

IN THE SUPREME COURT OF OHIO

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| Amanda Brandt. | : | Ohio Supreme Court Case No. |
| | : | 2021-0497 |
| Appellant, | : | |
| | : | On Appeal from the Cuyahoga |
| v. | : | County Court of Common Pleas, |
| | : | Eighth Appellate District |
| Roy Pompa | : | |
| | : | Court of Appeals |
| Appellee. | : | Case No. CA 20 109517 |

**MERIT BRIEF OF AMICUS CURIAE OHIO ALLIANCE TO END
SEXUAL VIOLENCE IN SUPPORT OF APPELLANT AMANDA BRANDT**

Camille M. Crary (0092692)
Ohio Alliance to End Sexual Violence 6111
Oak Tree Boulevard, Suite 140
Independence, OH 44131
T: 614-929-5875
F: 216-675-1186
ccrary@oaesv.org

*Counsel for Amicus Curiae Ohio Alliance
to End Sexual Violence*

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STATEMENT OF INTEREST AND INTRODUCTION

The Ohio Alliance to End Sexual Violence (“OAESV”) is Ohio’s federally recognized statewide sexual violence prevention and survivor advocacy coalition. OAESV provides training and technical assistance for Ohio’s 35 rape crisis centers, and direct victim advocacy in the 11 counties lacking rape crisis services, delivers prevention education, and informs survivor-centered public policy. Since 2015, OAESV has received VOCA funds to represent sexual violence survivors with a variety of emergency legal needs, including victim rights, Title IX, custody, housing, protection order, and expungement matters. In 2018, OAESV received a three-year Office on Violence Against Women Legal Assistance for Victims (“LAV”) grant to create the Ohio Survivor Legal Assistance Clinic. OAESV’s LAV grant is the second sexual violence coalition driven legal clinic in the United States.

OAESV staff have worked with hundreds of survivors, including many impacted by childhood sexual abuse. We have observed time and time again the egregious long-term harms childhood sexual abuse cost communities, families, and survivors themselves. In our collaborations with forensic nurses, physicians, mental health professionals, law enforcement officers, and prosecuting attorneys, we have come to understand that survivors often go without necessary recourse because Ohio misclassifies the harm suffered as the sum of injuries accrued during the precise act of sexual violence, instead of the kaleidoscope of long-term harms that manifest for decades after instances of child sexual abuse.

Decades of research confirms what OAESV and our peers in the medical, law enforcement, and social work fields observe on the ground – that the specific injuries of child sexual abuse change the fundamental experience of life to include predictable and significant harms across the remainder of the victim’s lifespan, and the burden of resulting fiscal consequences are demonstrably spread out among whole communities and

economies. Discussed in more depth *infra*, in 2017, the Centers for Disease Control estimated an annual population economic burden of \$263 billion and a lifetime population economic burden of nearly \$3 trillion as the “minimal identifiable cost of rape.” Cora Peterson et al., *Lifetime Economic Burden of Rape Among U.S. Adults*, 52 Am. J. Prev. Med. 691 (2017). The government absorbs approximately 32 percent, or \$1 trillion of the costs, Peterson *Id.* at 697-98, and rape has the highest per-victim cost to the government among violent crimes. Kathryn E. McCollister et al., *The Cost of Crime to Society: New Crime-Specific Estimates for Policy and Program Evaluation*, 108 Drug Alcohol Depend. 98, 101 (2010).

OAESV’s fundamental purpose is to end sexual violence in Ohio. Overturning the *Simpkins* application of *Arbino* to child sexual abuse victims is a critical step in achieving that goal. Should this Court decline that proposition, we urge you to acknowledge the factual distinctions between the *Simpkins* record and Amanda’s injuries and provide at least this child sexual abuse survivor with the financial award commiserate with the horrendous harm that will impact her for the rest of her life.

STATEMENT OF THE CASE AND FACTS

In the interests of judicial economy, Amicus adopt by reference the Statement of Facts and Case submitted by Appellant Amanda Brandt, but briefly reiterate the underlying abuse.

As this Court is aware, from 2002-2006, Roy Pompa (“Pompa”) molested and sexually abused girls ages 6 to 14 in his own home. Pompa sexually abused Appellant Amanda Brandt on 34 separate occasions in 2004 and 2005, when she was 11- and 12-years-old. (TR. 22-27.) Pompa’s daughter and Amanda were friends, and Pompa laced beverages

with illicit drugs and gave them to Amanda to facilitate sexual abuse, recording many of the violations. Searches by the Ohio Internet Crimes Against Children (“ICAC”) Task Force and the Brook Park police revealed not only the recordings of Amanda, but also that Pompa possessed child pornography depicting other children, as young as three years old, being sexually abused by adults. (Pompa Dep. 111-112.)

Pompa was subsequently arrested and convicted of 17 counts of rape, five counts of kidnapping, 55 counts of pandering sexually oriented matter involving a minor, 21 counts of gross sexual imposition, and possession of criminal tools, among other convictions, in *State v. Pompa*, Cuyahoga C.P. No. CR-493438 (June 6, 2007), *aff’d*, 8th Dist. Cuyahoga No. 90110, 2008-Ohio-3672.

The abuse has caused Amanda significant and long-term injury, and fundamental changes to the course of her life. Prior to Pompa’s sexual abuse, Amanda was an active girl involved in her community. (TR. 30.) Since the abuse, however, Amanda fundamentally changed. Her mother testified that “we saw our daughter go from being outgoing to a recluse. Her anxiety level was huge. She never wanted to go anywhere. We saw this beautiful, outgoing child turn into someone that didn’t want to leave. She just wanted to be alone. (TR. 77-78.). Continuing today, Pompa’s abuse has caused Amanda to experience PTSD, anxiety attacks, agoraphobia, nightmares, and physical contact issues even with her husband, (Yingling Dep. 25-29.), injuries that have fundamentally changed the character and processes of Amanda’s daily life.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

- I. **Proposition of Law 1: OAESV urges this court to overturn *Simpkins*, as it was wrongly decided at the time, a change of condition demands reversal, it is practically unworkable, and overturning**

the decision will not create undue hardship for those who have relied upon it.

OAESV asks this court to overturn the decision made in *Simpkins* that cases of minor victims of sexual abuse should be subject to the limits enacted under R.C. 2315.18. As discussed herein, OAESV knows from experience that child sexual abuse creates long-term injury distinct in character to the harms caused by torts specifically contemplated by R.C. 2315.18(B)(3). Amanda Brandt has experienced a living nightmare since Roy Pompa intentionally drugged and sexually abused her repeatedly, at least 34 times across two years of her childhood. Her injuries are well-established and consistent with research on the outcomes of child sexual abuse. Further, adherence to *Simpkins* burdens the statewide economy to the benefit of child sexual abuse perpetrators, in contradiction of the Ohio Legislature's stated purpose.

A. Standard of Review.

Under the doctrine of stare decisis, courts generally must adhere to prior judicial decisions. See *City of Cleveland v. Maistros*, 145 Ohio App.3d 346, 354, 762 N.E.2d 1065 (8th Dist. 2001). The benefits that flow from stare decisis consist of a greater degree of certainty and stability in our legal system. *Id.* However, the principle of stare decisis is not intended to “effect a petrifying rigidity.” *Id.* Where adherence to precedence results not in “justice but unfairness, not certainty but doubt and confusion, it loses its right to survive, and no principle constrains the court to follow it.” *Id.*

Nonetheless, “any departure from the doctrine of stare decisis demands special justification.” *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 44. In formulating what constitutes “special justification,” the Supreme Court of Ohio articulated three conditions: “(1) the decision was wrongly decided at that

time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning precedent would not create an undue hardship for those who have relied upon.” *Id.* at ¶ 48.

B. *Simpkins* Was Wrongly Decided at That Time.

The plurality in *Simpkins* incorrectly applied R.C. 2315.18, and the reasoning of *Arbino*, to cases involving minor victims of sexual abuse. The heart of the court’s error was in equating Jessica Simpkin’s injuries from childhood sexual abuse to that of other tort victims whose physical injuries do not meet the exception of R.C. 2315.18(B)(3). *See Simpkins* at ¶ 41 (“[i]n the end, R.C. 2315.18 does not affect *Simpkins* any differently than it affects any other victim whose injuries do not fall within the R.C. 2315.18(B)(3) exceptions to the damage caps.”) This simplistic declaration was the analytical step that deemed *Arbino* controlling of the outcome. But the assertion was and remains incorrect on its face.

As Amanda’s and Jessica’s cases show, the injury incurred by a minor due to sexual abuse is of an entirely different kind and degree than other physical injuries that fall short of R.C. 2315.18(B)(3). Minor victims of sexual abuse rarely suffer the type of upfront, significant economic injury that older victims of other types of tortious actions do. Where a car accident victim may experience immediate physical limitations and an extended resulting hospital stay, sexual abuse victims often do not experience an analogous physical limitation or visible physical injury in the immediate aftermath of an act of rape or sexual abuse. *See, e.g.* Arnow, 61 *Psychosom. Med.* 762 (1999); Finestone, 24 *Child Abuse Negl.* 547 (2000); Sharon G. Smith & M.J. Breiding, *Chronic Disease and Health Behaviours Linked to Experiences of Non-Consensual Sex Among Women and Men*, 125 *Public Health* 653 (2011). While a plaintiff injured by a faulty product may

lose functioning required for their job and thus lose wages, adult survivors of rape and sexual abuse often continue on with work and other obligations in the hours, days, and weeks after rape or sexual abuse. Minor survivors are, by virtue of school attendance rules and labor standards laws, unlikely to experience meaningful wage loss, and many, like Amanda, face medical bills that are different in character than those of other tort plaintiffs. See Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 Emory L.J. 1263 (2004) (“Several types of injuries that are disproportionately suffered by women—[i.e.] sexual assault[]—do not affect women in primarily economic terms.”); see also Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 Tenn.L.Rev. 847 (1997) (noting that in cases such as sexual assault, the effects “on earnings are not as linear and temporally direct as when a more tangible physical injury or disease physically disables a person from working or forces her to take a reduced job”).

A decade’s long parade of consistent academic research provides a strong framework to analyze the differences between the injuries of a typical tort case contemplated by the Ohio Legislature in passing R.C. 2315.18(B)(3) and the realities facing victims of child sexual abuse victims for the rest of their lives. *Lifetime Economic Burden of Rape Among U.S. Adults* reported on a range consistent and predictable harms suffered by rape victims, including long and short-term lost productivity, pregnancy and the subsequent costs (11.3 percent of persons impregnated during rape suffered miscarriage, 32.3 percent kept and raised the conceived child, 5.9 percent gave the child to adoptive parents, and 50 percent pursued a medically assisted abortion), property loss or dam-

age, hospital admission for sexual assault, emergency room treatment for non-fatal injuries, care related to non-fatal suicide attempts, and others. Peterson, 52 Am. J. Prev. Med. 691 (2017) at 693-697.

Conducting a meta-analysis of studies published between 1980 and 2008, the researchers found that rape victims have a “significantly higher observed prevalence of mental health outcomes – anxiety, depression, eating disorder, post-traumatic stress disorder, and suicide attempt.” *Id.* at 694. This analysis revealed this to be particularly true when the victim experienced sexual abuse as a child. *Id.* at 694-96. Other physical harms have higher prevalence among sexual violence victims, including high cholesterol, gastrointestinal symptoms, HIV risk factors, non-specific pain, urinary problems, and being overweight. *Id.* at 696. Women victims of sexual violence are more likely than non-victims to experience heart attack or heart disease. Sharon G. Smith & M.J. Breiding, *Chronic Disease and Health Behaviours Linked to Experiences of Non-Consensual Sex Among Women and Men*, 125 Public Health 653 (2011).

In 2010, Laura Chen published *Sexual Abuse and Lifetime Diagnosis of Psychiatric Disorders: Systematic Review and Meta-analysis* in Mayo Clinic Proceedings. Chen, 85 Mayo Clin. Proc. 618 (2010). This systematic review yielded 37 studies, 17 case-control and 20 cohort, with 3,162,318 participants (Figure 1).^{7,29-64}, and found a “significant association” between sexual abuse and lifetime diagnoses of PTSD, anxiety disorders, suicide attempts, eating disorders, and sleep disorders (but no statistical association between sexual abuse and diagnoses of schizophrenia or somatoform disorders). *Id.* at 621. These results were consistent regardless of the victim’s sex or age at the time of abuse. *Id.*

Beth Molnar's study of 8,098 participants found "[a]mong women, significant associations" between childhood sexual abuse and "14 of 17 subsequent lifetime mood, anxiety, and substance disorders." Beth Molnar et al., *Child Sexual Abuse and Subsequent Psychopathology: Results from the National Comorbidity Survey*, 91 Am. J. Public Health 753, 755 (2001). Molnar noted that the results "support previous findings of a strong relationship between CSA and psychopathology, among both men and women." *Id.* at 757. In his survey of 206 women, Bruce Arnow found "child sexual abuse-distressed participants used significantly more ER visits and were more likely to visit the ER for pain-related complaints than other participants." Arnow, 61 Psychosom. Med. 762 (1999). Hillel Finestone conducted a cross-sectional, controlled study of 80 women, finding "sixty-nine percent of the women who had experienced childhood sexual abuse reported a chronic painful condition lasting more than three months, compared to forty-three percent of the combined control groups ... Women who had experienced childhood sexual abuse reported a greater number of painful body areas, more diffuse pain and more diagnoses of fibromyalgia [and] had more surgeries, hospitalizations and family physician visits." Finestone, 24 Child Abuse Negl. 547-548 (2000).

Finestone and numerous others identify that victims of childhood sexual abuse require more medical treatment (and thus more medical care costs) than their peers who did not experience childhood sexual abuse. *See, e.g.* 24 Child Abuse Negl. 547 (2000); Chen, 85 Mayo Clin. Proc. 618 (2010). A 2000 study by Polly Hulme, published in *Child Abuse and Neglect*, surveyed 395 random patients of one healthcare provider. Polly A. Hulme, 24 Child Abuse Negl. 1471 (2000). Hulme found that women with a history of childhood sexual abuse visited their health system's primary care clinic 1.33 more times than their peers without a history of childhood sexual abuse. *Id.* at 1471-

1472. Additionally, Hulme reported that “the findings demonstrate that not only is [child sexual abuse] associated with increased primary care visits, but also increased primary care costs, as measured by charges.” *Id.*

In 2008, Amy Bonomi of The Ohio State University and Melissa Anderson of the Columbus-Children’s Research Institute published *Health Care Utilization and Costs Associated with Childhood Abuse* in the *Journal of General Internal Medicine*. Bonomi, 23 *J. Gen. Intern. Med.* 294 (2008). Analyzing medical files of 3,333 randomly selected female patients (median age 47) of a large integrated health system, Bonomi et al. found that women with a child abuse (sexual, physical, or sexual and physical) history faced significantly higher healthcare costs throughout life than women without a history of child abuse. Bonomi at 294. Across primary care, emergency department, pharmacy, specialty care, and mental health, women with a history of child sexual abuse faced annual healthcare expenses 16 percent higher than their peers without a history of child sexual abuse. *Id.* Similarly, a 1999 study published in *General Psychology* surveyed 1,225 patients of a health maintenance organization, finding that “women with sexual abuse histories had significantly higher primary care and outpatient costs and more frequent emergency department visits than women without these histories.” Edward A. Walker et al., *Costs of Health Care Use by Women HMO Members with a History of Childhood Abuse and Neglect*, 57 *Arch. Gen. Psychiatry* 609, 609-610 (1999).

The findings described above exemplify the rule, not the exception. *See., e.g.,* Committee on Healthcare for Underserved Women, *Committee Opinion No. 498: Adult Manifestations of Childhood Sexual Abuse*, The American College of Obstetricians and Gynecologists, August 2011; Helen P. Hailes et al., *Long-Term Outcomes of Childhood*

Sexual Abuse: An Umbrella Review, 6 *Lancet Psychiatry* 830 (2019) (“associations between childhood sexual abuse and many psychological and health-related problems”); Nina Papalia, et al. *The Long-term Co-occurrence of Psychiatric Illness and Behavioral Problems Following Child Sexual Abuse*, 51 *Australia NZ J. Psychiatry* 604 (2017) (connecting CSA to mental health morbidity, criminal justice system contact, and suicide). And as in Amanda’s case, “[m]ore extreme symptoms can be associated with abuse onset at an early age, extended or frequent abuse.” See *Adult Manifestations of Childhood Sexual Abuse*. These devastating consequences often take place across a victim’s entire lifespan. See Scott D. Easton & Jooyoung Kong, *Mental Health Indicators Fifty Years Later*, 63 *Child Abuse Negl.* 273 (2017) (stating that “CSA has the capacity to undermine mental health across the lifespan,” and reviewing numerous studies showing life-time impact of childhood sexual abuse); Dixie Meyer et al., *Persistent Complications of Childhood Sexual Abuse*, 26 *J Child Sex Abus.* 140 (2017) (“The effects of CSA often persist across the lifespan, suggesting that sexual abuse may disrupt development processes.”).

A lifetime of stigma and self-blame are also symptoms of childhood abuse not present in other types of injuries. See Angie C. Kennedy and Kristen A. Prock, *“I Still Feel Like I Am Not Normal”: A Review of the Role of Stigma and Stigmatization Among Female Survivors of Child Sexual Abuse, Sexual Assault, and Intimate Partner Violence*, 19 *Trauma, Violence and Abuse* 512 (2018). Finally, a key difference between these injuries and other physical injuries is that many remain hidden for years to come, and can be unearthed or re-triggered later in life. See *Committee on Healthcare for Underserved Women* (2011) (“Common life events, like death, birth, marriage, or divorce may trigger the return of symptoms for a childhood sexual abuse survivor.”).

This medical and scientific consensus makes clear that the *Simpkins* Court made a deeply flawed assumption in concluding that "R.C. 2315.18 does not affect *Simpkins* any differently than it affects any other victim whose injuries do not fall within the R.C. 2315.18(B)(3) exceptions to the damage caps." To the contrary, the statute impacts victims like Jessica and Amanda far differently from non-sexual abuse tort plaintiffs. As compared to purely physical injuries that fall short of the exception, the injuries experienced by Amanda, Jessica, and other child sexual abuse victims are wholly different in kind and degree. That difference means that *Simpkins* is a fundamentally different case than *Arbino*, and the latter should not have controlled.

But the casual equating of the injuries also renders the *Simpkins* analysis—and the Court's justification for applying the R.C. 2315.18 damage caps to victims of child sexual abuse—deeply flawed and unreasonable on both due process and equal protection grounds. As explained *supra*, the *Simpkins* Court upheld the statute in large measure by deferring to "the General Assembly's determination that the types of physical injuries listed in R.C. 2315.18(B)(3) offer more concrete evidence of noneconomic damages." ¶ 50, And that injuries not included in R.C. 2315.18(B)(3) are "less severe[]." That, the Court concluded, provided a "rational basis" for limiting noneconomic damages "that are not accompanied by those types of serious physical injuries." ¶ 50. In other words, both the legislature and Court are acting on an assumption that the particular injuries of R.C. 2315.18(B)(3) serve as a rough proxy for the noneconomic damages a victim will have suffered.

With respect to childhood sexual abuse, there is no connection whatsoever between the degree of instantaneous physical injuries and the level of non-economic damages the child sexual abuse caused. To suggest that the type of severe physical injury

experienced by a car accident victim, for example, is a proxy for the long-term physical consequences and deep emotional injury of abuse is the height of arbitrary and unreasonable. This is especially true when, as the College of Obstetricians and Gynecologists reminds us, many injuries from childhood sexual abuse remain hidden for years, and are often triggered by later events in life. *See Committee on Healthcare for Underserved Women* (2011). Any suggestion that physical injury can serve as even a rough proxy for the level of noneconomic damages stemming from sexual abuse defies not only common sense, but overwhelming scientific consensus. *See supra*.

Further, the economic justification that anchored *Arbino* simply doesn't work in the instant matter. In *Arbino*, the Court upheld R.C. 2315.18(B)(2) by crediting the economic arguments made by the legislature in enacting the statute. *See Arbino*, at ¶ 68 (explaining that the Statehouse goal was to curb “frivolous lawsuits, which increases the cost of doing business, threatens Ohio jobs, drives up costs to consumers, and may stifle innovation”) (quoting S.B. 80, Section 3(A)(3), 150 Ohio Laws, Part V, 8024); *id.* at ¶ 69 (“we conclude that R.C. 2315.18 is rationally related to the legitimate state interests of reforming the state civil justice system to make it fairer and more predictable and thereby improving the state's economy”). *See also Simpkins*, ¶ 37 (noting that the General Assembly “reviewed evidence demonstrating that uncertainty related to the civil-litigation system was harming the economy”) (citing *Arbino*). If the goal was improving the statewide economy, the legislature did well to craft a statute that neither considered or aligned capping child sexual abuse damages – as doing so would harm the economy more than it would help. Specifically, decades of published research demonstrate that

completed acts of sexual violence, especially those against child victims, severally burden victims and whole economic systems alike. Cora Peterson et al., *Lifetime Economic Burden of Rape Among U.S. Adults*, 52 Am. J. Prev. Med. 691 (2017).

In 2017, researchers for the Centers for Disease Control published *Lifetime Economic Burden of Rape Among U.S. Adults* in the American Journal of Preventative Medicine. Peterson, 52 Am. J. Prev. Med. 691. Using data from previous studies and the 2011 U.S. National Intimate Partner and Sexual Violence Survey, Peterson et al. adhered to the Consolidated Health Economic Evaluation Reporting Standards model, and estimated the “per-victim U.S. lifetime cost and total population economic burden of rape among adults not currently institutionalized”, with a focus on long-term impacts on victim health. Peterson at 692. The study defined “rape” as “any lifetime completed or attempted forced penetration or alcohol- or drug-facilitated penetration, measured among adults not currently institutionalized.” *Id.* at 691. Specifically excluding non-monetary elements (such as “pain and suffering”), the study estimated lifetime cost per victim of \$122,461 (in 2014 USD) and a population economic burden of nearly \$3 trillion as the “minimal identifiable cost of rape.” *Id.* at 695. Though the population economic burden is spread among many (victims, employers, the criminal justice system, insurance companies, and the like), the United States Government absorbs approximately 1/3 (or \$1 Trillion) of the costs. *Id.* at 691.

Additional scholarly analysis of the U.S. Department of Justice’s Bureau of Justice Statistics *National Crime Victim Survey*, the Federal Bureau of Investigation’s *Uniform Crime Reports* and National Incident-Based Reporting System, along with data from the Federal Emergency Management Agency and the U.S. Fire Administration identified rape as the crime with the highest annual per-victim cost to government systems, far exceeding

the per victim cost of homicide, aggravated assault, and other violent crimes. Kathryn E. McCollister et al., *The Cost of Crime to Society: New Crime-Specific Estimates for Policy and Program Evaluation*, 108 *Drug Alcohol Depend.* 98, 101 (2010).

Applying R.C. 2315.18 and *Arbino* to *Simpkins* not only fails to support the legislative basis of passing punitive damage caps, it directly contradicted it. Specifically, removing damage caps from sexual violence perpetration cases centralizes the economic burden of sexual abuse, putting the onus of payment solely on the perpetrator. This deters grievous sexual abuse, and when such deterrent is effective, the population-wide economic burden of sexual violence will reduce.

Even if the financial costs of sexual violence to governments and communities did not contradict the goals of R.C. 2315.18, the criminal nature of the predatory acts here, and the victimization of and devastation to children like Amanda, eviscerates any legitimate economic interest served by applying the statute's damage caps in this case. The economic foundation of the *Arbino* decision is wholly inapposite.

Ultimately, precluding victims of child sexual abuse from full compensation from their predators for debilitating, indefinite injury does not bear a real and substantial relationship to the public's general welfare. To the contrary, in cases of child sexual abuse, the cap *undermines* public health and welfare, and harms the economy. Therefore, *Simpkins* must be reversed.

C. Circumstances Have Changed Since *Simpkins*.

Not only was *Simpkins* wrongly decided at that time, circumstances have also changed since the decision, providing even more support to overturn *Simpkins*.

Even before COVID-19 shone a light on increasing child sexual abuse, the United States Department of Education reported spikes in instances of adults sexually

abusing children within public K-12 schools, in the very years since the *Simpkins* decision. See Moriah Balingit, *Sexual assault reports sharply increased at K-12 schools, numbering nearly 15,000, Education Department data shows*, Washington Post (October 5, 2020), <https://www.washingtonpost.com/education/2020/10/15/sexual-assault-k-12-schools/>. Specifically, the Education Department’s data showed a 50 percent increase in reports of K-12 sexual abuse between the 2015-16 and 2017-18 school years. Balingit, Washington Post (Oct. 2020) (“We hear all too often about innocent children being sexually assaulted by an adult at school. That should never happen. No parent should have to think twice about their child’s safety while on school grounds,” Education Secretary Betsy DeVos said.”). Stories of large-scale abuse by athletic doctors and within competitive youth sports in our region and Ohio’s capitol city have provided consistent testimony about the deeply horrific impact these crimes have had on our neighbors, classmates, and even our heroes on the international Olympic stage. See, e.g., Jennifer Smoula, *Number of sex crimes at Ohio State, Michigan State ‘unprecedented’ due to Richard Strauss, Larry Nassar cases*, Columbus Dispatch (October 6, 2019), <https://www.dispatch.com/news/20191006/number-of-sex-crimes-at-ohio-state-michigan-state-unprecedented-due-to-richard-strauss-larry-nassar-cases> (accessed October 2, 2021).

Additionally, in the years since *Simpkins*, the public has absorbed the reverberations of high-profile adults using their sizable financial means to coordinate and hide child sexual abuse, see, e.g. Troy Closson, *R. Kelly is Found Guilty on all Counts and Faces Life in Prison*, NY Times, September 27, 2021, <https://www.nytimes.com/live/2021/09/27/nyregion/r-kelly-trial-news> (accessed October 1, 2021); Benjamin Weiser, *Ghislaine Maxwell Charged With Sex Trafficking of 14-Year-Old*

Girl, NY Times, March 29, 2021, <https://www.nytimes.com/2021/03/29/nyregion/ghislaine-maxwell-sex-trafficking-epstein.html> (accessed September 20, 2021).

When left unchecked and undeterred by possible damage awards that might actually make an impact, wealthy and powerful abusers can continue inflicting life-long injury on children across Ohio.

In trying to follow the General Assembly's economic reform statute, the Court created a loophole for child sexual predators that fails to improve business conditions, and instead actually costs Ohio money. In applying *Arbino*, the *Simpkins* Court created a loophole for child sexual predators that, though shocks the conscious even to consider, does not actually save Ohio's economy the money contemplated by the General Assembly when passing the R.C. 2315.18 damage caps. Instead, the loophole costs Ohioans money.

As these high-profile cases have come to light, it is impossible to ignore the distinction between child sexual abuse damages and (1) the Ohio Legislature's inapposite goal in setting the caps at issue, and (2) the uniquely paced and egregiously harmful aftermath of child sexual abuse. Instead, this Court must act to overturn *Simpkins* and the increasingly unjustifiable misclassification of the injury of child sexual abuse.

D. The Unworkable Nature of *Simpkins*.

The next prong that provides "special justification" to decline to follow a prior judicial decision is whether the prior decision defies "practical workability." *Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, at ¶ 50. (more cases on workability). *Simpkins* satisfies this prong by forcing on Ohio courts a mode of analyzing and comparing emotional and physical injury that defies basic science and common sense.

First, the *Simpkins* decision suggests that courts and litigants undertake an assessment of whether the emotional injury from a child sexual abuse case "rise[s] to the

level of the physical injuries excepted from the damage caps by R.C. 2315.18(B)(3).” *Simpkins*, ¶ 42. In such cases, the Court offers, a due process violation might exist. The court then proceeds to undertake its suggested analysis. While noting negative consequences in Jessica’s life, *see id.* at ¶ 44 (noting posttraumatic stress disorder, low-grade depression and the fact that Jessica “is afraid of the dark, suffers from anxiety, and has trust issues with men”), the court weighed *against* Jessica the fact that she “played basketball in high school and college, got good grades in college, is currently employed full-time, has not sought or participated in mental health treatment or counseling since 2008 and does not have current plans to seek treatment.” *Id.*

The Eight District reviewed this *Simpkins* analysis as it approached Amanda’s case. *See* ¶ 46 (“There was other evidence, however, that [Jessica] played basketball in college, received good grades in college, was currently employed full-time, and had not been in counseling for some time and had no current plans to seek further counseling.”) (citing *Simpkins*). The court then balanced similar factors in Amanda’s case. It acknowledged that Amanda “suffers from PTSD, depression, anxiety, and recurrent nightmares [] became a heroin addict and tried to commit suicide [,] was homeless for a year [, and] has been in counseling many times during the years after the abuse and assumes she will need counseling for the foreseeable future, an assumption corroborated by Dr. Yingling.” ¶ 47. It also noted that Amanda’s “participation in some activities, such as those involving crowds, are admittedly very limited.” ¶ 48. But weighing *against* Amanda, the court found, was the fact that she:

is married and has two young children[,] works part-time as a waitress, and has completed the necessary classes to obtain her real estate license and hopes to establish a career selling real estate. Thus, it appears that she is able to independently care for herself and perform life-sustaining activities....

Id.

This is a strained and deeply flawed analysis, for two reasons. First, whether a victim of childhood sexual abuse can play basketball or other sports, achieve good grades, obtain a professional license, or even get married and have two children has *no bearing whatsoever* on the extent of the injury the abuse rendered over her lifetime. Only recently, we witnessed Olympic athletes testifying in Congress about the deep damage they suffered from childhood abuse—the fact that they were strong enough to rise to athletic success as Olympians does not bear in any way on the injury they suffered from the abuse.

In this way, the *Simpkins* analysis sends courts down a meandering road to nowhere—weighing facts and factors that have no connection to the actual injury victims have suffered. (No more so than if an accident victim who satisfied the R.C. 2315.18(B)(3) exception managed to get good grades in college or have kids). Nor do these facts have any bearing on whether the injury victims suffered is somehow equivalent, in its effects, to the type and degree of catastrophic physical injury that meets the exception of the statute. The required analysis doesn't simply mix apples with oranges; it's asking courts to count oranges and compare them to a separate set of apples.

Second, the *Simpkins* analysis puts Ohio judges in the unenviable and morally fraught position of holding *against* child abuse victims the moments in their life where they have made progress—where they have taken the most basic steps to achieve normalcy despite the abuse they suffered. Playing basketball? Made the Olympics? Good grades? A professional license? All are positive steps on a long and difficult road for these victims, but none should be used to undermine other tangible evidence (drug

abuse, suicide attempts, struggles to keep a job) that the abuse they suffered has rendered a lifetime of debilitating injury. Using positive steps victims have taken in life to deny the full amount of damages to which they are entitled only serves to punish victims for whatever progress they have made.

If adherence to precedent results not in “justice but unfairness, not certainty but doubt and confusion, it loses its right to survive, and no principle constrains the court to follow it.” *City of Cleveland v. Maistros*, 145 Ohio App.3d 346, 354, 762 N.E.2d 1065 (8th Dist. 2001). *See also* William Blackstone, *Commentaries*, 63 (courts must adhere to “precedents and rules..., unless flatly absurd or unjust”). *Simpkins*, by imposing a mode of analysis that is not only arbitrary and unreasonable, but weighs positive steps an abuse victim has taken *against* other evidence of lifelong and debilitating injury, creates just such an unworkable and unjust standard.

E. Reliance Interests.

The last prong that provides a court “special justification” to decline to follow a prior judicial decision requires that disregarding the precedent in question would not create undue hardship for those who have relied upon that precedent. In considering this prong, the court “must ask whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations.” *Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, at ¶ 58.

It is clear on its face that this prong weighs heavily in favor of overturning *Simpkins*. There is no possible reliance interest to speak of other than perhaps that of child sexual abuse perpetrators and those who harbor who engaged in criminal conduct with the understanding that punitive damage caps would shield them from fully

financial accountability for the trauma and injury their malicious acts caused. Needless to say, that is not a reliance interest any court should find legitimate.

II. Proposition of Law 2: If this Court does not overturn *Simpkins*, it must find that R.C. 2315.18—as applied to Amanda Brandt—violates constitutional rights to due process of law and equal protection of the laws, as guaranteed to her by the Ohio Constitution.

In *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, the Ohio Supreme Court held that R.C. 2315.18 was constitutional on a *facial* basis. “If a statute is unconstitutional on its face, the statute may not be enforced under any circumstances” and “(r)efERENCE to extrinsic facts is not required * * *.” *Wymsylo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898, ¶ 21. An *as applied* challenge, however, recognizes that a statute might operate unconstitutionally under some plausible set of circumstances without rendering it wholly invalid. *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, ¶ 37. In an *as applied* challenge, the issue is whether application of the statute in a particular context is constitutional and is dependent upon a particular set of facts. *Wymsylo* at ¶ 22. *See also Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 181 (“A party raising an as-applied constitutional challenge must prove by clear and convincing evidence that the statute is unconstitutional when applied to an existing set of facts.”) “The practical effect of holding a statute unconstitutional ‘as applied’ is to prevent its future application in a similar context, but not to render it utterly inoperative.” *Id.*

In *Simpkins v. Grace Brethren Church of Delaware*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, ¶ 51, a district court applied R.C. 2315.18 to limit the recovery of Jessica Simpkins for injuries she suffered from sexual abuse by an adult. On appeal, this Court rejected an as-applied challenge to R.C. 2315.18. But the Court posited that

“there may exist a set of facts under which application of the statutory damage caps would prove unconstitutional[.]” *Id.*

Appellant Brandt asserts that that “set of facts” does exist, and is now before this Court. She maintains the multiple acts of sexual abuse she suffered rendered such debilitating and lasting injury that application of R.C. 2315.18 violates her rights to the “due course of law,” as well as the equal protection of the laws, both guaranteed by the Ohio Constitution. The trial and appellate courts below erred in not distinguishing the *Simpkins* case from the even more debilitating and indefinite injury Amanda has suffered, and still suffers to this day.

A. R.C. 2315.18 As Applied to Amanda Brandt Violates Her Right to Due Course of Law Under Section 16, Article I Of The Ohio Constitution.

Even under the most lax scrutiny of Ohio's “due course of law” standard, applying the caps of R.C. 2315.18 to Amanda’s case violates the Ohio Constitution.

This Court treats the “due course of law” provision in Article I, Section 16 of the Ohio Constitution as the equivalent of the “due process of law” protections in the U.S. Constitution. *Arbino* at ¶ 48. In *Arbino*, the Supreme Court of Ohio declined to apply a “strict scrutiny” test to the due process challenge in that case, instead applying a “rational-basis” test. Under the rational basis test, a statute must “bear a real and substantial relation to the public health, safety, morals or general welfare of the public and not be unreasonable or arbitrary.” *Arbino* at ¶ 49; *Groch v. General Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377.

B. R.C. 2315.18, As Applied to Amanda Brandt, Does Not Bear a Real and Substantial Relation to the General Welfare of the Public.

The application of R.C. 2315.18’s damage caps to Amanda and others similarly situated is not rationally related to the public’s health, safety or welfare.

In *Arbino*, the Supreme Court of Ohio accepted the General Assembly’s view that noneconomic damages are “inherently subjective” and “that an uncertain and subjective system of evaluating noneconomic damages was contributing to the deleterious economic effects of the tort system.” *Arbino* at ¶ 55. As a result, the court upheld a cap on noneconomic damages for all tort victims except those suffering injuries designated in R.C. 2315.18(B)(3). In *Simpkins*, the Court rejected an as-applied “due course of law” challenge to the damage caps, relying on the reasoning of *Arbino*. The lynchpin of the Court’s rejection of *Simpkins*’ due process challenge was its assessment of the injury she endured. On reviewing the facts of her injury, the Court concluded that, “[i]n the end, R.C. 2315.18 does not affect *Simpkins* any differently than it affects any other victim whose injuries do not fall within the R.C. 2315.18(B)(3) exceptions to the damage caps.” *Simpkins* at ¶ 41. It therefore dismissed the claim based on the controlling precedent of *Arbino*. *See id.*

But then the Court ventured a step further, raising the possibility that a plaintiff might show sufficiently serious injury as to succeed on a due process claim:

Appellants also seize upon the Fifth District’s acknowledgment that “*there may be nonphysical injuries the effects of which approximate those listed in R.C. 2315.18(B)(3)*” as an acknowledgment that subjecting all awards for nonphysical injuries to a damage cap might be arbitrary and unreasonable. 2014- Ohio-3465, 16 N.E.3d 687, at ¶ 78. But *we leave that question for another day*. Because that situation does not exist here, *we need not opine whether there may be some instance in which application of the damage caps to damage awards for emotional injuries that rise to the level of the physical injuries excepted from the damage caps by R.C. 2315.18(B)(3) would violate due process*.

Id. at ¶ 42 (emphasis added). The Court explained that such an injury would require “extreme qualifications.” *Id.* at 43. *Id.* at 43 (citing *Weldon v. Presley*, N.D. Ohio No. 1:10 CV 1077, 2011 WL 3749469, *6 (Aug. 9, 2011)). Examining the nature of Jessica

Simpkins’ abuse and injuries, the Court again concluded that her “noneconomic injuries do not meet the “extreme qualifications” that the law requires in order to avoid the operation of the damage caps in R.C. 2315.18(B)(2),” and therefore the application of the caps did not violate her due process rights. *Id.* at ¶ 44.

Those “extreme qualifications” *do* exist here. In fact, a close analysis of the trial record shows that the abuse and injury endured by Amanda are not only more severe than that in *Simpkins*, but they satisfy the deficiencies the Court explicitly noted in *Simpkins*, and approximate “the effects” of injuries described in R.C. 2315.18(B)(3). The Eighth District erred in not recognizing Amanda’s far more severe degree of injury.

First, in *Simpkins*, at issue was a single act of abuse. *See Simpkins*, at ¶ 62. Here, Amanda’s abuse took place over several years, occurring dozens of times. *See supra*. And here, the injury suffered by Amanda is considerably more severe, with permanent and debilitating “effects” at least equivalent to the types of physical injuries exempted in R.C. 2315.18(B)(3)—the threshold which *Simpkins* suggested was necessary to raise a constitutional problem in an as-applied case. The heart of the R.C. 2315.18(B)(3) exception is that the physical injury “permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities.” In *Simpkins*, the Court concluded that *Simpkins* was indeed “able to independently care for herself and perform life-sustaining activities.” *Simpkins*, at ¶ 44. It reached that conclusion based, in part, on the fact that *Simpkins* is “currently employed full-time, has not sought or participated in mental health treatment or counseling since 2008 and does not have current plans to seek treatment.” *Id.*

Sadly, here, Amanda’s injuries *are* ongoing, and both her own and expert testimony made clear that the suffering will likely continue indefinitely. Her downward trajectory began almost immediately and has not ceased. Prior to Pompa’s sexual abuse, Amanda maintained academic excellence and played an active role in her community. (TR. 30-31, 77.) Then, from 2004-2005, following numerous instances of sexual abuse, Amanda was reduced from a “beautiful, outgoing” “honor student” to an anxious and angry “recluse” with plummeting grades. (TR. 77-78.) The dehumanizing effect of the abuse on Amanda was such that her mother declared that she no longer had the “same daughter anymore.” (TR. 78.) This, despite her loving family investing significant resources in treatment. (TR. 49-51, 78.)

As Amanda grew into an adult, she never could escape from the debilitating grip that Pompa’s abuse had on her. Even now, Amanda suffers from recurring and constant nightmares involving invasions of her personal space, which “almost always” include Pompa. (TR. 32-33.) These invasive nightmares occur “at a minimum” five days a week, even with medication. (TR. 32.) Beyond nightmares, Amanda continues to suffer from heightened levels of anxiety, which is directly attributable to her abuse at the hands of Pompa. (Yingling Dep. 40-41.) She experiences severe anxiety attacks—often leading to hyperventilation—in crowded places, such that she has to grocery shop at two or three in the morning in order to avoid other customers. (TR. 34, 43.)

The severe extent of Amanda’s anxiety, induced by the numerous instances of Pompa’s sexual abuse, plunged Amanda into her lowest points in life—points for which *Simpkins* has no parallel. After several successful years working in customer service, her anxiety became so severe that she could no longer function in her role, and she was subsequently terminated. (TR. 35-36.) Following her termination, she struggled to find

a new job. (TR. 36.) Soon after losing her job, and with her mental health deteriorating, Amanda turned to heroin and subsequently lost the only roof over her head. (TR. 36-37.) She spent approximately the entire next year homeless, at times living in a tent, even during the winter, and addicted to heroin. (TR. 37.) She finally returned to her parents' home in an attempt to rid herself of her drug addiction. (TR. 38.) By then, however, her mental health had deteriorated even further. (*Id.*) Amanda attempted suicide by heroin overdose. (*Id.*) As Amanda testified, were it not for the abuse of Pompa, she would never have turned to drugs and never would have attempted suicide. (TR. 37, 39.)

Pompa's abuse also directly led to Amanda's Post-Traumatic Stress Disorder. (Yingling Dep. 40-41.) The type of life-altering abuse Pompa inflicted upon Amanda was of such a traumatizing nature that Amanda is likely to continue suffering from her symptoms to some degree of intensity over a significant period of time. (Yingling Dep. 42-43.) Amanda began counseling from the day her family discovered Pompa's sexual abuse. (TR. 34, 41.) Unlike *Simpkins*, fourteen years later, Amanda still continues her counseling, and she hopes to one day no longer require counseling but "that's not even on the radar right now." (TR. 33, 41.) So, while Amanda's case certainly shares some factual similarities with *Simpkins*, the differences are what matter. The repugnant character of Pompa's sexual abuse, along with the ruinous impact that the abuse had on Amanda, distinguish the cases from one another. Jessica *Simpkins* never became homeless, she never lost a job as result of her abuse, she never became a drug addict, and she never attempted suicide. The *Simpkins* Court weighed that Jessica had not undergone mental health treatment in years; Amanda still undergoes such treatment, and will indefinitely. She struggles with even the most basic tasks—having to shop in the early hours of the morning because she has anxiety attacks when in large crowd, and holding

a steady job. The pattern of her life makes clear that the injury has prevented her from being able to independently care for herself in a sustained, stable and healthy way.

In short, the nature of Amanda’s suffering sets this case apart from the factual core grounding the *Simpkins* Court’s rejection of the due process claim—that *Simpkins*’ injury did “not affect *Simpkins* any differently than it affects any other victim whose injuries do not fall within the R.C. 2315.18(B)(3) exceptions to the damage caps.” *Simpkins* at 44. It is clear that Amanda’s injuries do affect her differently than victims whose physical injuries fall short of R.C. 2315.18(B)(3). And the effects of her injuries “rise to the level of the physical injuries excepted from the damage caps by R.C. 2315.18(B)(3).”

Because the injury here is factually distinguishable from *Simpkins*, the case no longer controls. Instead, applied to the facts of this case, see *Wymyslo*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898, at ¶ 22 (an “as applied” challenge to the constitutionality of the damage caps must focus on the “particular context” in which the statute is being applied), no rational basis exists to apply R.C. 2315.18(B)(3) against Amanda for her injuries. There is simply no legitimate public good—safety, morals, or public health—served by applying damage caps to limit Poppa’s liability for his years of abuse, or to limit Amanda Brandt’s recovery for the life-time of non-economic damages she has suffered. Indeed, the public interest for safety, morals and public health would *be best served by* unlimited damages against predators such as Poppa, and to the benefit of minor victims such as Brandt.

As discussed *supra*, the economic justification that anchored *Arbino* simply doesn’t work in the instant matter. In *Arbino*, the Court upheld R.C. 2315.18(B)(2) by crediting the economic arguments made by the legislature in enacting statute. *See Arbino*, at ¶ 68 (explaining that the Statehouse goal was to curb “frivolous lawsuits, which

increases the cost of doing business, threatens Ohio jobs, drives up costs to consumers, and may stifle innovation”) (quoting S.B. 80, Section 3(A)(3), 150 Ohio Laws, Part V, 8024); *id. at* ¶ 69 (“we conclude that R.C. 2315.18 is rationally related to the legitimate state interests of reforming the state civil justice system to make it fairer and more predictable and thereby improving the state’s economy”). *See also Simpkins*, ¶ 37 (noting that the General Assembly “reviewed evidence demonstrating that uncertainty related to the civil-litigation system was harming the economy”) (citing *Arbino*). Considering the decades of published research demonstrating that completed acts of child sexual abuse severally burden victims and whole economic systems alike, the economic “good” sought by the General Assembly is completely inapplicable here. Cora Peterson et al., *Lifetime Economic Burden of Rape Among U.S. Adults*, 52 *Am. J. Prev. Med.* 691, 695 (2017); (estimating the lifetime cost per victim of \$122,461 (in 2014 USD) and a population economic burden of nearly \$3 trillion as the “minimal identifiable cost of rape ... and the government absorbs approximately \$1 trillion of these costs); McCollister, 108 *Drug Alcohol Depend.* 98, 101 (2010) (rape is the crime with the highest annual per-victim cost to government systems, far exceeding the per victim cost of homicide, aggravated assault, and other violent crime). Applying R.C. 2315.18 and *Arbino* to cases like this one (and *Simpkins*).

Even if the financial costs of sexual violence to governments and communities did not contradict the goals of R.C. 2315.18, the criminal nature of the predatory acts here, and the victimization of and devastation to children like Amanda, eviscerates any legitimate economic interest served by applying the statute’s damage caps in this case. The economic foundation of the *Arbino* decision is wholly inapposite. Barring Amanda and similarly situated victims of childhood sexual abuse from full economic recovery for

their lifelong harms does not correlate to a real or substantial relationship to public welfare. It actually contradicts public well-being. As a result, applying R.C. 2315.18 in cases such as Amanda's fails the first prong of the rational basis test.

C. R.C. 2315.18 is both arbitrary and unreasonable as applied to Amanda Brandt.

Even, assuming *arguendo*, that the statute bears a real and substantial relationship to the general public welfare, it still cannot be arbitrary or unreasonable if it is to pass constitutional muster. "Arbitrary" has been defined as "without adequate determining principal" and "unreasonable" has been defined as "irrational." *Detelich v. Gecik*, 90 Ohio App.3d 793, 795, 630 N.E.2d 771 (11th Dist. 1993). The application of R.C. in cases such as Amanda's is arbitrary and unreasonable because it deprives Amanda and similar plaintiffs of damages for the type of injury that the specific abuse they endured is far more likely to inflict—long-term and varied instances of economic harm, and significant noneconomic harm.

Accordingly, as applied to Amanda and others similarly situated, it is clearly irrational to require that they exhibit the concrete physical injuries listed in R.C. 2315.18(B)(3) before they can receive the amount of compensatory damages awarded by a jury for their injury. While overwhelming, and lifetime in their duration, the damage caused by sexual abuse of a child does not fall into the simple category of physical injury or economic harm. Rather, as Amanda's case illustrates, it manifests itself in far broader-reaching ways, such as of emotional distress, depression, altered sense of self and social adjustment and impaired relationships. *See, e.g.* Committee on Healthcare for Underserved Women, *Committee Opinion No. 498: Adult Manifestations of Childhood Sexual Abuse*, The American College of Obstetricians and Gynecologists, August

2011, <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2011/08/adult-manifestations-of-childhood-sexual-abuse> (accessed October 4, 2021) (detailing emotional, physical and sexual impacts of childhood sexual abuse); Helen P. Hailes et al., *Long-Term Outcomes of Childhood Sexual Abuse: An Umbrella Review*, 6 *Lancet Psychiatry* 830 (2019). (“Studies have reported associations between childhood sexual abuse and many psychological and health-related problems, including psychological problems, self-harm, psychiatric disorders, and physical health diagnoses such as HIV and obesity.”). These injuries are real and generally as permanent as any other type of harm, and often hidden for years. And yet, *Simpkins* classifies them, within a constellation of wholly inapposite circumstances prompting R.C. 2315.18, as being unworthy of full compensation.

Given the nature of these injuries, research has recognized that caps on noneconomic damages do indeed disproportionately affect girls and women, like Amanda, in particular. As one commentator noted:

The reasons go beyond the lower wages earned by women. Several types of injuries that are disproportionately suffered by women – sexual assault, reproductive harm, such as pregnancy loss or infertility, and gynecological medical malpractice – do not affect women in primarily economic terms. Rather, the impact is felt more in the ways compensated through noneconomic loss damages: emotional distress and grief, altered sense of self and social adjustment, impaired relationships, or impaired physical capacities, such as reproduction, that are not directly involved in market-based wage-earning activity. Many of these most precious, indeed priceless, aspects of human life are virtually worthless in the market, and there is social resistance to seeing them solely or primarily in commodified, market-based terms. Society, and thus jurors, tends to understand these injuries in noneconomic, nonmarket referenced ways. Consequently, noneconomic loss damages become the principal means by which a jury can signal its sense that these types of harm are serious and profound and provide a woman plaintiff with what it regards as adequate compensation.

Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53

Emory L.J. 1263 (2004). A study of Florida sexual abuse damages awards bore out this exact pattern:

[D]ata show that noneconomic loss damages are a much higher proportion of total compensatory tort awards for sexual assault victims than for tort awards overall. Sexual assault victims are overwhelmingly female, and female plaintiffs noneconomic loss damages comprise virtually the entire award—91.6%.

Id. at 1301.

This disproportionate impact of caps on minor abuse victims marks an important difference between this case and *Arbino*. In *Arbino*, the Court made clear that damage limits violate due process *if they impose the cost of the intended benefit to the public on “those most severely injured.”* *Arbino* at ¶ 59 (emphasis added) (citing *Morris v. Savoy*, 61 Ohio St.3d 684, 576 N.E.2d 765 (1991) and *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 715 N.E.2d 1062 (1999)). But that was not an issue in *Arbino*, the Court concluded, because “R.C. 2315.18 alleviates this concern by allowing for limitless noneconomic damages for those suffering catastrophic injuries.” *Id.* at ¶ 60.

That reasoning does not apply with respect to victims of childhood sexual abuse. While minors in Amanda’s position are clearly among the most severely injured of any victim imaginable, the full extent of their injury is *not* reflected by injuries that would satisfy the R.C. 2315.18(B)(3) exception—for many, none or almost none of their injury will be exhibited by immediately physically identifiable harm. *See* Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 Tenn.L.Rev. 847 (1997) (“Unlike an external physical injury that can be seen, such as a broken limb, the physical effects of stress and anxiety or the malformed reproductive organs are not visually tangible.”);

Finestone, 24 Child Abuse Negl. 547 (2000) (describing long-term injury including diagnoses of chronic pain, fibromyalgia, high cholesterol, gastrointestinal symptoms, HIV risk factors, urinary problems, and being overweight). Rather, they suffer real, substantial noneconomic injury that over time accrues physical and financial consequences in the form described at trial by Amanda, Dr. Yingling and in multiple treatises and articles (See, e.g., Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 Emory L.J. 1263 (2004)). Nonetheless, R.C. 2315.18 provides no equivalent exception for such victims (as, *Arbino* explains, it does for other types of victims). As a result, a large group of Ohio's most vulnerable and deeply injured citizens *do* bear a disproportionate share of the burden in the legislature's attempt to improve the business climate in this state. And unlike in *Arbino*, there is no safety valve for these victims via R.C. 2315.18(B)(3). The reasoning of *Arbino*, and the way it distinguished *Morris v. Savoy*, renders the application of caps to Amanda arbitrary and unreasonable.

Chief Justice Moyer once wrote: "If the underlying purpose of tort law is to wholly compensate victims, due process is satisfied when the plaintiff recovers, from all sources, the amount that the jury deems a just and appropriate reward." *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 427, 633 N.E.2d 504 (1994) (Moyer, J., dissenting). Victims of childhood sexual abuse face a lifetime of consequences of a tortious and, in this case, criminal act. R.C. 2315.18, as applied to those victims, however, ignores the fact that some torts result almost exclusively in noneconomic injuries and thus guarantees that young victims such as Amanda Brandt can never be wholly compensated for their injury. As such, the application of R.C. 2315.18 to her case is arbitrary and unreasonable, and violates the due course of law guaranteed to Amanda by the Ohio Constitution.

D. R.C. 2315.18 As Applied To Amanda Brandt Violates Her Right To Equal Protection Under Section 2, Article I of The Ohio Constitution.

Applying the caps of R.C. 2315.18 to Amanda Brandt violates her right to equal protection under Section 2, Article 1 of the Ohio Constitution.

This Court interprets Article I, Section 2 of the Ohio Constitution to be the equivalent of the Equal Protection Clause of the United States Constitution. *See Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 63, citing *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, ¶ 7. *Arbino* established that cases challenging the application of R.C. 2315.18 involve neither a fundamental right nor a suspect class, thus requiring rational-basis scrutiny. *See Arbino* at ¶ 66, citing *State v. Williams*, 88 Ohio St.3d 513, 530, 728 N.E.2d 342 (2000). Under rational-basis review, the Court grants “substantial deference” to the General Assembly’s predictive judgment. *State v. Williams*, 88 Ohio St.3d 513, 531, 728 N.E.2d 342 (2000). A statute will be upheld if it is rationally related to a legitimate governmental interest. *See Arbino* at ¶ 66.

In *Simpkins*, this Court rejected an as-applied equal protection challenge to the application of R.C. 2315.18 to minor victims of sexual abuse. The court examined the extent of *Simpkins*’ injury, and determined that “the statutory classification is rationally related to the legitimate governmental purpose of improving the state’s civil justice system and its economy.” ¶ 49. But just as with the “process of law” challenge, the court here too acknowledged that “there may exist a set of facts under which application of the statutory damage caps would prove unconstitutional—but this case does not present it.” ¶ 51.

As argued *supra*, the facts of this case are distinguishable from *Simpkins*, and therefore, *Simpkins* does not control. Even under the less strict review of rational basis, R.C. 2315.18 violates Amanda Brandt’s equal protection rights.

Under the rational-basis test, the Court must first identify a valid state interest and then determine whether the means chosen to advance that interest is rational. *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, ¶ 9. A “means” is not rational if it is clearly arbitrary and unreasonable. *Id.* As applied to victims such as Amanda, damage caps for noneconomic injuries are indeed arbitrary and unreasonable. While, as explained *supra*, the court credited the economic justification of R.C. 2315.18 as a legitimate government interest, the differential treatment of minor victims of sexual abuse like Amanda—who have suffered catastrophic injuries—from other victims who’ve suffered catastrophic physical injuries, is not a “means” that in any way advances Ohio’s economic interest, or any other legitimate public purpose.

To the contrary, that differing treatment plays out in a way that meets the textbook definition of “arbitrary and unreasonable.” *Arbino* explained that R.C. 2315.18 creates different classes of injured persons in order to *sift out which victims are more or less severely injured*: “(T)he statute treats those with lesser injuries, i.e., those not suffering the injuries designated in R.C. 2315.18(B)(3), differently from those most severely injured.” *Arbino* at ¶ 67. In this way, the Court reasoned that “catastrophic injuries offer more concrete evidence of noneconomic damages.” *Id.* at ¶ 72. But in cases of abuse of childhood victims of abuse like Amanda, the physical injury threshold of R.C. 2315.18(B)(3) has no bearing on whether a victim has suffered “more or less severe[]” injuries from that abuse. Nor does it tell us in any way how much non-economic damage a victim like Amanda has suffered. As explained *supra*, Amanda suffered injuries whose

effects are every bit as indefinite and debilitating as some of the physical injuries listed in R.C. 2315.18(B)(3). And that is true even though, as explained *supra*, the nature of the abuse and the age of the victim mean girls like Amanda will rarely suffer the very specific injury captured within 2315.18(B)(3). Thus, creating two sets of classes might make sense in some contexts (per *Arbino*), but makes no sense for cases of childhood sexual abuse. The operation of 2315.18(B) thus leads to the arbitrary outcome that one type of victim enjoys unlimited noneconomic damages, while victims of childhood sexual abuse like Amanda—also suffering a lifetime of catastrophic injury—are subject to the cap, no matter how permanent or severe their injuries are. In sum, the rationale employed in *Arbino* to defend separate classes of victims simply does not apply in cases like Amanda's.

Thus, there are numerous hypothetical examples where a victim in Amanda's situation will suffer injury *more* catastrophic than those suffering physical injuries that meet the 2315.18(B)(3) exception, yet are barred from obtaining equivalent damages. For example, R.C. 2315.18 allows unlimited noneconomic damages for "(p)ermanent and substantial physical deformity." R.C. 2315.18(B)(3)(a). That language has been interpreted to include scarring. *Bransteter v. Moore*, N.D. Ohio No. 3:09-cv-2, 2009 U.S. Dist. LEXIS 6692 (Jan. 21, 2009) ("scarring may be so severe as to qualify as a serious disfigurement (for purposes of R.C. 2315.18(B)(3)(a))."). Thus, under the statute, an elderly victim of a traffic accident with residual scarring may recover unlimited noneconomic damages but a child victim of sexual abuse, facing a lifetime of permanent psychological damage, encounters caps of \$250,000 for noneconomic damages.

Equally arbitrary is the statute's differential treatment *among* sexual assault victims. Take two victims of sexual abuse, both of whom suffer a lifetime of injury from the

abuse. If damage caps are only triggered by the physical injuries, a hypothetical abuse victim who also receives a physical scar that qualifies as a deformity under R.C. 2315.18(B)(3) is not limited by the cap. (If physically scarred in that way, for example, Amanda would have been able to receive the full \$34,000,000 in noneconomic damages awarded to her by the jury.) Another victim, equally debilitated by her injury but with the absence of such a scar, would see her damages capped by the statute. That dramatically different treatment of two victims, simply due to the presence or absence of a physical scar, represents the height of arbitrariness. But that is exactly how the statute would operate in those two cases.

Fundamentally, the issue before this Court is whether the legislature, consistent with the constitutional right to equal protection, can create a civil legal system where tort victims with some physical injuries are excluded from the cap on noneconomic damages but minor victims of sexual abuse, who routinely suffer little or no instantaneous physical injury, but permanent, catastrophic nonphysical injuries, are denied the same exclusion *no matter how severe their nonphysical injuries may be*. Such a system is clearly arbitrary and unreasonable, and violates Amanda's equal protection rights under the Ohio Constitution. Even if one assumes the state has a valid state interest in limiting noneconomic damages, the means chosen by the legislature—the exclusion of a class of victims who by the nature of the tort are likely to only suffer nonphysical injuries—is clearly not rational.

CONCLUSION

Amanda Brandt, from age 11 to 12, suffered a series of some of the most degrading and repugnant acts that a human can suffer. She will suffer a lifetime of debilitating injury because of it. For many in her position, that includes a lifetime of stigma and self-blame. Applying R.C. 2315.18 to cases such as hers is arbitrary and unreasonable, just as protecting those who commit such dehumanizing acts is profoundly unjust. For the reasons set forth above, this Court should reverse the trial court's decision and declare the damages caps unconstitutional as applied to Amanda and all other similarly situated victims of sexual abuse.

Respectfully Submitted,

/s Camille M. Crary
Camille M. Crary (0092692)

Ohio Alliance to End Sexual Violence
6111 Oak Tree Boulevard, Suite 140
Independence, OH 44131
T: 614-929-5875
F: 216-675-1186
ccrary@oaesv.org

*Counsel for Amicus Curiae Ohio Alliance to
End Sexual Violence*

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **Brief** has been served by e-mail on October 5, 2021, upon:

John K. Fitch, Esq. (#0008119)
Kirstin A. Peterson, Esq. (#0099040)
THE FITCH LAW FIRM
900 Michigan Avenue
Columbus, OH 43215
(614) 545-3930
john@thefitchlawfirm.com
kirstin@thefitchlawfirm.com

Stephen C. Fitch, Esq. (#0022322)
TAFT STETTINIUS & HOLLISTER LLP
65 East State Street, Suite 1000
Columbus, Ohio 43215
(614) 221-2838
sfitch@taftlaw.com

*Attorneys for Plaintiff-Appellant,
Amanda Brandt*

Konrad Kircher, Esq. (#0059249)
RITTGERS & RITTGERS
12 E. Warren St.
Lebanon, Ohio 45036
Telephone: (513) 932-2115
Fax: (513) 934-2210
konrad@rittgers.com

*Attorneys for Amici Curiae,
Child USA, Ohio Crime Victim Justice
Center, Coalition for Children,
and Crime Victims Center, Inc.*

Samuel R. Smith, Esq. (#0076242)
1220 W. 6th St., Suite 203
Cleveland, Ohio 44113
(216) 225-7972 srsmithii44118@yahoo.com
*Attorney for Defendant-Appellee, Roy
Pompa*

Pamela J. Miller, Esq. (PHV-22651-2021)
THE LAW OFFICES OF PAMELA J. MILLER
618 Sire Avenue
Mount Juliet, TN 37122
(513)-259-7919
pamelajoym@gmail.com

Attorney for Amicus Curiae, American Professional Society on the Abuse of Children

Jessica Schidlow, Esq.
3508 Market Street, Suite 202 Philadelphia, PA 19104
(215) 539-1906
jschidlow@childusa.org

*Staff Attorney for Amicus Curiae,
Child USA*

Louis E. Grube, Esq. (#0091337)
Paul W. Flowers, Esq. (#0046625)
PAUL W. FLOWERS CO., L.P.A. Terminal Tower, 40th Floor
50 Public Square
Cleveland, Ohio 44113
(216) 344-9393
leg@pwfco.com
pwf@pwfco.com

Attorneys for Amici Curiae, Ohio Association for Justice and American Association for Justice

s/ Camille M. Crary
Camille M. Crary (0092692)
*Counsel for Amicus Curiae,
Ohio Alliance to End Sexual Violence*