an exception for permanent and debilitating "catastrophic" injuries. Thus, her challenge is not that the general exception is irrational in light of the statute's overall purpose, but rather that the physical injury requirement is irrational in light of the exception's specific purpose. Second, and relatedly, legislative compromise is permissible, even when the law contains provisions that accomplish different or contrary ends, so long as the law "still serves the general objective when seen as a whole," while (under strict scrutiny) "target[ing] and eliminate[ing] no more than the exact source of the 'evil' it seeks to remedy." *Fitzgerald v. Racing Ass'n of Central Iowa*, 539 U.S. 103, 108 (2003) (on rational basis review); *Burnett* at 429.

The exceptions are narrowly tailored to accomplish their compelling objectives of exempting from the noneconomic damages cap the most functionally severe and distinctly permanent injuries, while still minimizing the subjectivity inherent in noneconomic damages awards in service of the overarching goals of the statute. Specifically, the physical injury requirement bears directly upon both the permanence and functional disability elements of the exceptions, both of which Brandt endorses in concept, even though the record is clear that her injuries satisfy neither.

i. The physical injury requirement is narrowly tailored to ensure that only permanent injuries qualify for the exception

Physical injury is objectively more susceptible to a permanence determination than psychological or emotional injury. The "physically observable" nature of the evidence required to show permanence of physical deformity or disability—there is rarely if ever a medical disagreement about whether a victim has, in fact, lost an arm—gives such determinations by experts in the "biological sciences" greater certainty than what is possible with the "subjective analysis" of emotional and psychological diagnoses.[8] *Kroger* at 234. Indeed, Brandt's own argument recounts, to her great credit, the progress she has made over the years to mitigate and overcome the emotional consequences of her abuse. *Id*. at 15. But no amount of time or effort can regrow an arm. That does not mean that one would prefer Brandt's experience to one in which an arm was lost—it simply means that the physical/non-physical distinction makes sense in light of the concededly legitimate rationale for the exception, *i.e.*, to allow noneconomic damages to remain uncapped for certain, objectively *permanent* injuries.

ii. The physical injury requirement is narrowly tailored to ensure that only totally disabling injuries qualify for the exception

Similarly, the physical/non-physical distinction bears on the issue of total disability. Especially with respect to the exception for an injury "that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities," the difference between the two types of injury is readily apparent. R.C. 2315.18(B)(3)(b). Assume for the sake of argument that Brandt had testified that her psychological and emotional injuries rendered her incapable of ever getting out of bed, thereby providing a basis for her to invoke the second

[8] It is perhaps why Dr. Yingling could opine only that Brandt's "injuries would persist 'with some degree of intensity' for a 'significant' period of time'"—not that they were permanent injuries that had produced permanent, functional disability. AB, p. 6.

exception. Leaving to one side the issue of permanence (*see, supra*), there is unquestionably a real and meaningful distinction between the person whose emotional state "prevents" them from "being able" to get out of bed and the person whose quadriplegia "prevents" them from "being able" to get out of bed. We need not minimize the reality or awfulness of the psychological struggle in order also to acknowledge that the determination of total, functional disability with respect to the quadriplegic is infinitely more concrete and objective. Thus, R.C. 2315.18(B)(3)(b)'s physical/non-physical distinction makes perfect sense in light of the other, concededly legitimate rationale for the exception, *i.e.*, to allow noneconomic damages to remain uncapped for injuries that make certain activities actually and objectively impossible.

iii. Brandt's criticisms of the physical injury requirement are without merit

Brandt's arguments that the physical injury requirement is wholly irrational simply are not persuasive. For example, she argues that the typical absence of physical injury for sexual abuse victims makes the requirement irrational. AB, p. 14. But that is not an argument against the physical injury criterion—it simply assumes the conclusion it seeks to prove, namely that unlimited monetary awards are appropriate for "immeasurable perturbations of the spirit." Jaffe at 222. Yet that view is precisely the fallacy that the cap and exception are designed to address. Brandt also quarrels with the appellate court's evaluation of the degree to which all of her injuries were a consequence of the abuse. AB, p. 16. But the causal analysis is immaterial to the issue of applicability of the exception. Even if it is presumed that all of Brandt's injuries are attributable to the sexual assaults, the exception is concerned with the nature of the injuries, not their source.

* * *

No doubt, Brandt disagrees with the policy choices made by the General Assembly. Perhaps some of the members of this Court do as well. But those policy choices are not only

rationally related to legitimate interests of the state—they are a narrowly tailored, legislative solution to a litany of essentially undisputed practical and jurisprudential problems that emerge when "inherently subjective" noneconomic damage awards are left uncapped. Although R.C. 2315.18 does not impinge upon any of Brandt's constitutional rights, even if it did, it survives strict scrutiny. If Brandt desires a change in Ohio's policy nonetheless, she is free to pursue that change through "the legislative branch[,] 'the ultimate arbiter of public policy.'" *Arbino* at ¶ 21 (citing *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Information Network v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, 781 N.E.2 163, ¶ 21).

C. Neither the noneconomic damages cap, nor the exception for permanent, physical deformity or dysfunction impinges on Brandt's constitutional rights

Because both the cap and the exception survive even strict scrutiny, the Court need not consider whether R.C. 2315.18 implicates Brandt's constitutional rights. Nevertheless, the statute is an entirely proper exercise of legislative authority, which modifies but preserves a meaningful remedy for noneconomic injuries without usurping the jury's fact finding function. And it does so in a manner that draws careful and nondiscriminatory distinctions between certain categories of injury to serve compelling—and indisputably rational—governmental interests. The Court should not reach the constitutional questions, but if it does, it should conclude that R.C. 2315.18 does not violate any of Brandt's constitutional rights and is subject only to rational basis review.

1. R.C. 2315.18 does not violate Brandt's right to due course of law

The Ohio Constitution's "due course of law" provision simply requires a statute to serve an identifiable governmental interest by an appropriate means. *Arbino* at ¶ 48-49. In the absence of implication of a fundamental right, a rational basis test applies. But in light of the analysis above—showing that both the cap and the exception survive even strict scrutiny—there is no

circumstance in which the Court should conclude that either violates Brandt's right to the "due course of law."

2. R.C. 2315.18 does not violate Brandt's right to the equal protection of the law

Under Ohio's Equal Protection Clause, rational basis review is appropriate unless either a "fundamental" right is implicated or the rights of a "suspect class" are infringed. *Arbino* at ¶ 65. While Brandt challenges certain classifications in the statute as irrational, she does not claim that the rights of any "suspect" class are at issue. And her argument for strict scrutiny rests entirely on the assertion that the law infringes on her right to a jury trial. AB, p. 30. That assertion is wrong, as demonstrated below. However, because the law under review and the distinctions it draws not only are rational, but are narrowly tailored to serve compelling state objectives without being over-inclusive, there is no circumstance in which the Court should conclude that R.C. 2315.18 violates Brandt's right to equal protection of the law.

3. R.C. 2315.18 does not violate Brandt's right to a jury trial

a. Brandt's argument is not a proper, as-applied challenge

As an initial matter, Brandt's argument that R.C. 2315.18 violates her right to a jury trial is not, and cannot be, an as-applied challenge. There is neither an articulated basis, nor a conceivable rationale, for how application of the noneconomic damages cap to childhood victims of sexual assault who suffer no economic or physical injuries *uniquely* violates their right to a jury trial differently from anyone else. As this Court recognized in *Simpkins*, "application of the damage caps does not affect [their] right to a jury trial any differently than it affects any tort claimant whose damages are capped as a matter of law." *Simpkins* at ¶ 25. Thus, this Court should not even entertain Brandt's jury trial right argument apart from the *stare decisis* analysis—and "special justification"—that would be required in revisiting *Arbino*. *Id*. at ¶ 26. That is, in order

to prevail, Brandt must show not just that *Arbino* was wrongly decided on the jury trial issue, but that all of the other factors of *stare decisis* counsel in favor of overturning *Arbino* and striking down R.C. 2315.18 as unconstitutional on its face. Brandt has not made and cannot make that showing. And in any event, as *amicus* observes below, the Court should dismiss Proposition of Law No. 2 as improvidently granted.

b. R.C. 2315.18 is consistent with the right to a jury trial

Nonetheless, R.C. 2315.18 clearly does not infringe upon Brandt's—or any other plaintiff's—constitutional right to a jury trial. While the Ohio Constitution requires that "[t]he right of trial by jury shall be inviolate," it also is true that "the right is not absolute." *Arbino* at ¶ 30. Rather, it secures "the right of either party, in an action for the recovery of money only, to demand that the issues of fact therein be tried to a jury." *Id.* at ¶ 43. While that includes "the amount of damages to be awarded," "the right to a trial by jury does not extend to the determination of questions of law." *Id.* at ¶¶ 37, 43. A court simply does not intrude on the jury's fact-finding when it applies a legislative limit on the amount of recoverable, noneconomic damages. *Oliver v. Cleveland Indians Baseball Co. Ltd. Partnership*, 123 Ohio St.3d 278, 2009-Ohio-5030, 915 N.E.2d 1205, ¶ 8 (citing *Arbino*).

According to Brandt, the noneconomic damages cap deprives her of the right to a jury trial because it "intrude[s] on…the jury's findings of fact" by substituting the legislature's general damages limit for the jury's specific award based on "all of the evidence." AB, pp. 20-21. This argument rests on a mistaken understanding of the jury trial right, and of R.C. 2315.18, on at least three levels.

i. Judicial review and modification of jury damage awards in Ohio is both longstanding and common place and does not violate the jury trial right

Brandt ignores the longstanding history of judicial review and modification of jury damages awards. It is instructive to note that courts have always had the authority not only to review and modify damage awards, but to reverse entire verdicts when they are simply "against the weight of evidence…." *Dean v. King, Pennock & King*, 22 Ohio St. 118 (1871); Civ.R. 59(A)(6). The point is not that legislative damage caps are equivalent to "weight of evidence" review, but rather that the jury's fact-finding has never been wholly insulated from correction or alteration. Judicial correction of jury damage awards is a well-established practice that has never been regarded as a violation of the jury trial right. *See, e.g., Larrisey v. Norwalk Truck Lines*, 155 Ohio St. 207 (1951). When an award is the result of passion or prejudice, a new trial is appropriate; when the court merely views the award as excessive, then remittitur by the court "to any amount warranted by the evidence" is permissible. *Id*. at 219; Civ.R. 59(A)(4). In either case, although the jury trial right may be "inviolate," the jury's ostensible findings are not unalterable. Moreover, the prerogative of courts to review and modify jury damage awards extends not only to excessive awards, but also to inadequate awards. *See, e.g., Pena v. Northeast Ohio Emergency Affiliates, Inc.*, 108 Ohio App.3d 96 (9th Dist. 1995) (citing Civ. R. 59(A)(6)). In short, while "it is within the jury's province to determine the amount of damages," that determination has never been regarded as beyond correction.

Brandt's observation that remittitur requires the plaintiff's consent is no response at all. It is not as though the court simply asks a prevailing plaintiff whether they are willing accept a lesser award. The remittitur is offered to the plaintiff as an alternative to the court ordering a completely new trial—*i.e.*, the plaintiff must give up the judgment altogether, based on nothing more than the fact that the "verdict…is in the opinion of the trial court excessive, but not appearing to be

influenced by passion or prejudice…." *Chester Park Co. v. Schulte*, 120 Ohio St. 273, 290, 166 N.E. 186 (1929). Remittitur is essentially coercive, not voluntary, on the basis that the court—speaking for the law—has found the award to be in excess of what the evidence warrants. A damages cap is no more coercive than that. Even more, Brandt further distinguishes the remittitur from legislative damages caps on grounds that the caps operate "without any consideration of the facts underlying the case." AB, p. 28. But that is only a further illustration of how damages caps quite clearly do *not* invade the "fact-finding" province of the jury in the first place. Quarrel as she may with the wisdom of damage caps as a matter of policy, they clearly do not substitute the legislature's determination of the facts of a case for that of the jury, but rather make a policy determination about the appropriate limit of every plaintiff's right of recovery.

ii. Legislative modification of causes of action and their remedies is not a violation of the jury trial right

Notwithstanding the historical role the judiciary has played in constraining and correcting jury awards, Brandt misconceives the structural dimensions of the jury trial right itself. As Justice Cupp observed in his concurrence in *Arbino*, the "primary purpose of the trial by jury was to safeguard the rights of individual citizens, not against legislative overreaching, but from judicial bias and judicial reexamination of jury-determined facts." *Arbino* at ¶ 119. Yet, even that conception of the jury trial right has not been understood to prevent all forms of *judicial* supervision. *See supra*. No wonder, then, that it has never been suggested that, simply because the jury trial right attaches to a cause of action that existed at common law, the action itself is somehow immune from legislative modification, lest the policy-making body invade the "province of the jury." To the contrary, it is well-established that the legislature "may modify or entirely abolish common-law actions." *Id.* at 128 (citing cases). Moreover, as early as 1847, this Court acknowledged that such legislative power necessarily implies authority over the remedies for such

actions as well, namely that "[s]o far as the action of the courts of the state are concerned, common-law remedies can be varied or changed by our own legislature alone." *Goodsill v. The Brig St. Louis*, 16 Ohio 178, 180 (1847). To find the damages cap unconstitutional, the Court cannot simply invoke the jury trial right—it must completely abandon the historical understanding of legislative power itself.

iii. The damages cap does not invade upon the jury's fact-finding function in any event

Brandt also distorts the legal parameters of the jury's fact-finding function, confusing the "extent of damages suffered by a plaintiff, [which] is a factual issue," with the legal and remedial issue of what amount of damages the plaintiff ought to be permitted to recover for her injuries, which is not. *Arbino* at ¶ 34. This distinction is explicit in R.C. 2315.18 itself, which insulates the jury's fact-finding role with respect to damages from the court and counsel alike. *See* R.C. 2315.18(D)(3), (F)(2). "Only after the jury has made its factual findings and determinations as to the damages" by specifying the amount of "compensatory damages that represents damages for noneconomic loss" does the court "enter a judgment…for noneconomic loss" that does not "exceed the maximum recoverable amount…." *Id.* Thus, the statute establishes a process whereby the jury decides the facts, but the court applies the law as established by the legislature.

Brandt's argument rests upon two related, but equally fatal errors of analysis. First, Brandt confuses the "is" with the "ought," *i.e.*, the fact of the amount of damages suffered by the plaintiff with the remedy of the amount of those damages that she ought legally to be able to recover in a judgment. As this Court observed in *Arbino*, legislatively established treble damages awards, which are predicated upon multiplying the jury's unmodified findings of fact regarding damages by a statutorily mandated factor, do not violate the jury trial right. Neither the purpose of the multiplier, nor its particular value, has any bearing on whether or not the law usurps the jury's

fact-finding function. In no case is the legislature declaring that the recoverable amount constitutes a substituted valuation of what the plaintiff has, in fact, suffered—it is simply saying that it is the amount that she *should* recover for a certain class of injuries under the delineated circumstance. R.C. 2315.18's caps, which employ a fixed limit rather than a multiplier for purposes of recovery, are functionally indistinguishable.

The second error in Brandt's analysis ultimately brings us full circle. Specifically, her argument rests entirely on a mistaken view of the jury's award of noneconomic damages as a "finding of fact" in the first place. To be sure, this Court has held in general that damages are an issue of fact for the jury to decide. But as demonstrated at great length above, noneconomic damages are "inherently subjective" and lack "any intelligible guiding premise." "[T]here is no objective referent for such damages," so that "[j]uries are left with nothing but their consciences to guide them." King at 175, fn. 75 (citing Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 Cal. L. Rev. 772, 778 (1985)). As a result, such damages determinations cannot meaningfully be described as "fact" for the jury to "find" at all. To wit: Brandt acknowledges that the jury awarded her $20 million, not because it found objective facts established with evidence demonstrating that she suffered precisely $20 million in post-April 6, 2005 actual, noneconomic losses, but rather because it wanted to offer her "recognition and deterrence…," based on a "belief that minor victims of sexual abuse deserve …a substantial verdict…." AB, p. 13. In short, they are symbolic, punitive, and empathetic damages awarded as a matter of conscience, not evidence. When noneconomic damages awards are properly understood for what they are—and for what Brandt quite readily acknowledges they truly represent—the notion that a legislative cap on such damages somehow invades the "fact-finding" province of the jury loses all persuasive force.

4. R.C. 2315.18 does not violate Brandt's right to open courts and a remedy

The Ohio Constitution's mandate that all courts be "open" and that "every person…shall have a remedy" for his injuries "requires an opportunity granted at a meaningful time and in a meaningful manner." *Simpkins* at ¶¶ 28-29. It does not bar statutes that modify or even abolish causes of action or the remedies available for them, which is within the legislature's power, but rather disallows those laws that "effectively prohibit individuals from pursuing relief for their injuries" in the first place. *Id*. In short, it ensures that injured persons will have a meaningful opportunity to get into court to seek whatever redress is available for whatever claims they might have. *See, e.g, Hardy v. VerMeulen*, 32 Ohio St.3d 45, 47, 512 N.E.2d 626, 628 (1987), overruled on other grounds. While this Court has held that the provision also guarantees a "meaningful remedy," it has done so only where the statute in question effectively "obliterates" a damages award, by reducing the "entire" amount of a plaintiff's recovery for a given injury, such that a "trip to court [is] futile…." *Sorrell* at 426.[9]

Nothing even approaching such a constitutional violation is presented here. R.C. 2315.18 limits noneconomic damages to a maximum recovery in the hundreds of thousands of dollars. Hence, there is no basis to conclude that the award to Brandt is not "meaningful." *Arbino* at ¶ 47. While Brandt may argue that it is so "emasculated" as to be effectively meaningless to her, it plainly does not "obliterate" the "entirety" of her award or constitute a sum so negligible that seeking redress in court would be completely "futile." Brandt had a meaningful opportunity to seek redress for her injuries, at a meaningful time, and in a meaningful manner, all of which

[9] Here, Brandt's court proceeding resulted in a judgment for more than $100 million even without the noneconomic damage award at issue. Her trip to court was not futile.

resulted in a meaningful judgment rendered in her favor in accordance with the law. The Constitution does not require more.

Proposition of Law No. 2:

> ***Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, was (1) wrongly decided at the time, (2) circumstances have changed since the decision, (3) the decision defied practical workability, (4) abandoning the decision would not create an undue hardship for those who have relied upon it, and accordingly *Arbino* must be overruled.**

A. The Second Proposition of Law should be dismissed

There is no circumstance in which it would be appropriate to overturn *Arbino*. Brandt has purported to bring an as-applied challenge to R.C. 2315.18, asserting that under the unique factual circumstances of her case, the law cannot constitutionally be applied to bar her recovery of unlimited, noneconomic damages. If that argument does not carry the day, then it is impossible for this Court to reach the conclusion that the statute at issue is, in fact, unconstitutional on its face such that "there is no set of circumstances in which [the] statute would be valid"—*i.e.*, the conclusion the Court must reach even to entertain the possibility of overturning *Arbino*, which upheld the law against a facial challenge more than a decade ago. *Arbino* at ¶ 26. In short, Brandt's challenge to *Arbino* is logically incoherent. R.C. 2315.18 cannot be unconstitutional in all circumstances if it is not unconstitutional as applied to Brandt's circumstances to begin with. *See* AB, p. 32 (arguing paradoxically for facial invalidation of the statute "in this context" and criticizing *Arbino* as it applies to intentional tortfeasors as a basis to invalidate it on its face).

The Court should dismiss the Second Proposition of Law as improvidently granted.

B. *Arbino* was correctly decided, and even if this Court concludes that it was not, *stare decisis* does not warrant changing course

"Stare decisis is the bedrock of the American judicial system." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 1. "[A]ny departure from the

doctrine…demands special justification." *Id*. at ¶ 44 (citing *Wampler v. Higgins*, 93 Ohio St.3d 111, 120, 752 N.E.2d 962 (2001)). This Court has identified the criteria for that "special justification" as follows: (1) the decision was wrong at the time or changed circumstances cease to justify adherence to it; (2) the decision defies practical workability; and (3) abandoning the decision would not impose undue hardship on those who have relied on it. *Id*. at ¶ 47. Brandt has failed to make the requisite showing with respect to even a single element of the "special justification" required to overturn *Arbino*.

1. *Arbino* was decided correctly, and no circumstances have changed to make it wrong today

For all of the reasons stated above with respect to the First Proposition of Law, *Arbino* was clearly correct when it was decided and remains so today. R.C. 2315.18 implicates none of Brandt's constitutional rights and is, nonetheless, narrowly tailored to achieve a number of compelling state objectives. Moreover, even if the *Arbino* Court erred, as Brandt now suggests, in failing to apply strict scrutiny to the law rather than mere rational basis review, *amicus* has shown that the statute survives even the most exacting constitutional examination. Moreover, no "changes in circumstances" justify a departure from *Arbino*. To begin with, neither the compelling interests in eliminating or mitigating the inherent subjectivity in noneconomic damages awards, nor the basic mechanisms for achieving that end—*i.e.*, statutory caps with exceptions for permanent and debilitating physical injury—are even susceptible to being rendered "obsolete." AB, p. 30. They are predicated on enduring realities about the very nature of psychological and emotional injury and the corresponding incommensurability of the monetary valuation of such forms of harm. King at 178. While views about the best policy to address those realities may differ, the categorical realities themselves—and hence the relevant circumstances of the *Arbino* decision—will never change.

As a result, even a cursory examination of Brandt's arguments shows that they do not withstand scrutiny. For example, Brandt's argument that Ohio has not seen an economic benefit from the caps, even if supported with actual evidence (it is not), would not be sufficient to overcome the other, foundational reasons for the statute or for this Court's decision to uphold it in *Arbino*. Similarly, Brandt's assertions about the statute's purportedly mistaken application to intentional torts is a policy position, not a constitutional argument. Even more, it is a policy argument about the nature of the underlying conduct, not about the compensatory function of damages subject to the cap, only further illustrating one of the central rationales for the cap in the first place—the influence of improper considerations in noneconomic damages awards. In addition, the law's application to intentional torts is not a "changed circumstance" to begin with. R.C. 2315.18 has applied to intentional torts, by its terms, from the day of enactment, even if *Wayt v. DHSC*, 155 Ohio St.3d 401, 2018-Ohio-4822, 122 N.E.3d 92, confirmed it just three years ago. And finally, Brandt's arguments—both with respect to intentional torts and regarding the employment and productivity benefits of applying the law specifically to child rape victims—are clearly as-applied attacks on the law, not a facial challenge. Hence, Brandt cannot supply any justification—let alone the requisite "special justification"—for overturning *Arbino*'s rejection of a wholly *facial* challenge to R.C. 2315.18.

2. *Arbino* and the damages cap itself have been applied without confusion or disruption, foreclosing any notion that the decision has proved practically unworkable

Nothing about *Arbino* or the damages cap itself is unworkable. Indeed, there is no indication that application of R.C. 2315.18 has posed any practical problems in operation. There was no confusion over whether or how it would apply to Brandt's noneconomic damages award. Nor has there been a rash of conflicts from the lower courts with respect to following *Arbino* itself. *See, e.g.*, *Brandt v. Pompa*, 2021-Ohio-845, 169 N.E.3d 285 (8th Dist.) (following *Arbino* and

Simpkins without difficulty). Brandt points to no jurisprudential or doctrinal chaos, no institutional disruption, no uncertainty in application that has resulted from *Arbino*. Instead, Brandt actually acknowledges the straightforwardness and workability of *Arbino* when she complains that this Court's decision in *Simpkins* was the result of "rigid" (read: consistent and unambiguous) application of *Arbino*'s principles. AB, p. 33. Reiterating dissatisfaction with the results of that adherence to *Arbino* is not an indictment of the underlying decision's workability. Neither is Brandt's observation about the reality and prevalence of mental health problems or the costs they impose on the economy. *Id.* at 32. Nothing about "modern standards and beliefs" concerning matters of mental health changes the noneconomic and inherently subjective problems of monetarily valuing such injuries or the compelling justifications for employing damages caps in our tort system to address those concerns.

3. The reliance interests of Ohio's citizens counsel overwhelmingly against overturning *Arbino*

There are reliance interests at stake that counsel against overturning *Arbino*, even if its constitutional analysis were somehow in error. According to Brandt, a majority of the cases that have relied on *Arbino* are in the medical malpractice context. (AB, p. 34). If anything, this illustrates that the principles laid down in the decision have come to be relied upon far beyond the context of damages for sexual abuse, as in *Simpkins*, or even products liability, as in *Arbino* itself. *See also, Oliver*, 123 Ohio St.3d 278 (sustaining caps for noneconomic damages against political subdivisions). In addition, beyond the decisional law in Ohio, businesses all over the state, from physician practices and their insurers to restaurants, manufacturers, and agricultural businesses, rely on R.C. 2315.18's noneconomic damages cap itself in their assessment of various business risks and costs. They also rely upon the stability and consistency of the law itself, which is essential for economic flourishing. And perhaps most importantly, the interests at stake are those

of Ohio's citizens at large, who rely—above all—on this Court's continued recognition that their representatives in the General Assembly will decide questions of public policy.

If the Court overturns *Arbino* it will be simply because enough members of the Court now disagree with *Arbino*'s reasoning—not because there is any compelling jurisprudential justification for abandoning it pursuant to the dictates of *stare decisis*. Especially where, as here, the Court is being asked to revisit the constitutionality of legislation that can be—and is even now, at this very moment—being considered for revision to accommodate the policy concerns of litigants, reexamining *Arbino*, let alone overturning it, would disrupt the most important reliance interest of all. It would signal to the people of Ohio that they cannot, in fact, rely upon the decisions of this Court as the final exposition of what the law of our State is, or upon the institution of this Court to respect the legislative branch of our government as "the ultimate arbiter of public policy," with "the power to continually create and refine the laws to meet the needs of the citizens of Ohio." *Id*. (citing *State ex rel. Cincinnati Enquirer* at ¶ 21).

CONCLUSION

For the foregoing reasons, and for all of the reasons stated in the briefs of Appellants and fellow amici, Amicus urges AFFIRMANCE of the judgment below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic mail on November 24, 2021, upon the following:

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