IN THE SUPREME COURT OF OHIO

CASE NO. 2021-0497

AMANDA BRANDT,
Plaintiff-Appellant,

-vs-

ROY POMPA,
Defendant-Appellee.

ON APPEAL FROM THE EIGHTH DISTRICT COURT OF APPEALS
CASE NO. CA-20-109517

BRIEF OF *AMICI CURIAE*, OHIO ASSOCIATION FOR JUSTICE and AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PLAINTIFF-APPELLANT

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The Ohio Association for Justice ("OAJ") is devoted to strengthening the civil justice system so that deserving individuals may have justice and wrongdoers are held accountable. The OAJ comprises approximately one-thousand five-hundred attorneys practicing in such specialty areas as personal injury, general negligence, medical negligence, products liability, consumer law, insurance law, employment law, and civil rights law. These lawyers seek to preserve the rights of private litigants and to promote public confidence in the legal system.

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including in Ohio. Throughout its 75-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

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The OAJ and AAJ (collectively "*Amici*") submit this brief to urge this Court to rectify negative consequences flowing from the decision in *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, either in whole or in part. While the facts underlying this proceeding and the posture of the case permit and strongly support a ruling that the statutory cap on non-economic compensatory damages, R.C. 2315.18, is irrational, arbitrary, and therefore unconstitutional as applied to minor victims of sexual abuse suffering from permanent post-traumatic stress disorder ("PTSD"), the time has also come to revisit and overrule this Court's decision on the

enactment's facial constitutionality. Because the *Arbino* majority's analysis of the fundamental rights to due process, equal protection, and to a jury trial was wrong in a subtle but unmistakable way, and because the mode of constitutional review that was employed is unworkable when applied to any fundamental right, this Court should take the opportunity to overrule *Arbino* and right what went wrong in that instance.

STATEMENT OF THE CASE AND FACTS

The *Amici* adopt and incorporate the statement of the case and facts offered in the Merit Brief of Plaintiff-Appellant, Amanda Brandt, filed October 1, 2021.

Of particular note, the *Amici* wish to highlight that Plaintiff Amanda Brandt ("Brandt") was an ambitious honor student without mental health problems before she was brutally molested many times by Defendant Roy Pompa ("Pompa") between the ages of eleven and twelve. *Transcript of Proceedings filed March 31, 2020 (Tr.), pp. 76-77.* After these assaults, Brandt became prone to anxiety and anger as she went through life suffering from PTSD. *Id., pp. 62, 77-78, 80.* Her grades deteriorated due to her significant symptoms, her career was stunted, and she turned to dangerous drugs, which resulted in poverty and homelessness. *Id., pp. 31, 35.* In the most stable version of her life, which was achieved through hard work and therapy, she is reclusive and anxious about physical contact with others, including her husband. *Id., pp. 44-45, 63; R. 82, Deposition of Dr. Patrick Yingling filed October 22, 2019 ("Dr. Yingling Depo."), pp. 36-42.*

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ARGUMENT

In the last century, society has grown and evolved from viewing children as either chattel in the workplace or simply small adults in the courthouse to treating them as people living at a sensitive and tender age. *See* Wikipedia, *Child Labour; History* (accessed Oct. 5, 2021), https://en.wikipedia.org/wiki/Child_labour#History; *In re*

Gault, 387 U.S. 1, 14-18, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) (discussing the development of the juvenile system). Since the decision in *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, there has been a positive movement to address the harms suffered by children at the hands of sexual abusers as among the most serious injuries imaginable in our society, even long after the incidents occurred. The New York Times, *R. Kelly is going to prison. Why did it take so long?* (Sept. 27, 2021), https://www.nytimes.com/live/2021/09/27/nyregion/r-kelly-trial-news#r-kelly-is-going-to-prison-why-did-it-take-so-long (discussing why it took "three decades for the singer to receive criminal punishment"); CNN, *Judge orders that Larry Nassar's prison funds be turned over to victim restitution* (Aug. 20, 2021), https://www.cnn.com/2021/08/20/us/larry-nassar-prison-funds-restitution/index.html; Fox News, *DOJ reviewing decision not to prosecute FBI agents in Nassar case* (Oct. 5, 2021), https://www.foxnews.com/politics/doj-criminal-review-fbi-agents-larry-nassar-case; The Washington Post, *In Larry Nassar's shadow, a larger sex abuse case at the University of Michigan* (Sept. 23, 2021), https://www.washingtonpost.com/health/robert-anderson-university-of-michigan-sex-abuse/2021/09/22/4fc38052-f541-11eb-9068-bf463c8c74de_story.html. While news stories chronicling instances where the criminal justice system has recently taken serious action to punish abusers seem to be endless, the civil justice system has failed to secure adequate recompense for this same class of victims. It may not have been the most obvious application of the law, but R.C. 2315.18 has applied in this state to seriously limit recovery of non-economic damages suffered by these young victims of sexual assault. This proceeding presents an opportunity to correct the course of the civil law by relieving this class of plaintiffs from the irrational decision to cap their recovery in the low six

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figures regardless of the scale of trauma suffered.

Solely because money cannot be spent to salve the injuries that child victims most often suffer, the Ohio General Assembly's cap on non-economic damages has limited the amount of money that may be awarded to compensate for losses that are unquestionably incurred. *Compare R.C. 2315.18(A)(2)* (" 'Economic loss' means any of the following types of pecuniary harm," including lost compensation and any kind of "expenditures incurred as a result of an injury or loss to person or property that is a subject of a tort action" other than attorney's fees) with *R.C. 2315.18(A)(4)* (" 'Noneconomic loss' means nonpecuniary harm that results from an injury or loss to person or property that is a subject of a tort action"); *R.C. 2315.18(B)(2)* (limiting "the amount of compensatory damages that represents damages for noneconomic loss that is recoverable in a tort action"). As a result of the General Assembly's narrow focus, the justice system's capacity to make the victims of tort whole is now a half measure of what it was designed to be in Ohio. There are, after all, "countless treasures of the heart" that money "could never purchase." Dickens, *The Life and Adventures of Nicholas Nickleby*, Chapter 31 (December 1838).[1] This is the wealth that was wrongfully stripped from Plaintiff Brandt, and from countless other youths who have been sexually assaulted.

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Under the extreme circumstances established at trial in this matter, a jury tasked with placing a dollar value on Brandt's non-economic injuries determined that as a matter of fact, her loss was worth $34 million dollars. *Brandt v. Pompa*, 2021-Ohio-845, 169 N.E.3d 285, ¶ 20 (8th Dist.). $20 million of these losses were experienced on or after the effective date of R.C. 2315.18, April 7, 2005. *Id.* So, "as a matter of law," Brandt will be

[1] Available in the public domain online at:
https://gutenberg.org/files/967/967-h/967-h.htm#link2HCH0031

compensated a total of $250,000 for the $20 million worth of injuries she proved she had suffered after the General Assembly passed that statute. *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 37.

On July 14, 2021, this Court accepted two propositions of law for review, either of which would undo some or all of the wrongs wrought by R.C. 2315.18:

> **<u>Proposition of Law 1</u>: R.C. 2315.18, as applied to minor victims of sexual abuse that suffer severe and permanent injuries, violates constitutional rights to due process of law, equal protection of the laws, trial by jury, and open courts and a remedy as guaranteed by the Ohio Constitution.**
>
> * * *
>
> **<u>Proposition of Law 2</u>: *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.**

Memorandum in Support of Jurisdiction of Appellant Amanda Brandt filed April 21, 2021, pp. 5, 11; 07/14/2020 Case Announcements, 2021-Ohio-2307, p. 3.

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A codified injustice is no less an injustice. Not only is it inherently unreasonable and arbitrary for the law to require compensation for only a fraction of the losses that the constitutional jury system has determined were suffered given the circumstances underlying this appeal, this regulation of the fundamental right to a jury trial justifies more exacting scrutiny than this Court's decision in *Arbino* has permitted. In the following ways, the injustice worked by R.C. 2315.18 upon the child-victims of sexual assault suffering from long-term PTSD violates several fundamental constitutional rights when the law is applied to that class of citizens. This Court should therefore adopt both

propositions of law and reverse the decision of the Eighth District Court of Appeals in *Pompa*, 2021-Ohio-845, 169 N.E.3d 285.

I. THE STATUTE IS UNCONSTITUTIONAL AS APPLIED TO CHILD VICTIMS OF SEXUAL ASSAULT WITH LONG-TERM PTSD

A. The Right to Due Process of Law

The last time that this Court considered an as-applied challenge to R.C. 2315.18 on the basis of due process, the "rational-basis test" was employed consistent with the decision in *Arbino*. *Simpkins v. Grace Brethren Church of Delaware, Ohio*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, ¶ 36. The Fifth District Court of Appeals had acknowledged in that instance "that subjecting all awards for nonphysical injuries to a damage cap might be arbitrary and unreasonable" if the effects of non-physical injuries approximated those of the physical injuries listed as exceptions to the damage cap in R.C. 2315.18(B)(3). Because the facts in *Simpkins* did not rise to the necessary level, this Court left open "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. The time to answer this question—in the affirmative—is now.

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The Article I, Section 16 of the Ohio Constitution guarantees due process of law and requires all legislation to have "a real and substantial relation to the public health, safety, morals or general welfare" and not be "unreasonable or arbitrary." *Benjamin v. City of Columbus*, 167 Ohio St. 103, 110, 146 N.E.2d 854 (1957); *Mominee v. Scherbarth*, 28 Ohio St.3d 270, 274, 503 N.E.2d 717 (1986); *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St.3d 54, 59, 514 N.E.2d 709 (1987); *Roginski v. Shelly Co.*, 31 N.E.3d 724, 752 (C.P.2014).. These state substantive due process rights are essentially the same as those

under the Fourteenth Amendment to the United States Constitution. *Direct Plumbing Supply Co. v. Dayton*, 138 Ohio St. 540, 544, 38 N.E.2d 70 (1941). This Court once explained:

> It must be remembered that neither the state in the passage of general laws, nor the municipality in the passage of local laws, may make any regulations which are unreasonable. The means adopted must be suitable to the ends in view, they must be impartial in operation, and not unduly oppressive upon individuals, must have a real and substantial relation to their purpose, and must not interfere with private rights beyond the necessities of the situation. (Emphasis added.)

Froelich v. Cleveland, 99 Ohio St. 376, 391, 124 N.E. 212 (1919); *Holeton v. Crouse Cartage Co.*, 92 Ohio St.3d 115, 121, 748 N.E.2d 1111 (2001).

Due process of law applies not just to the manner in which a claim is litigated, but also to the remedy that is available:

> [I]t is not competent for the legislature to give one class of citizens legal exemption for wrongs not granted to others; and it is not competent to authorize any person, natural or artificial, to do wrong to others without answering *fully* for the wrong. (Emphasis sic.)

Byers v. Meridian Printing Co., 84 Ohio St. 408, 423, 95 N.E. 917 (1911), quoting *Park v. The Detroit Free Press Co.*, 72 Mich. 560, 40 N.W. 731 (1888).

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B. The Right to Equal Protection

This Court also considered an as-applied equal protection challenge to R.C. 2315.18 in *Simpkins*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, at ¶ 46-51. The decision did not analyze whether physical and non-physical injuries rising to the level of "loss of use" of a bodily system or that "permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities" were similar enough that distinctions between individuals with such injuries are irrational. *R.C.*

2315.18(B)(3)(a) and (b). While this comparison was raised in the context of due process, it naturally lends itself to an equal protection analysis.

Section 1 of the Fourteenth Amendment to the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." At a minimum, legislative classifications must bear a rational relationship to a legitimate public objective to withstand constitutional scrutiny. *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 1627, 134 L.Ed.2d 855 (1996). "[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." (Emphasis added.) *F.S. Royster Guano Co. v. Commonwealth of Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989 (1920); *see also Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); *Maye v. Klee*, 915 F.3d 1076, 1085 (6th Cir.2019); *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 692 (6th Cir.2015). When a fundamental right is involved, a heightened scrutiny test will apply, requiring the legislation to be narrowly tailored to advance a compelling state interest. *Jesus Christ is the Answer Ministries, Inc. v. Baltimore Cty.*, 915 F.3d 256, 265 (4th Cir.2019).

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Likewise, Article I, Section 2 of the Ohio Constitution guarantees that citizens shall not be denied equal protection of the law. *Kinney v. Kaiser-Aluminum & Chem. Corp.*, 41 Ohio St.2d 120, 322 N.E.2d 880 (1975). And this Court has regularly applied Ohio's Equal Protection Clause in tandem with the corresponding federal guarantee. *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 24-68. "While the General Assembly also has the power to define the contours of the state's liability, it must operate within the confines of equal protection[.]" *Adamsky v. Buckeye Local School Dist.*, 73

Ohio St.3d 360, 361-362, 653 N.E.2d 212 (1995). Consistent with its federal counterpart, Ohio's Equal Protection Clause requires that all similarly situated individuals are treated in a similar manner. *State ex rel. Patterson v. Indus. Comm.*, 77 Ohio St.3d 201, 204, 672 N.E.2d 1008 (1996); *State ex rel. Doersam v. Indus. Comm.*, 45 Ohio St.3d 115, 119, 543 N.E.2d 1169 (1989); *State ex rel. Nyitray v. Indus. Comm.*, 2 Ohio St.3d 173, 175, 443 N.E.2d 962 (1983); *Roginski*, 31 N.E.3d at 758.

The Ohio Constitution's guarantee of Equal Protection, like the federal provision, requires an elevated level of scrutiny of classifications bearing upon a fundamental right. *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 424-425, 633 N.E.2d 504 (1994); *Primes v. Tyler*, 43 Ohio St.2d 195, 198-199, 331 N.E.2d 723 (1975); *Crowe v. Owens Corning Fiberglas*, 8th Dist. Cuyahoga No. 73206, 1998 WL 767622 (Oct. 29, 1998). This demanding standard is appropriate where access to the courts and civil justice is threatened. *Sorrell*, 69 Ohio St.3d at 424-425, 633 N.E.2d 504; *Galayda v. Lake Hosp. Sys., Inc.*, 71 Ohio St.3d 421, 425, 644 N.E.2d 298 (1994); *Gladon v. Greater Cleveland Regional Transit Auth.*, 8th Dist. Cuyahoga No. 64029, 1994 WL 78468, *4-5 (Mar. 10, 1994);[2] *Yanakos v. UPMC,* 218 A.3d 1214, 1222 (Pa.2019). In *Beatty v. Akron City Hosp.*, 67 Ohio St.2d 483, 492, 424 N.E.2d 586 (1981), this Court explained:

> If the discrimination infringes upon a fundamental right, it becomes the subject of strict judicial scrutiny and will be upheld only upon a showing that it is justified by a compelling state interest. That is, once the existence of a fundamental right or a suspect class is shown to be involved, the state must assume the heavy burden of proving that the legislation is constitutional. (Citations omitted.)

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[2] This Court reversed *the premises liability* analysis of this opinion in *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312, 662 N.E.2d 287 (1996), but left the Eighth District's constitutional analysis undisturbed.

Even in the absence of a fundamental right or a suspect class, legislation creating group distinctions must still be rationally based upon legitimate governmental interests. *Adamsky*, 73 Ohio St.3d at 362, 653 N.E.2d 212. This "rational-basis review, whether under Ohio constitutional principles or federal ones, does not mean toothless scrutiny." *Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, at ¶ 28.

C. The Lack of a Substantial Relationship to the General Assembly's Legislative Objectives in Brandt's Lawsuit

This Court has previously recognized the legislature's goal in capping non-economic damages:

> The General Assembly's general justification for the tort reforms in S.B. 80 was that the state has an "interest in making certain that Ohio has a fair, predictable system of civil justice that preserves the rights of those who have been harmed by negligent behavior, while curbing the number of frivolous lawsuits, which increases the cost of doing business, threatens Ohio jobs, drives up costs to consumers, and may stifle innovation."

Arbino, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 68, quoting *S.B. 80, Section 3(A)(3), 150 Ohio Laws, Part V, 8024*. No one could rationally suggest that imposing a cap on tort victims' recovery "preserves" their "rights." *Id.* Rather, the General Assembly was laser-focused on reducing the cost of doing business in Ohio, protecting Ohio jobs, bringing down costs to consumers, and fostering innovation, all by "curbing the number of frivolous lawsuits." *Id.* The only real question is whether the legislature had some reason to believe capping noneconomic damages would accomplish this objective. And in this as-applied challenge, that question should focus closely on the way that the law impacts child-victims of sexual assault suffering from long-term PTSD and the abusers who traumatize them.

The *Arbino* court stated that the fatal flaw in the noneconomic damage cap struck

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down in *Morris v. Savoy*, 61 Ohio St.3d 684, 576 N.E.2d 765 (1991), was that the court found no record evidence "demonstrating a connection between awards in excess of the statutory limits and rising malpractice-insurance rates." *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 50-51. Thus, the *Arbino* court recognized that it had only to find record evidence that "draws a clear connection between limiting uncertain and potentially tainted noneconomic-damages awards and the economic problems" referenced by the General Assembly. *Id.* at ¶ 56.

It should have been a straightforward task for the General Assembly, with complete data regarding the performance of Ohio's civil justice system and broader economy at its disposal, to demonstrate that frivolous noneconomic damage awards were increasing substantially in Ohio, if that were the case. But the legislative majority has not offered a shred of evidence that this was so.

It is true that the General Assembly cited six reports and studies in support of its findings. *Am.Sub.S.B. 80, Section 3(A)(3), 150 Ohio Laws, Part V, 8024 ("S.B. 80").* The *Arbino* majority declined to delve into the reliability or relevance of those sources, although Associate Justice Paul E. Pfeifer offered a critical examination in his dissent. *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 195-204 (Pfeifer J., dissenting). But this court need look no further than the General Assembly's own brief description of these sources to recognize that they are merely window-dressing. They provide no rationale for taking a portion of noneconomic damages away from tort victims.

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1. The legislative record does not indicate that substantial noneconomic damages are frequently awarded in Ohio or that they have any impact on Ohio's economy

The sources that the General Assembly relied upon for its findings in support of R.C. 2315.18 and other provisions in S.B. 80 deal almost entirely with national tort

"costs." *S.B. 80, Section 3(A)(3).* This is a single figure purporting to represent the aggregate of tort payments and administrative expenses, calculated annually for the years from 1951 to 2002 for the entire nation. *Id., Section 3(A)(3)(f).* None of the legislative findings determined tort "costs" for Ohio or whether those costs have risen over time. *Id., Section 3(A)(3).* Nor do any of the sources indicate whether the national increase in "costs" reflects recognition of new causes of action, an increase in the number of injured plaintiffs, an increase in plaintiffs' rate of success at trial, an increase in the size of their awards, either on average or in the aggregate, or some other factor entirely. But perhaps most importantly, none of the data permits an analysis of whether these costs were the result of "frivolous" litigation or well-deserved recoveries. The General Assembly simply equated national growth in recovery for plaintiffs with an increase in fabricated or factually questionable damages in Ohio—an inference not borne out by any of the evidence cited. In cases where a jury agrees that the recovery of a child-victim of sexual assault is substantial, based upon PTSD suffered over a long period of time, it is irrational to treat the recovery of non-economic damages as frivolous simply because the verdict is large.

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2. The legislative record provides no indication that increases in tort costs are at all attributable to noneconomic damages or how limits on awards in meritorious cases will curb frivolous lawsuits

Even if tort "costs" were increasing by 2004, there was no evidence in the legislative record that mentioned the number, size, or frequency of noneconomic damage awards. None of this evidence suggested that any noneconomic damages were actually recovered in a "frivolous lawsuit." It is conceivable that some patently excessive awards of non-economic damages could have been limited by R.C. 2315.18, which would thwart any facial challenge under the rational basis review employed in *Arbino*. But classes of

particularly deserving plaintiffs are unreasonably singled out and regulated by the statute, which demonstrates the inherent flaw in R.C. 2315.18 as it has been applied in these proceedings.

Moreover, the General Assembly appears to have added an additional consideration, wholly without support in the record evidence, that noneconomic damage awards are "inflated" by improper jury consideration of evidence of wrongdoing. *S.B. 80, Section (A)(6)(d) and (e).* No evidence in the legislative record indicates that Ohio judges were frequently—or ever—failing to properly exclude prejudicial evidence or instruct juries on the proper basis for their awards. Additionally, the General Assembly made no effort to show how imposing a ceiling of $250,000 or $350,000, which will never adjust for changing economic factors in ensuing years, and which limits recoveries that are by definition meritorious, would curb frivolous lawsuits.

3. The legislative record provides no evidence to indicate that imposing a limit on noneconomic damage awards would result in the economic benefits anticipated by the General Assembly

A cap on damages is a transfer of compensation, redirected from injured plaintiffs to the defendants who have wrongfully harmed them. The *Arbino* court characterized this subsidy for wrongdoers as "a policy decision to achieve a public good." *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 61. The flaw in this rationalization is that there was not a scrap of evidence to support the General Assembly's expectation that lowering the liability costs for wrongdoers would result in the positive benefit the legislature anticipated.

First, although nearly all of the plaintiffs who will lose a portion of their jury verdict are Ohioans, many of the recipients of this subsidy are not. The defendants hailed into this state include the manufacturers of unreasonably dangerous products made in other

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states or in other countries, foreign corporations doing business in Ohio, and drivers temporarily using Ohio's roads. Reducing damage awards for these defendants will not contribute to Ohio's economic health. Nor is there any evidence that a substantial economic gain will be felt in Ohio if sexual abusers of children pay less to their victims. This benefit is most likely felt by a wrongdoer in prison, where their impact on the economy is already substantially curtailed.

Even where reduced damages benefit this state's residents and proprietors, there is no direct connection to lowered costs for Ohio businesses, lowered costs for Ohio consumers, or more Ohio jobs. Virtually all the tort awards affected by the damage cap are paid out by liability insurers. This Court once noted that the insurance industry's own rate-setting arm found that a $250,000 cap on noneconomic damages would result in little, if any savings to those paying insurance premiums. *Morris*, 61 Ohio St.3d at 690, 576 N.E.2d 765. To the extent that any savings are realized by an insurer, there is nothing in S.B. 80 requiring them to be passed along to the insureds, rather than allocating those extra profits to boosting shareholder dividends or executive compensation. And more narrowly, these rationalizations miss the mark when it is a child-victim of a sexual assault suffering from PTSD whose recovery is paid back to the insurance industry. Much of the losses they suffer relate to their inability to participate in work and in society more broadly. It is therefore perverse to cut back at the money these victims could acquire from the class of sex-abusers on the general theory that lower tort-recoveries may create more jobs and a better economy.

In short, the General Assembly relied upon sources that contained generic assertions that were generally favorable to tort reform—in some cases, only because of the motives of the creators of these materials rather than any actual evidence. *Arbino*, 116

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Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 195-204 (Pfeifer J., dissenting) (describing the motives of each source and flaws with the methodologies employed). But there was no evidence at all specific to Ohio, to this state's civil justice system and economy, to the types of reforms the legislature was asked to consider, or to the actual impact of limiting recovery for child-victims of a sexual assault suffering from PTSD. There was no rational relationship between limiting the compensatory damage recoveries of Ohioans and economic gains. The General Assembly was simply legislating in the dark, which has resulted in egregious outcomes like the one in this case.

D. The Arbitrary and Unreasonable Discrimination Against Child Victims Suffering from PTSD

Children are unique in that most of their years are ahead of them, yet the future is inherently uncertain. When a child is injured in tort, most if not all of the legally compensable losses will be measured by the value of experiences and possessions that the young person will never have a chance to acquire. This is particularly true when the tort is committed against a child by sexual means without significant physical injury.

Plaintiff Brandt has endured a horrific experience that is exemplary of this unique class of tort victims. At trial, witnesses described the hopeful future that lay ahead of her until Defendant Pompa exacted his perverse will upon her whole universe. *Tr., pp. 76-77.* Her injuries were mostly psychological, and they have truly haunted her. *Tr., pp. 43-45.* According to a clinical psychologist, Dr. Patrick Yingling, her significant PTSD symptoms will persist indefinitely. *Dr. Yingling Depo., p. 42.* For the category of youth victims that Brandt represents, the limitation on the damages recoverable under R.C. 2315.18(B)(2) misses the constitutional mark both because it is irrational to treat the damages of a child differently when they cannot be measured by funds already expended and because the

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distinction between physical and non-physical permanent injuries is without a real difference.

Children do not typically have or earn significant money. When a child plaintiff sues his or her sexual abuser, the losses will be predominantly if not entirely "noneconomic" as defined in R.C. 2315.18(A)(4). In these instances, the distinction between pecuniary and non-pecuniary harm falls apart—it loses any rational footing. For example, when a child is sexually assaulted and develops PTSD along with agoraphobic tendencies, there will not be an obvious way to measure wage losses as in the case of an adult with an established work history who is rendered unable to "independently care for [his or her] self." *R.C. 2315.18(B)(3)(b)*. These psychological conditions are unlike a purely physical injury, such as the "loss of use of a limb, or loss of a bodily organ system," which is typically valued in an actuarial manner. *R.C. 2315.18(B)(3)(a); see R.C. 4123.57(B)*. Nor is the bulk of the loss measurable in terms of medical or comprehensive life-care expenses, such as in a catastrophic motor vehicle accident resulting in "[p]ermanent and substantial physical deformity." *R.C. 2315.18(B)(3)(b)*.

Yet even where treatment is sought for PTSD, the effects of trauma often linger through, leaving "considerable residual symptoms." Bradley, Greene, Russ, Dutra, and Westen, *A Multidimensional Meta-Analysis of Psychotherapy for PTSD*, Am. Journal of Psychiatry 162: 214-227 (Feb. 1, 2005).[3] Indeed, PTSD is distinguished from the symptoms of less-severe traumas by virtue of its lasting impacts. One does not need to go far to see that the symptoms of PTSD can cause the same lifelong problems as a physical injury identified in R.C. 2315.18(B). The Mayo Clinic's basic overview of the condition

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[3] Available online at:
https://ajp.psychiatryonline.org/doi/full/10.1176/appi.ajp.162.2.214

explains:

> Most people who go through traumatic events may have temporary difficulty adjusting and coping, but with time and good self-care, they usually get better. If the symptoms get worse, last for months or even years, and interfere with your day-to-day functioning, you may have PTSD.
>
> * * *
>
> Post-traumatic stress disorder symptoms may start within one month of a traumatic event, but sometimes symptoms may not appear until years after the event. These symptoms cause significant problems in social or work situations and in relationships. They can also interfere with your ability to go about your normal daily tasks. (Emphasis added.)

Mayo Clinic, *Post-traumatic stress disorder (PTSD)* (accessed Sept. 22, 2021).[4] The diagnostic criterion for PTSD accordingly requires evidence of "clinically significant distress or impairment in social, occupational, or other important areas of functioning" as a result of a disturbance lasting "more than 1 month." American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 272 (5th Ed.2013). Where, as in Plaintiff Brandt's case, the deficits in her ability to care for herself are proven to be relatively permanent by medical testimony, there is no rational distinction between her injury and the physical injuries identified in R.C. 2315.18(B)(3).

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But perhaps on a deeper level, Plaintiff Brandt is the same as every other tort victim in the *relevant* respect—she has been injured by another and a jury has already quantified the value of the harm sustained. Regardless of the General Assembly's view of which categories of injury are proven by subjective information, *Simpkins*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, at ¶ 6, R.C. 2315.18 is only applied after a jury has

[4] Available online at: https://www.mayoclinic.org/diseases-conditions/post-traumatic-stress-disorder/symptoms-causes/syc-20355967

determined what the actual injury was worth as a matter of fact. A jury's verdict must be the final factual determination of the actual value of injury. *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 34-37. And in this way the General assembly's assessment of how subjective the deliberative process in Brandt's jury trial may have been is irrelevant. If it is true that "findings of fact" must not be "ignored or replaced by another body's findings," *Arbino* at ¶ 37, legislative concerns about subjectivity in a jury's determinations cannot trump a specific finding that Brandt's injury was worth the same as any other $34 million injury—pecuniary or not. If the jurors had shared the concern that the value of her non-economic harms was too speculative, these citizens could have made a nominal award. But once a value was placed upon Brandt's specific harm, it is thoroughly irrational for the General Assembly to treat it differently than any other verdict of the same amount. Most simply put, the legislature should not be permitted to pick and choose between the jury verdicts it will respect.

For these reasons, this Court should recognize that R.C. 2315.18 violates the rights to due process and equal protection in this case and in other similar instances.

II. *ARBINO* AND THE FACIAL CONSTITUTIONALITY OF R.C. 2315.18

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Although this Court directed that R.C. 2315.18 should be reviewed for a rational basis in *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 49, the correctness of that decision is now before the Court in the Second Proposition of Law. The statute regulates the outcome of a jury trial by directing trial courts to enter judgment notwithstanding the factual determination of damages made by a jury, and in doing so, it does infringe on the fundamental right to a jury trial. This should trigger more exacting review of the statute. Recognizing this reality would be the narrowest way to overrule *Arbino*, and doing so is consistent with the substantial bulk of the case law examining

fundamental rights. For the following reasons, this Court should reorient this State's jurisprudence so that fundamental rights are conserved and respected by the judiciary without exception.

A. The Right to a Trial by Jury

Article I, Section 5 of the Ohio Constitution guarantees:

> The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury. (Emphasis added.)

The right to a jury trial "is a substantial right," and it "does not involve merely a question of procedure." *Cleveland Ry. Co. v. Halliday*, 127 Ohio St. 278, 188 N.E. 1 (1933), paragraph one of the syllabus; *Kneisley v. Lattimer-Stevens Co.*, 40 Ohio St.3d 354, 356, 533 N.E.2d 743 (1988) ("The right to a jury trial, where it exists, is substantive, not procedural."). The right to a trial by jury attached to common law causes of action that existed before the adoption of the Constitution. *Belding v. State ex rel. Heifner,* 121 Ohio St. 393, 396, 169 N.E. 301 (1929); *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 556, 644 N.E.2d 397 (1994). Intentional tort claims, which are the "progeny" of actions in trespass that could be pursued prior to 1851, are thus entitled to this constitutional protection. *Kneisley*, 40 Ohio St.3d at 356-357, 533 N.E.2d 743. The role of the jury in adjudicating such theories of recovery therefore "cannot be invaded or violated by either legislative act or judicial order or decree." *Gibbs v. Village of Girard*, 88 Ohio St. 34, 102 N.E. 299 (1913), paragraph two of the syllabus. Where Article I, Section 5 controls, the jury is entitled to resolve all disputed issues of fact as well as the amount of damages to be imposed. *Seth v. Capitol Paper Co.*, 2d Dist. Montgomery No. 11539, 1990 WL 125724, *9 (Aug. 29, 1990).

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The sanctity of the constitutional right to a jury trial was re-affirmed in *Galayda*, 71 Ohio St.3d 421, 644 N.E.2d 298. At issue was a tort reform statute that allowed tortfeasor health care providers to pay judgments in periodic installments over time. While some tort plaintiffs could immediately collect their full verdicts, a victim of medical negligence had to wait years before a judgment was satisfied. *Galayda*, 71 Ohio St.3d at 425-426, 644 N.E.2d 298. Accordingly, this Court determined:

> R.C. 2323.57(C) invades the jury's province to determine damages, and that the statute violates a plaintiff's right to trial by jury as guaranteed by Section 5, Article I of the Ohio Constitution.

Id. at 426. The same sound analysis was applied in *Gladon*, 1994 WL 78468, at *4-6, and *Richardson v. Bd. of Cty. Commrs. of Tuscarawas Cty.*, 5th Dist. Tuscarawas No. 95-AP-110114, 1996 WL 753188, *8 (Dec. 4, 1996). And more recently in the United States Court of Appeals for the Sixth Circuit, Tennessee's identical constitutional guarantee of an "inviolate" right to a jury trial was invoked to invalidate caps on punitive damages. *Lindenberg v. Jackson Natl. Life Ins. Co.*, 912 F.3d 348, 363-370 (6th Cir.2018).

B. The Decision in *Arbino* Was Wrongly Decided

Arbino held that the least exacting standard of review is appropriate because: "So long as the fact-finding process is not intruded upon and the resulting findings of fact are not ignored or replaced by another body's findings, awards may be altered *as a matter of law*." (Emphasis sic.) *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 37. By adopting this artificial distinction between the factual question of damages and the legal question of the value of a judgment, this Court held that R.C. 2315.18 did not infringe upon a fundamental right and was entitled to substantial deference. *Id.* at ¶ 49. The obvious problem with this ruling is that before R.C. 2315.18 was enacted and *Arbino*

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was issued, courts were required to enter judgment based upon a jury's non-excessive factual determination of damages. Plaintiff Brandt's case is exemplary—she was awarded the full $14 million worth of non-economic compensatory damages suffered prior to the effective date of the statute.

Indeed, a legal entitlement to the full damages determined by a jury was an *essential* feature of the right to a jury trial under Article I, Section 5 of the Ohio Constitution. *Galayda*, 71 Ohio St.3d at 425-426, 644 N.E.2d 298. In *Galayda*, this Court considered a statute requiring:

> (C) [I]f the total of the future damages described in division (B)(1)(b) of this section exceeds two hundred thousand dollars, then, at any time after the verdict or determination in favor of the plaintiff in question is rendered by the trier of fact but prior to the entry of judgment in accordance with Civil Rule 58, the plaintiff or the defendant in question may file a motion with the court that requests the court to include an order in the journal entry that the future damages in excess of two hundred thousand dollars shall be paid in periodic payments rather than in a lump sum. (Emphasis added.)

Id. at 424, fn. 2. If such a motion was timely filed, the court was required to issue an order permitting immediate payment of a $200,000.00 lump sum followed by periodic payments of the excess. *Id.* The problem was that juries are required under the common law to reduce future damages to present value, and in effect, the statute directed "the trial court to further reduce the jury's award of damages already once reduced to present value." *Id.* at 425. This Court ruled that the statute violated the fundamental right to a jury trial because "[a]pplication of the statute quite simply results in a successful plaintiff's receiving less than the jury awarded, and deprives the most severely injured victims of the benefits of investment." *Id.* at 425-426.

Whether or not the trial court's order under the statute at issue in *Galayda* could

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be characterized as a factual determination or a legal ruling, this Court focused on the result of the order mandated by the statute. The determinative point was that the fundamental right to a jury trial had always required, until *Arbino*, that trial courts enter judgment requiring payment of the damages determined by a jury. As was once forcefully stated for the Court by Associate Justice Alice Robie Resnick with regard to caps imposed upon punitive damages:

> These amendments create the illusion of compliance by permitting the jury to assess the amount of punitive damages to be awarded, but requiring the court to nullify the jury's determination and substitute the will of the General Assembly in any case where a jury awards punitive damages in excess of the amounts specified in R.C. 2315.21(D)(1)(a) and (b). This is a Constitution we are dealing with. "The right to a trial by jury is a fundamental constitutional right which derives from the Magna Carta." *Zoppo*, 71 Ohio St.3d at 556, 644 N.E.2d at 401. The right belongs to the litigant, not the jury, and a statute that allows the jury to determine the amount of punitive damages to be awarded but denies the litigant the benefit of that determination stands on no better constitutional footing than one that precludes the jury from making the determination in the first instance. (Emphasis added.)

State ex rel. Ohio Academy of Trial Lawyers v. Sheward, 86 Ohio St.3d 451, 484-485, 715 N.E.2d 1062 (1999).

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Because the statute in *Galayda* violated the right to a jury trial by permitting any modification of the amount owed on the judgment, it is impossible to square *Galayda* with *Arbino*. But *Galayda* was never explicitly overruled. *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 213 (Pfeifer J., dissenting) (demanding that the majority "should provide a nonconclusory explanation of each statement that contradicts a prior statement of this court," and if necessary, "should definitively overrule cases that it contradicts" under the framework of *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216,

2003-Ohio-5849, 797 N.E.2d 1256). The statement in *Arbino* that R.C. 2315.18 is distinguishable from the statute at issue in *Galayda* because only the latter provision required modification of a finding of fact does not hold up through even a cursory reading of both decisions and a comparison of the structure of the statutes that were examined.

While the clear explanation of the broad scope of the right to a jury trial in *Sheward* was criticized as "dicta" considering the ruling that "H.B. 350 was unconstitutional in toto as a violation of the separation of powers and of the single-subject clause," *Arbino* at ¶ 52, this observation likewise missed the point of the prior Court's decision. An essential facet of the ruling that the enactment violated the doctrine of the separation of powers was the determination that the cap on punitive damages still violated the fundamental right to a jury trial after the General Assembly's amendments in response to decisions issued by this Court before *Sheward*:

> Am.Sub.H.B. No. 350 is no ordinary piece of legislation that happens to inadvertently cross the boundaries of legislative authority. The General Assembly has circumvented our mandates, while attempting to establish itself as the final arbiter of the validity of its own legislation. It has boldly seized the power of constitutional adjudication, appropriated the authority to establish rules of court and overrule judicial declarations of unconstitutionality, and, under the thinly veiled guise of declaring "public policy," establishing "jurisdiction," and enacting "substantive" law, forbade the courts the province of judicial review.
>
> Such a threat to judicial independence is reminiscent of a bygone era of legislative omnipotence existing prior to the adoption of the Constitution of 1851.

Sheward at 492. Had the General Assembly enacted an amended law complying with the right to a jury trial rather than reenacting a statute that still violated the right to a jury trial, it stands to reason that this Court's decision in *Sheward* may have been different. So the statement could not have been dicta.

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Moving past this Court's other decisions on the same issue, the logic of the *Arbino* majority would have been flawed in the absence of prior authorities. The majority in *Arbino* relied upon three grounds to support the constitutionality of the General Assembly's invasion of the province of the jury, each of which fails. First, as an example of how courts may modify an award of damages as a matter of law, the *Arbino* court noted that common law courts, not legislatures, possess the inherent power to order remittitur of excessive awards, although the "plaintiff must consent to such an order." *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 38; *see also Hetzel v. Prince William Cty.*, 523 U.S. 208, 211, 118 S.Ct. 1210, 140 L.Ed.2d 336 (1998) (same). But this position fails to account for the role of consent to a remittitur, which would constitute an intentional relinquishment, and therefore a waiver, of the constitutional right to a jury trial. *E.g., State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 20. If, alternatively, a plaintiff will not consent to remittitur, the remedy when a jury's award is excessive *is a new jury trial. See, e.g., Chester Park Co. v. Schulte*, 120 Ohio St. 273, 278-280, 166 N.E. 186 (1929).

Second, the *Arbino* majority pointed to several statutory causes of action in which the General Assembly authorized courts to award treble the damages found by the jury, reasoning that a "corresponding decrease as a matter of law cannot logically violate that right." *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 39. But the Ohio constitutional guarantee, as the majority had just stated, "guarantees a right to a jury trial only for those causes of action in which the right existed in the common law when Section 5 was adopted." *Id.* at ¶ 32. The right to a jury trial does not apply to the statutory causes of action that were listed, and so this analogy has never made sense.

Finally, the court noted that federal courts have held that " 'statutory damages caps

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do not violate the Seventh Amendment, largely because a court does not "reexamine" a jury's verdict or impose its own factual determination regarding what a proper award might be,' " but " 'simply implements a legislative policy decision to reduce the amount recoverable to that which the legislature deems reasonable.' " *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 41, quoting *Estate of Sisk v. Manzanares*, 270 F.Supp.2d 1265, 1277-1278 (D.Kan.2003). The Ohio guarantee does not contain a Reexamination Clause. Instead, unlike its federal counterpart, Article I, Section 5 of the Ohio Constitution commands this Court to preserve the right of trial by jury as "inviolate." *Arbino* at ¶ 138-162 (O'Donnell J., dissenting in part). And as this Court had already decided by that time, the inviolate right to a jury trial included compensation in an amount decided by a jury. *Galayda*, 71 Ohio St.3d at 425-426, 644 N.E.2d 298. It stands to reason that taking away a part of the benefit of this fundamental right is a violation of it.

In each of these ways, *Arbino* was wrongly decided.

C. The Proper Standard of Review

Because R.C. 2315.18 thwarts the fundamental right to a jury trial, and notwithstanding *Arbino*'s mistaken ruling to the contrary, this Court should hold that the statute should be examined under the strict scrutiny test. *E.g.*, *Sorrell*, 69 Ohio St.3d at 424-425, 633 N.E.2d 504. But even if this Court maintains that R.C. 2315.18 does not deny litigants their rights under Article I, Section 5 of the Ohio Constitution, the fact that it regulates in the field covered by this constitutional provision should be sufficient to trigger stricter review. When other fundamental rights have been examined, by this Court and others, even a very minor degree of intrusion has appropriately raised the level of judicial scrutiny. And in this way, the mode of constitutional review employed in *Arbino*

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is unworkable in the broader field of fundamental rights.

Most recently, a plurality of this Court blessed "a two-step framework to decide Second Amendment cases" on review of a law that regulated carrying or use of a firearm " 'while under the influence of alcohol or any drug of abuse.' " *State v. Weber*, 163 Ohio St.3d 125, 2020-Ohio-6832, 168 N.E.3d 468, ¶ 5, quoting *R.C. 2923.15(A)*. Chief Justice Maureen O'Connor explained in the lead opinion:

> In the first step of the framework, courts ask whether " 'the challenged statute "regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment," ' " namely, the ratification of the Bill of Rights in 1791 or of the Fourteenth Amendment in 1868. *Stimmel v. Sessions*, 879 F.3d 198, 204 (6th Cir.2018), quoting *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir.2012), quoting *Ezell v. Chicago*, 651 F.3d 684, 702-703 (7th Cir.2011). If the regulation falls outside the scope of the Second Amendment, the "inquiry is complete," and the law cannot be determined to violate that Amendment. *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir.2010); *accord Stimmel*, 879 F.3d at 204.
>
> If the reviewing court moves on to the second step, it should "determine and apply the appropriate level of heightened means-end scrutiny" based on whether and how severely a particular law burdens the core Second Amendment right. *Stimmel*, 879 F.3d at 204; *see also Natl. Rifle Assn. of Am., Inc. v. Bur. of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185 (5th Cir.2012) ("In harmony with well-developed principles that have guided our interpretation of the First Amendment, we believe that a law impinging upon the Second Amendment right must be reviewed under a properly tuned level of scrutiny—i.e., a level that is proportionate to the severity of the burden that the law imposes on the right"). (Footnote omitted.)

Weber, 163 Ohio St.3d 125, 2020-Ohio-6832, 168 N.E.3d 468, at ¶ 13-15. If "the challenged law does not severely burden the core of the Second Amendment's protections, the court should apply intermediate scrutiny." *Id.* at ¶ 16. But if "a statute imposes a severe burden on the core of the Second Amendment right, the court should apply strict

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scrutiny." *Id.* at ¶ 17. Finding that the statute "imposes, at most, only a slight burden" on the right to bear arms, the plurality engaged in intermediate scrutiny. *Id.* at ¶ 27-47.

The analogy to *Arbino* is obvious. In *Arbino* at ¶ 34-42, the Court pointed out that a plaintiff was still entitled to have factual findings made by a jury despite the adjustment of the judgment value mandated by R.C. 2315.18, while in *Weber*, it was observed:

> R.C. 2923.15 is also *very* limited in its application. The statute does not prevent someone who consumes alcohol from owning a gun, nor does it prohibit a gun from being in a house or provide that a gun must be rendered inoperable if someone in the house is intoxicated. The statute also leaves persons who consume alcohol free to carry and use a gun in the home for self-defense when they are not intoxicated. In fact, the law does not even apply to a person carrying or using a gun while consuming alcohol—as long as the person is not intoxicated. * * * Overall, R.C. 2923.15 is a targeted restriction that prohibits a narrow range of conduct (carrying or using a gun) for a very limited period of time (while someone is in a state of intoxication) due to the inherently dangerous nature of carrying or using a gun while in that state.

Weber, 163 Ohio St.3d 125, 2020-Ohio-6832, 168 N.E.3d 468, at ¶ 29. Nonetheless, heightened scrutiny was appropriate. *Id.* at ¶ 27-47. Just as with the ban on drunken gun possession, which left most forms of possession lawful, the fact that a jury still decides questions of fact at a trial does not prevent more exacting review of R.C. 2315.18, which impacts only a part of the jury's function. Even a limited intrusion into the operation of a fundamental right triggers a closer look at the relationship between the General Assembly's motives and means.

Just as with the right to bear arms, other fundamental rights are closely guarded by the courts even when the state makes partial invasions into the protected space. A law that permits speech but limits the content—even a little bit—is strictly scrutinized. *Painesville Bldg. Dept. v. Dworken & Bernstein Co., L.P.A.*, 89 Ohio St.3d 564, 567-568,

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733 N.E.2d 1152 (2000). A law that permits anyone to enter into a marriage but picks and chooses which pairings will be recognized by the state as lawful is closely reviewed for its "lawful basis" and "justification." *Obergefell v. Hodges*, 576 U.S. 644, 680-681, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015). And when a law dictates to a person that some but not all relatives will lawfully be recognized as a member of a family, a matter falling within the fundamental right to define one's own family, a "Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Moore v. East Cleveland*, 431 U.S. 494, 499, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). In each of these examples, the fact that individuals could still exercise a fundamental right in part did not permit a less demanding degree of judicial scrutiny. Because R.C. 2315.18 acts within the realm of a fundamental right in the same way, this Court should overrule *Arbino* and mandate a heightened degree of review.

D. The Proper Mandate

Since *Arbino*, none of the lower courts have been empowered to engage in a more exacting review of R.C. 2315.18 than the rational basis standard provides for. *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 49. Accordingly, if *Arbino* is overruled, it would be appropriate to remand the matter for trial court proceedings to create a record and determine in the first instance whether R.C. 2315.18 passes muster under whichever test this Court concludes is appropriate. *See Shelly Materials, Inc. v. City of Streetsboro Planning & Zoning Commission*, 158 Ohio St.3d 476, 2019-Ohio-4499, 145 N.E.3d 246, ¶ 25; *Kraynak v. Youngstown City School Dist. Bd. of Edn.*, 118 Ohio St.3d 400, 2008-Ohio-2618, 889 N.E.2d 528, ¶ 24; *State ex rel. Ware v. Pureval*, 160 Ohio St.3d 387, 2020-Ohio-4024, 157 N.E.3d 714, ¶ 8.

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CONCLUSION

For all of the foregoing reasons, this Court should reverse the decision of the Eighth District Court of Appeals in *Pompa*, 2021-Ohio-845, 169 N.E.3d 285, and declare Ohio's damage caps unconstitutional as applied in this case or remand for strict scrutiny of the enactments.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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

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