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

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

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REPLY

Amici curiae the Ohio Association for Justice and the American Association for Justice submit this Reply to address a theme that runs through several of the briefs filed by *amici* in support of Appellee Roy Pompa: that the right to a jury trial—guaranteed by Article I, Section 5 of the Ohio Constitution—is "about process, not substance." *Merit Brief of Amicus Curiae Ohio Attorney General Dave Yost in Support of Appellee Roy Pompa filed November 23, 2021 ("Ohio AG Br."), p. 26.* This is a linchpin issue that should inspire this Court to revisit its decision in *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420.

I. THE ATTEMPT TO THWART THE SUBSTANCE OF THE RIGHT TO A JURY TRIAL

"The right to trial by jury is one of the most fundamentally democratic institutions in the history of the human race." *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312, 331, 662 N.E.2d 287 (1996) (Douglas, J., dissenting). The right to a jury trial "derives from Magna Charta" and is embedded in both the United States Constitution and the Constitution of the State of Ohio. *Cleveland Ry. Co. v. Halliday*, 127 Ohio St. 278, 284, 188 N.E. 1 (1933). "Throughout history, the right to trial by jury has been considered the crown jewel of our liberty." *Gladon* at 331 (Douglas, J., dissenting).

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This fundamental right is set forth in Article I, Section 5 of the Ohio Constitution, which guarantees in plain terms: "The right of trial by jury shall be inviolate." " 'Inviolate' means free from substantial impairment." *Gladon*, 75 Ohio St.3d at 332, 662 N.E.2d 287 (Douglas, J., dissenting), quoting *Black's Law Dictionary*, 826 (6th Ed.1990). "It is difficult to imagine a more forceful way of saying that the right to trial by jury should in no way be infringed." *Id.* If the "inviolate" right to a jury trial under the Ohio Constitution

is a right of "substance," rather than merely a "process" as Pompa's *amici* contend, the right is thoroughly violated when a jury's determination of appropriate noneconomic damages is replaced by a different amount set by the General Assembly.

Pompa's *amici* minimize Article I, Section 5, repositioning it as merely guaranteeing a right to a certain type of fact-finding procedure. But "[f]or centuries it has been held that the right of trial by jury is a fundamental constitutional right, a substantial right" and not simply "a procedural privilege." *Halliday*, 127 Ohio St. at 284, 188 N.E. 1. *See also Arrington v. DaimlerChrysler Corp.*, 109 Ohio St.3d 539, 2006-Ohio-3257, 849 N.E.2d 1004, ¶ 21 ("It is well understood that the right is 'fundamental,' 'substantial,' *Halliday*, 127 Ohio St. at 284, 188 N.E. 1, and 'inviolate.' Section 5, Article I, Ohio Constitution."); *Bertolino v. Indus. Comm.*, 43 Ohio St.3d 44, 46, 538 N.E.2d 1040 (1989) ("the right to a jury trial is substantive in nature[.]"); *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."). Succinctly stated, " '[t]he right to a jury trial does not involve merely a question of procedure.' " *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 421, 633 N.E.2d 504 (1994), quoting *Halliday* at 284.

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And how could the right to a jury trial merely guarantee certain procedures? If the entire constitutional right to a jury trial is reduced to procedure, nothing would stop the General Assembly from taking all the teeth out of its guarantee. If a law like R.C. 2315.18 may be passed limiting the "recoverable" damages in any matter governed by Article I, Section 5, subject only to the minimal bar of rationality, what stops legislators from reducing the amount of a permissible judgment to $0.00? Nothing. With the support and encouragement of organizations like the United States Chamber of Commerce, the members of the General Assembly have never been at a loss for reasons, however terrible,

to do something like that. And this Court would be bound to accord such a legislative judgment " 'substantial deference.' " *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 58, quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981). So long as the parties to a lawsuit are still permitted by law to offer evidence of the cost of an injury to jurors during a proceeding and a verdict is returned answering the question of value, nothing would prevent passage of a law requiring jurists to disregard a verdict and enter judgment *as a matter of law*. Precisely because a procedural right to a jury trial carries no strength at all, this Court should reaffirm, as it has before, that there is substance to Article I, Section 5 of the Ohio Constitution. *Halliday* at 284; *Sorrell* at 421. Without substantive protection of a jury's right to decide how much tortfeasors must pay to their victims, laws like R.C. 2315.18 accomplish the "government oppression" warned about in *Arrington*, 109 Ohio St.3d 539, 2006-Ohio-3257, 849 N.E.2d 1004, at ¶ 21.

The notion that Article I, Section 5's jury guarantee is about process, not substance, undermines what has historically and practically been very much a substantive guarantee. Juries are entrusted by the Constitution with some of the most important decisions made in a courtroom, including in criminal cases the choice whether to impose capital punishment. *See Hurst v. Florida*, 577 U.S. 92, 97-98, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016) (invalidating a Florida law that permitted a court to impose a sentence of death notwithstanding an "advisory jury verdict"). To treat the right to trial by jury as a mere procedural nicety is to fail to understand why it was of foundational importance to the formation of the United States, figuring both in the Declaration of Independence and the reason the federal Constitution was ratified and contains a bill of rights.

Reframing the right to a jury trial as merely a "process" weakens an important

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democratic institution in Ohio. Regrettably, however, that is exactly what the decision in *Arbino* did:

> 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*. There is no dispute that the right to a trial by jury does not extend to the determination of questions of law. *See Conley v. Shearer* (1992), 64 Ohio St.3d 284, 292, 1992 Ohio 133, 595 N.E.2d 862. Thus, without violating the Constitution, a court may apply the law to the facts determined by a jury. (Emphasis sic.)

Arbino, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 37. Using this as a springboard, the Court reasoned that imposing damages caps is not unconstitutional because it simply involves applying the law to the jury's "fact-finding process." *Id.* The Court's plurality opinion in *Simpkins v. Grace Brethren Church of Delaware*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, ¶ 24, echoed this reasoning.

II. THE JURY'S ROLE IN APPLYING THE LAW

In describing the jury's function as a "fact-finding process" and a court's function as one in which a judge "appl[ies] the law to the facts determined by the jury," the *Arbino* majority cabined the jury and the court into separate roles that do not overlap. *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 37. This allowed the Court to state that "[s]o long as the [jury's] 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.) *Id.* Respectfully, the *Arbino* majority's reasoning was flawed, because it rested on the premise that the jury merely finds facts and is not entrusted with applying the law to those facts. This premise is incorrect. In fact, throughout Ohio juries are told the very opposite.

When judges use Ohio's model jury instructions, jurors are told: "You decide the

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disputed facts and I give the instructions of law. It is your sworn duty to accept these instructions and to apply the law as it is given to you." *1 Ohio Jury Instructions CV 311.01* (2020). The jury receives instructions of law describing how to assess credibility, what the applicable burden of proof is, and what types of harms and losses may be considered as a matter of law. The jury applies the law to the facts to determine an appropriate amount of compensatory damages. Contrary to *Arbino*, it is an intrusion on the jury's role for a court to replace a jury's compensatory damages award with a different figure because the application of caps does more than simply apply the law to facts found by the jury. R.C. 2315.18 supplants the jury's finding of non-economic damages with a different number, thereby overriding the jury's application of the law to the facts.

III. THE TOO-RIGID VIEW OF STARE DECISIS

Clinging to *Arbino*, Pompa's *amici* invoke the doctrine of stare decisis and urge the Court not to depart from *Arbino*. But stare decisis "is limited to circumstances 'where the facts of a subsequent case are substantially the same as a former case.' " *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 23, quoting *Rocky River v. State Emp. Relations Bd.*, 43 Ohio St.3d 1, 5, 539 N.E.2d 103 (1989). This Court has not conclusively ruled upon the constitutionality of the damage caps in R.C. 2315.18 as applied to child-victims of rape because *Simpkins* was merely a plurality decision.

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Moreover, stare decisis "should not be, and has never been, used as the sole reason for the perpetuation of a stated rule of law which has proved to be unsound and unjust." *Carter-Jones Lumber Co. v. Eblen*, 167 Ohio St. 189, 197, 147 N.E.2d 486 (1958). The tort caps have proven to be just that. To the great credit of the Ohio Attorney General, he agrees. He described the application of the damages cap to the psychological harm suffered by a rape victim as "surprising," "callous," and "incredibly foolish." *Ohio AG Br.,*

p. 1. But he contends that this Court's hands are tied, and he simply "urges the legislature" to lift the damages cap in civil cases brought against rapists. *Id., p. 2.* The Attorney General is wrong that this Court lacks the power to solve the obvious problem presented by this case. The "surprising," "callous" and "incredibly foolish" noneconomic damages caps may be invalidated by recognizing that they are irrational as applied and broadly interfere with the constitutional guarantee of a jury trial.

Anything less would turn the constitutional order on its head. When the operation of a law is cruel to the point of absurdity and arbitrariness, this Court should not wait for the General Assembly to solve the problems it created. That is doubly true if a fundamental right is thwarted by a law. Whether this Court decides that R.C. 2315.18 interferes with a fundamental right, requiring a closer look at the state's reasoning, or fails to pass the minimum test of rationality as applied in this case, a legislative fix will do nothing to solve the broader problem. Only this Court may overrule *Arbino*, if it was wrongly decided, or conclusively distinguish *Simpkins*, if the plurality's reasoning now fails to meet the moment. And without such a ruling, the decision in *Arbino* will carry the force of law the next time that the General Assembly wanders outside of its lane.

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The gravity of this Court's role in protecting the constitutional order has inspired grand expressions of respect for fundamental rights on a number of occasions. For example:

> So long as the trial by jury is a part of our system of jurisprudence, its constitutional integrity and importance should be jealously safeguarded. The right of trial by jury should be as inviolate in the working of our courts as it is in the wording of our Constitutions.

Gibbs v. Girard, 88 Ohio St. 34, 47, 102 N.E. 299 (1913). A whimpering expression of deference to the General Assembly, permitting legislators to solve the problem in the first

place, is simply inadequate. The General Assembly has not demonstrated a willingness to protect the right to trial by jury, nor is it the role of legislators to draw boundaries around the legislative power. As a result, it falls on this Court to "jealously" safeguard that right and protect "all Ohioans, not just those with the most lobbying power." *Arbino,* 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 219-220 (Pfeiffer, J., dissenting)

To buttress its argument, one of Pompa's *amici* states that "many states" limit noneconomic damages. *See, e.g., Brief of Amici Curiae Chamber of Commerce of the United States of America filed November 23, 2021, pp. 13-14, fn. 12* (listing 19 states). The list is misleading in the context of this personal injury case, however, because it combines states that have only enacted medical malpractice caps with states that passed caps in personal injury cases. To determine where Ohio stands, a true apples-to-apples comparison is necessary, i.e., a list of states that still have noneconomic damages caps in personal injury cases. For various reasons, that number has dwindled. Currently, Ohio is one of just eight (8) states that limit noneconomic damages in personal injury cases,[1] and its cap is the lowest in the nation.

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Nor is there a "trend" holding that non-economic damages caps do not violate the right to trial by jury. *Brief of Amicus Curiae Ohio Association of Civil Trial Attorneys filed November 24, 2021, pp. 11-12.* To find enough cases to create a trend, the Ohio Association of Civil Trial Attorneys reaches back thirty years. But more recent cases

[1] The few states that still limit noneconomic damages in personal injury cases are: Alaska (Alaska Stat. § 09.17.010); Colorado (Colo. Rev. Stat. § 13-64302); Hawaii (Haw.Rev.Stat. 666-8.7); Idaho (Idaho Code § 6-1603); Maryland (Md.Code, Cts. & Jud.Proc. § 3-2A-09); Mississippi (Miss.Code Ann. § 11-1-60); Ohio (R.C. 2315.18); and Tennessee (Tenn.Code Ann. § 29-39-102).

reflect a trend that goes the other way, and that trend includes states that had previously eagerly embraced "tort reform." *See, e.g., Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731, 733, 691 S.E.2d 218 (2010) (noneconomic damages cap violated Georgia constitutional guarantee that "[t]he right to trial by jury shall remain inviolate," rejecting argument that caps pose no greater danger to trial by jury than remittitur); *Lebron v. Gottlieb Mem. Hosp.*, 237 Ill.2d 217, 930 N.E.2d 895 (2010); *N. Broward Hosp. Dist. v. Kalitan*, 219 So.3d 49 (Fla.2017) (noneconomic damages cap violated Florida constitution because there exists no evidence of a continuing tort crisis justifying caps); *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 1128, 442 P.3d 509 (2019) (noneconomic damages cap violated Kansas's constitutional guarantee that "[t]he right of trial by jury shall be inviolate"); *Beason v. I. E. Miller Servs., Inc.*, 2019 OK 28, 441 P.3d 1107 (noneconomic damages cap violated Oklahoma constitution). Several of these decisions involved state constitutions containing similar language, if not identical, guaranteeing that the right to trial by jury is inviolate.

IV. THE PROBLEMATIC APPEAL TO THE GENERAL ASSEMBLY'S JUSTIFICATIONS

Caps on noneconomic damages in personal injury cases were introduced in Ohio in their current form nearly two decades ago. They were part of a nationwide blitzkrieg spearheaded by the United States Chamber of Commerce. *Amicus curiae* David Goodman ("Goodman") participated in that coordinated effort in Ohio.[2] *Brief of Amicus Curiae David Goodman, Former Chairman of the Ohio Senate Judiciary Committee filed*

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[2] Mr. Goodman states he was involved in the "drafting" and enactment of R.C. 2315.18. In truth, there was little "drafting." *Goodman Brief, p. 2.* As evidenced by the similarity of damages caps enacted in various states at the same time, many of which have since been abandoned or declared unconstitutional, a template was created for legislators throughout the United States.

November 24, 2021 ("Goodman Brief"), p. 2. Amicus Goodman listed for this Court the "evidence" he claims justified imposing the damages caps. *Goodman Brief, pp. 5-6.* While he invites the Court to accept this information at this late stage, there are a number of reasons the Court should decline his invitation.

Most prominently, a fact finder has never examined these materials to determine whether they should be believed. The majority did not closely scrutinize the evidence in *Arbino*, because a rational basis analysis was employed. *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 58. Associate Justice Paul E. Pfeifer responded in dissent with sound reasons to believe that these materials are biased and untrustworthy. *Arbino* at ¶ 186-204 (Pfeifer, J., dissenting). But where a fundamental right is involved, a fact finder is essential to determine what is and is not true. Showing up for the first time at the state's highest court to give factual reasons in support of a law, as *Amicus* Goodman does, puts the cart before the horse.

If this Court holds that the justifications for the damage caps in R.C. 2315.18 should be reviewed more closely given the law's operation in the realm of a fundamental right, the evidence should finally be considered in some sort of proceeding to determine whether the General Assembly's factual justifications for the law are or are not true and valid. Since *Arbino*, none of the lower courts could have been able to conduct a more exacting review of R.C. 2315.18. *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 49. Accordingly, if *Arbino* is overruled, a remand for proceedings to create a record is indispensable. See *Shelly Materials, Inc. v. Streetsboro Planning & Zoning Comm.*, 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

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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.

Even if *Amicus* Goodman's materials demonstrated the existence of a tort "crisis" twenty years ago when the law was passed, he offers no reason to believe a crisis exists today that justifies usurping a jury's decision. Circumstances have no doubt changed in the ensuing decades, and evidence of an ongoing need for the damage caps in R.C. 2315.18 should be presented if this law is to continue infringing on the constitutional right to a jury trial. *E.g., Shelby Cty. v. Holder*, 570 U.S. 529, 545-557, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013) ("Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past."). The current record, even with the late-breaking additions of Pompa's *amici*, is insufficient for the purpose of heightened review.

And finally, the information *Amicus* Goodman relies upon to justify imposing noneconomic damages caps could never—then or now—justify imposing caps in a case like this one. He, and others in the General Assembly, may have intended to provide a benefit to corporate interests or certain professions by imposing caps, but surely rapists were not among those they were trying to benefit. The caps serve no rational purpose when they are applied to benefit such a defendant by reducing the noneconomic damages a jury has awarded to his victim. Not even *Amicus* Goodman defends the constitutionality of such an application; to the contrary, he conspicuously declines to comment on the constitutionality of the very legislation he helped draft and enact as applied to Amanda Brandt.

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CONCLUSION

For all of the foregoing reasons, and for each of the reasons urged in the Brief of *Amici Curiae*, Ohio Association for Justice and American Association for Justice, this Court should reverse the decision of the Eighth District Court of Appeals in *Brandt v. Pompa*, 8th Dist. Cuyahoga No. 109517, 2021-Ohio-845, and declare Ohio's damage caps unconstitutional as applied in this case or remand for strict scrutiny of the enactments.

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I certify that a copy of the foregoing **Amicus Reply** has been served by e-mail on December 14, 2021, upon:

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