No. 2021-0497

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS, EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. CA-20-109517

AMANDA BRANDT,

Plaintiff-Appellant,

v.

ROY POMPA,

Defendant-Appellee.

BRIEF OF AMICUS CURIAE OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS IN SUPPORT OF APPELLEE

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TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page

CASES

Page

Page

STATUTES

Page

OTHER AUTHORITIES

RULES

I. Statement of Interest of Ohio Association of Civil Trial Attorneys

The Ohio Association of Civil Trial Attorneys' ("OACTA") wide array of members includes attorneys, corporate executives, and claims professionals dedicated to the defense of tort litigation and civil disputes throughout Ohio. For over fifty years, OACTA has provided a forum where professionals work together to improve the administration of justice in Ohio. OACTA promotes fairness, predictability, stability, and consistency in Ohio's civil justice system.

The comprehensive tort reform measures in Amended Substitute Senate Bill 80 ("S.B. 80"), including limits on noneconomic damages in R.C. 2315.18, align with OACTA's mission by making Ohio's civil justice system more fair and predictable. *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, upheld these limits on noneconomic damages, and this Court should follow *Arbino* and confirm the General Assembly's prerogative to weigh competing concerns and make policy decisions that limit inherently subjective noneconomic damages awards for pain and suffering. The Court should also reject Appellant Amanda Brandt's as-applied constitutional challenge; her *capped* judgment of over $100 million shows the punitive and noneconomic damages caps work together as intended and no constitutional infirmity exists.

II. Statement of the Case and Facts

Amicus defers to the Statement of Facts in the Merit Brief of Defendant-Appellee Roy Pompa.

III. Argument

Brandt's first Proposition of Law argues that R.C. 2315.18's cap on noneconomic damages is unconstitutional as applied to her; the second asks this Court to overrule *Arbino*

and hold R.C. 2315.18 unconstitutional on its face. We address the propositions in reverse order below for clarity's sake.

After all, as-applied constitutional challenges address whether the statute can be applied to the parties before the Court. *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, ¶¶ 180-81. Facial constitutional challenges, on the other hand, address whether the statute can be applied to anyone. *Arbino*, 2007-Ohio-6948, ¶ 26. Because the former is a subset of the latter, it makes sense to address facial constitutionality first.

Proposition of Law No. 2

> ***Arbino* correctly held that R.C. 2315.18 violates no fundamental right, is rationally related to a legitimate governmental interest, and is neither unreasonable nor arbitrary; these holdings stand under stare decisis.**

Arbino should be followed, not overruled. *Arbino* rests on two main insights about the legislature's role: (i) the General Assembly is the branch of government that weighs competing concerns and makes policy decisions, and (ii) its province includes defining claims and remedies under Ohio law. *Arbino*, 2007-Ohio-6948, ¶¶ 20-21, 113; *id.* at ¶ 136 (Cupp, J., concurring). These insights underpin much of this Court's recent constitutional jurisprudence, from decisions upholding workers' compensation subrogation statutes to decisions upholding statutes of repose and Ohio's employment intentional tort statute.[1]

[1] *See, e.g.*, *Groch*, 2008-Ohio-546, ¶¶ 78-80, 92-93, (R.C. 4123.93, 4123.931, 2305.10(C) and former 2305.10(F) are constitutional on their face); *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, ¶¶ 34-36, 51-53, 60, 64, 84 (R.C. 2745.01 is constitutional on its face); *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, ¶¶ 13-14, 21 (R.C. 2305.113 is constitutional as applied to non-vested claims); *see also id.* at ¶¶ 36, 38 (McGee Brown, J., concurring); *Antoon v. Cleveland Clinic Found.*, 148 Ohio St.3d 483, 2016-Ohio-7432, ¶¶ 33-34 (R.C. 2305.113 is constitutional as applied to vested claims).

Arbino applied these insights to uphold R.C. 2315.18 on its face. As relevant here, *Arbino* held:

- **R.C. 2315.18 does not violate the right to a jury trial**: applying the law to facts the jury finds infringes no right. *Arbino*, 2007-Ohio-6948, ¶¶ 30-42.

- **Rational basis review applies**: Because R.C. 2315.18 does not implicate a fundamental right, rational basis review, not strict scrutiny, applies to the remaining constitutional challenges. *Id.* at ¶¶ 49, 64-66.

- **R.C. 2315.18 does not violate due process on its face**: R.C. 2315.18 bears a real and substantial relation to the general welfare by addressing the uncertainty and subjectivity of noneconomic damages, which contribute to rising civil litigation costs. *Id.* at ¶¶ 53-58. It is neither unreasonable nor arbitrary to allow uncapped damages for defined catastrophic injuries while setting limits for those not as severely injured. *Id.* at ¶¶ 61-62.

- **R.C. 2315.18 does not violate equal protection on its face**: 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." *Id.* at ¶ 69.

Each holding is correct and should be followed.

Adhering to precedent is the norm. Doing so creates stability and predictability. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 1 (hereinafter *Galatis*). It also "thwart[s] the arbitrary administration of justice" and promotes "clear rule[s] of law by which the citizenry can organize their affairs." *Id.* at ¶ 43. The Court thus requires "special justification" to overrule a decision, *id.* at ¶ 44, including an "assurance that the newly chosen course for the law is a significant improvement," *id.* at ¶ 1.

Galatis adopted a three-part test to determine whether this special justification exists, *id.* at ¶ 48; Brandt agrees that test applies here. Appellant Br. at 26-27. Under it, a decision may be overruled only if:

> (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 the precedent would not create an undue hardship for those who have relied upon it.

Galatis at paragraph one of the syllabus; *see also Alleyne v. United States*, 570 U.S. 99, 118 (2013) (Sotomayor, J., concurring) (noting "it would be illegitimate to overrule a precedent simply because the Court's current membership disagrees with it."). None of these factors support overruling *Arbino.*

A. *Arbino* was correctly decided.

First, *Arbino* correctly applied the law. *Galatis*, 2003-Ohio-5849, ¶ 48. Brandt argues that R.C. 2315.18 infringes on the right to a jury trial, triggering strict scrutiny review of her due process and equal protection challenges. Appellant Br. at 27-30. But *Arbino* correctly held that R.C. 2315.18 does not violate the right to trial by jury, making *Arbino*'s application of rational basis review correct.[2] And Brandt does not (and cannot) argue that *Arbino* misapplied rational basis review.

1. R.C. 2315.18 does not violate the right to a jury trial.

Section 5, Article I of the Ohio Constitution states:

> 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.

[2] R.C. 2315.18 also does not violate Ohio's "open courts" and "right to a remedy provision," because, as explained by other amici, it affords litigants a "meaningful remedy." Amicus Brief of Product Liability Advisory Council, Inc., pp. 7-14.

The "inviolate" right to trial by jury refers to the fundamental attributes of the right to trial by jury recognized at common law. *Dunn & Witt v. Kanmacher & Stark*, 26 Ohio St. 497, 503 (1875); *see also Keller v. Stark Elec. Ry. Co.*, 102 Ohio St. 114, 116, (1921); Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 Harv.L.Rev. 669, 671 (1918). These attributes include the right to have a jury determine questions of fact that reasonable persons may decide differently. Scott, 31 Harv.L.Rev. at 678. Contrary to Brandt's and her amici's contention, however, this right does not include a right to a judgment in the amount of a jury's damages award. Amicus Br. of Ohio Assn. Justice & Am. Assn. for Justice (hereinafter OAJ Br.) at 21; *see also* Appellant Br. at 28-30.

a. History shows the right to have jurors decide disputed facts protected against biased fact-finding by judges.

The right to have jurors decide disputed questions of fact reflects a historical concern with biased judicial fact-finding. *See, e.g.*, Blackstone, Commentaries on the Law, 689-90 (B. Gavit Ed. 1941):

> [I]n setting and adjusting a question of fact, when entrusted to any single magistrate, partiality and injustice have an ample field to range in, either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder.

See also 2 Reports of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio, 1850–1851, 191 (1851) (Ohio Constitutional Convention delegate expressed that jury trials "'elude[d] the force of oppression, by decrees of venal and subservient judges.'").

Indeed, a fear of biased fact-finders is why Americans first became "attached" to the right to trial by jury:

> A special American attachment for juries arose from the colonial worry about English common lawyers appointed by London to preside over the colonial courts who, it was feared, had a greater attachment to imperial rule than to impartial justice.

Reid, *Constitutional History of the American Revolution, The Authority of Rights*, 51 (1986); *see also id.* at 49 (juries "furnished the citizenry with a shield against venal jurists"); Henderson, *The Background of the Seventh Amendment*, 80 Harv.L.Rev. 289, 293 (1966) (Constitutional Convention delegate "urged the necessity of Juries to guard [against] corrupt Judges"), quoting 2 Records of the Federal Convention of 1787, 587 (M. Farrand Ed. 1937). Colonists worried judges were loyal to the Crown, not impartial justice. *Arbino*, 2007-Ohio-6948, ¶ 120 (Cupp, J., concurring), citing Robert Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U.L.Rev. 997, 1028–1030 (2007).

This fear, however, did not carry over to applying the law, which has always been a judge's job. *See, e.g.*, Henderson, *The Background of the Seventh Amendment*, 80 Harv.L.Rev. 289, 303 (at least "as early as 1755 the legal profession considered that a judge could take the case away from the jury by such preemptory instructions"); *see also Keller*, 102 Ohio St. at 117-118 (trial courts may direct verdicts without offending the right of a jury trial). In short, "the right to trial by jury was intended to guard against judicial bias rather than [] limit [] the ability of the legislature to act within its constitutional boundaries." *Arbino*, 2007-Ohio-6948, ¶ 126 (Cupp, J., concurring).

b. Judges have always been able to apply the law to facts the jury finds.

This intention aligns with longstanding Ohio practice, which requires trial judges to apply the law to a jury's factual findings. Trial judges, for example, must:

- Enter judgment notwithstanding the verdict when the evidence supporting it is insufficient. Civ.R. 60.
- Vacate jury verdicts against the manifest weight of the evidence. Civ.R. 59.
- Vacate, subject to remittitur or additur, jury verdicts that, while not influenced by passion or prejudice, are excessive or inadequate as a matter of law. *E.g.*, *Markota v. East Ohio Gas Co.*, 154 Ohio St. 546, 553-54, (1951).
- Increase jury verdicts by trebling the damages award under statutes that provide for it. *Arbino*, 2007-Ohio-6948, ¶ 39 (noting that "numerous statutes," including the Consumer Sales Practices Act, provide for treble damages).

Brandt and the OAJ resist the relevance of remittiturs, arguing they are different because a new trial results if the plaintiff will not consent to a lower damages award. Appellant Br. at 28; OAJ Br. at 24. But whether the remedy is lower damages or a new trial, this longstanding common law practice refutes the OAJ's position that "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." OAJ Br. at 21 (emphasis in original). After all, if it were true that a trial court had to enter judgment for the full amount of damages awarded by any jury, then even the alternative remedy of a new trial would be off limits.

Equally flawed is the effort to explain away legislation that *increases* jury verdicts by trebling the damages award. Appellant Br. at 29; OAJ Br. at 24. The OAJ dismisses treble-damages statutes by claiming that "[t]he right to a jury trial does not apply to the statutory causes of action[.]" OAJ Br. at 24. This claim is at best overbroad. For example, Ohio courts have long recognized a right to trial by jury in CSPA cases, *e.g.*, *Robinson v. McDougal*, 62 Ohio

App.3d 253 (3d Dist. 1988), which can include treble damages awards. *See Whitaker v. MT. Automotive, Inc.*, 111 Ohio St.3d 177, 2006-Ohio-5481, ¶ 8 (trial court trebled jury's damages award under R.C. 1345.09(B)).

Nor does it matter that CSPA treble damages are a penalty. Appellant Br. at 29. The point is that the statute alters the jury's determination of the amount a defendant must pay. *See* R.C. 1345.09(B). Treble damage awards in CSPA cases thus cannot be reconciled with Brandt and her amici's position that judgment can only be entered on the amount of damages found by the jury. *See Arbino*, 2007-Ohio-6948, ¶ 39 ("We have never held that the legislative choice to *increase* a jury award as a matter of law infringes upon the right to a trial by jury; the corresponding *decrease* as a matter of law cannot logically violate that right.") (emphasis in original).

In sum, longstanding Ohio practice shows that the right to trial by jury has never limited a court's ability to adjust the legal effect of a jury's factual findings under statutes and court rules.

c. *Arbino* correctly found R.C. 2315.18 does not violate the right to a jury trial.

Arbino's holding that R.C. 2315.18's noneconomic damages cap did not violate the right to a jury trial thus aligns with history and longstanding Ohio practice, as the majority and Justice Cupp's four-justice concurring opinion explained. *Id.* at ¶¶ 34-42; *id.* at 119-126, 132-137 (Cupp, J., concurring, joined by Lundberg Stratton, O'Connor & Lanzinger, JJ.). For while a party has a "right to have the jury determine the amount of damages to the extent the damages are legally available," the General Assembly "may alter or limit what damages the law makes available and legally recoverable." *Id.* at ¶ 134; *see also id.* at ¶ 41 (explaining that a court does not "impose its own factual determination regarding what a proper award

might be" when applying a damages cap but "simply implements a legislative policy decision to reduce the amount recoverable to that which the legislature deems reasonable").

Brandt disagrees, relying on Justice O'Donnell's dissent. Appellant Br. at 30. But the dissent "provide[s] no historical analysis to support" the contention that a legislature cannot limit the amount of damages legally recoverable. *Arbino*, 2007-Ohio-6948, ¶ 133 (Cupp, J., concurring). And other states that analyze the history of the right to a jury trial agree with *Arbino*. *See, e.g.*, *Horton v. Oregon Health & Science Univ.*, 359 Or. 168, 376 P.3d 998, 1036-40 (2016) (conducting a thorough historical analysis of the right to jury trial and finding history showed the "inviolate" right to jury trial does not "limit[ ] the legislature's authority to define, as a matter of law, the substantive elements of a cause of action or the extent to which damages will be available in that action"); *Siebert v. Okun*, 2021-NMSC-016, 485 P.3d 1265, ¶¶ 42-55 (same).

Nor do the cases the OAJ cites show that *Arbino* was wrongly decided. OAJ Br. at 21-23. The OAJ relies mainly on *Galayda v. Lake Hosp. Sys., Inc.*, 71 Ohio St.3d 421 (1994). But the statute in *Galayda* gave a trial judge *unfettered discretion* to "modify, approve, or reject" a plan for periodic payments of future damages the jury had reduced to present value, thus allowing judges to decide case-by-case how much more the present value of an award would be reduced. *Id.* at 433, quoting former R.C. 2323.57(D)(1)(d). *Galayda* is best understood as resting on that flaw, which aligns the result with history and Ohio practice. *See Arbino*, 2007-Ohio-6948, ¶ 40. R.C. 2315.18 does not contain this flaw; it merely requires courts to enter a judgment that conforms to the law while withdrawing jurisdiction to enter a judgment that exceeds legal limits. *See* R.C. 2315.18(E)(1), (F)(1).

The OAJ next cites *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451 (1999). OAJ Br. at 21-23. But this Court has repeatedly dismissed *Sheward*'s discussion of particular statutes as dicta. *E.g.*, *Groch*, 2008-Ohio-546, ¶ 205 n. 3 ("[B]ecause that decision held H.B. 350 unconstitutional on separation-of-powers and one-subject-rule grounds, see paragraphs two and three of the syllabus, any substantive discussion of the merits of particular tort-reform legislation within that case was dicta."); *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552, ¶ 35 (observing that "[i]nherent in our conclusion is rejection of the argument that dicta contained in *Sheward* * * * should control our determination here"). What is more, this Court recently described *Sheward*'s "heavily criticized" holdings as "at best, questionable." *State ex rel. Food & Water Watch v. State*, 153 Ohio St.3d 1, 2018-Ohio-555, ¶¶ 28, 30. Dicta in a heavily criticized decision cannot show *Arbino* was wrongly decided.

Beyond this, OAJ's criticism of the persuasiveness of Seventh Amendment cases is misplaced.[3] OAJ Br. at 24-25. True, the Seventh Amendment contains express guidance on trial court interference with jury fact-finding that Ohio's Constitution lacks. U.S. Const. amend VII (preventing any "fact tried by a jury" from being "reexamined in any Court of the United States" other "than according to the rules of the common law"). But that guidance does not make federal precedent irrelevant. Both the state and federal right to trial by jury align with the common law, *see* p. 5-6, *supra*, making federal precedent holding that damages

[3] Federal courts have repeatedly held that caps on damages do not violate the Seventh Amendment. *See, e.g.*, *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513, 519 (6th Cir. 2005) (the jury's role "as factfinder [is] to determine the extent of a plaintiff's injuries," not "to determine the legal consequences of its factual findings."); *see also Arbino*, 2007-Ohio-6948, ¶ 135 (Cupp, J., concurring).

caps do not infringe the common law right persuasive. *Arbino*, 2007-Ohio-6948, ¶ 135 (Cupp, J., concurring).

Finally, both before and after *Arbino*, sister state supreme courts have upheld caps on noneconomic damages, finding they do not violate the right to trial by jury. For example:

- Alaska: Holding "that a damages cap did not intrude on the jury's fact-finding function, because the cap was a 'policy decision' applied after the jury's determination, and did not constitute a re-examination of the factual question of damages." *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1051 (Alaska 2002);

- Idaho: Holding that the statutory cap on damages did not violate the right to a jury trial because it limited the legal consequences of the jury's finding, but it did not infringe on the jury's fact-finding. *Kirkland v. Blaine Cty. Med. Ctr.*, 134 Idaho 464, 469, 4 P.3d 1115 (2000);

- Michigan: "Plaintiff's right to a jury trial is not implicated. She has had a jury trial and the jury determined the facts of her case. The jury's function is complete. It is up to the court to determine the legal effect of those findings, whether it be that her damages are capped, reduced, increased, tripled, reduced to present value, or completely unavailable." *Phillips v. Mirac, Inc.*, 470 Mich. 415, 685 N.W.2d 174, 183 (2004);

- Nebraska: Holding that statutory cap on damages does not violate the right to a jury trial because the legislature "has the power to limit recovery in a cause of action" and "the trial court applies the remedy's limitation only after the jury has fulfilled its fact-finding function." *Gourley ex rel. Gourley v. Nebraska Methodist Health Sys., Inc.*, 265 Neb. 918, 663 N.W.2d 43, 75 (2003);

- Nevada: Explaining that the "cap does not interfere with the jury's factual findings because it takes effect only after the jury has made its assessment of damages, and thus, it does not implicate a plaintiff's right to a jury trial." *Tam v. Eighth Judicial Dist. Court*, 131 Nev. 792, 358 P.3d 234, 238 (2015);

- New Mexico: Upholding non-punitive caps on damages because the restrictions are "aimed at curtailing the legal remedy available to redress a plaintiff's injury and are consistent with the constitutional jury right." *Siebert*, 2021-NMSC-016, ¶¶ 34-54;

- Oregon: "In applying the statutory limit on damages * * * the court was applying a legal limit, expressed in the statute, to the facts that the jury had found." *Horton*, 359 Or. 168, 376 P.3d at 1046;

- Utah: "[T]he damage cap does not violate [the] right to a jury trial because it allows the jury to determine the facts in the first instance, before requiring the court to apply relevant law to the jury's verdict." *Judd ex rel. Montgomery v. Drezga*, 103 P.3d 135, 144-45 (Utah 2004);

- South Carolina: "A remedy is a matter of law, not a matter of fact. Although a party has the right to have a jury assess his damages, he has no right to have a jury dictate through an award, the legal consequences of its assessments." *Wright v. Colleton Cty. Sch. Dist.*, 301 S.C. 282, 391 S.E.2d 564, 569-70 (1990);

- Tennessee: Holding that the right to trial by jury under the Tennessee Constitution is satisfied when an unbiased and impartial jury makes a factual determination of the amount of noneconomic damages, if any, sustained by the plaintiff. That right is not violated when a judge then applies the statutory cap on noneconomic damages. *McClay v. Airport Mgmt. Servs.*, *LLC*, 596 S.W.3d 686, 693 (Tenn. 2020).

These cases reflect a trend that rejects the argument that noneconomic damages caps infringe an "inviolate" right to trial by jury:

> [T]hirty jurisdictions [have considered] whether a statutory cap on damages violates the constitutional right to trial by jury, [and] twenty-four have upheld such caps, reasoning that a statutory limit on recovery is a matter of law within the purview of the state legislature. Sixteen of these jurisdictions analyzed constitutional provisions of an "inviolate" right to trial by jury.

Siebert, 2021-NMSC-016, at n.3.

Thus, history, longstanding Ohio practice requiring courts to apply the law to the facts, and the weight of authority from other states and federal courts supports *Arbino*'s holding that Ohio's cap on noneconomic damages does not violate the right to trial by jury.

2. *Arbino* correctly applied rational basis review to the facial due process and equal protection challenges.

Whether considering due process or equal protection, *Arbino* correctly applied rational basis review. *Arbino*, 2007-Ohio-6948, ¶¶ 48-72; *accord Morris v. Savoy,* 61 Ohio St.3d 684, 688-689 (1991). Indeed, Brandt and her amici do not challenge how *Arbino* analyzed R.C. 2315.18 under rational basis review. Appellant Br. at 30; OAJ Br. at 25-28. They argue only that a higher standard of review applies. *Id.* But there is no basis for applying a higher standard of review to R.C. 2315.18.

Strict scrutiny does not apply because R.C. 2315.18 does not violate the right to trial by jury. *See* pp. 5-13, *supra.* Whether the challenge is rooted in substantive due process or equal protection, rational basis review applies to laws limiting rights that are not fundamental. *City of Toledo v. Tellings*, 114 Ohio St.3d 278, 2007-Ohio-3724, ¶ 33; *Pickaway Cty. Skilled Gaming, L.L.C. v. Cordray*, 127 Ohio St.3d 104, 2010-Ohio-4908, ¶ 18.

The OAJ also argues for "intermediate scrutiny," OAJ Br. at 25-27, because R.C. 2315.18 "regulates in the field covered by" Section 5, Article I of the Ohio Constitution, *id.* at 26. But no authority supports this argument. The OAJ cites no cases applying intermediate scrutiny to damages caps, relying mainly on an analogy to this Court's Second Amendment jurisprudence. *See, e.g.*, *State v. Weber*, 163 Ohio St.3d 125, 2020-Ohio-6832, ¶ 13, *cert. denied,* No. 20-1640, 2021 WL 4507744 (U.S. Oct. 4, 2021) ("[o]ver the past 12 years, courts have applied intermediate scrutiny as part of a two-step framework in *Second Amendment* cases."). The analogy is inapt.

Intermediate scrutiny applies to incidental burdens on core Second Amendment rights. *Id.* at ¶ 16. Thus, even in Second Amendment cases, the challenged statute must regulate activity within the scope of the Second Amendment as it was understood at the

relevant historical moment to trigger intermediate scrutiny. *Id.* at ¶ 14. Otherwise, "the 'inquiry is complete'" and there is no constitutional violation. *Id.*

Here, of course, a historical analysis shows damages caps do *not* implicate core attributes of the right of trial by jury at common law. *See* pp. 5-6, *supra*; *see also Arbino*, 2007-Ohio-6948, ¶¶ 119-126; *Keller*, 102 Ohio St. at 117-118; Scott, 31 Harv.L.Rev. at 678. In short, "[t]he historical information that is available does not support the contention that the right to trial by jury acts as a limit to constitutionally exercised legislative action." *Arbino*, 2007-Ohio-6948, ¶ 133 (Cupp, J., concurring). As a result, even if the two-step framework for Second Amendment cases were invoked here, the constitutional challenge to damages caps would fail at the first step. This Court correctly decided *Arbino*.

B. The remaining *Galatis* factors also weigh against overruling *Arbino*.

The remaining *Galatis* factors consider whether (1) changes in circumstances no longer justify adherence, (2) the decision defies practical workability, and (3) abandoning precedent would create an undue burden. *Galatis*, 2003-Ohio-5849, ¶ 48. None support overruling *Arbino*.

Brandt disagrees, but her arguments fail to appreciate the focus of a facial challenge. Appellant Br. at 30-35. Again, a facial challenge addresses whether the statute can be applied to *anyone*. *Arbino*, 2007-Ohio-6948, ¶ 26 (explaining that to succeed on a facial challenge, a party "must demonstrate that there is no set of circumstances in which each statute would be valid"). Brandt's arguments that *Arbino* satisfies the remaining *Galatis* factors when applied to her and other minors suffering from "severe mental health injuries," or to Pompa and others who commit criminal/intentional misconduct, thus miss the mark. *See, e.g.*, Appellant Br. at 32 (arguing *Arbino* and R.C. 2315.18 "[w]hen applied to the Roy Pompas of

Ohio" "bear[] no rational relationship to [their] purported goals"); *id.* at 33 (arguing *Arbino* is unworkable when applied to an individual with "mental health injuries"); *id.* at 33-34 (noting *Arbino*'s "unworkability" is shown *Simpkins v. Grace Brethren Church of Delaware, Ohio*, 149 Ohio St.3d 307, 2016-Ohio-8118, even though *Simpkins* was an "as-applied" challenge to R.C. 2315.18). Additional flaws in Brandt's arguments on the remaining *Galatis* factors are addressed below.

1. No changed circumstances, as the inherent subjectivity of noneconomic damages still contributes to uncertainty in civil litigation, which adversely impacts Ohio's economy.

Contrary to Brandt's contention, the passage of time has not made *Arbino* "obsolete." Appellant Br. at 30-31. *Arbino* rested its due process and equal protection analysis on the inherently subjective nature of noneconomic damages, a legislative desire to make Ohio's civil litigation system more predictable and fair, and studies showing that rising litigation costs were harming Ohio's economy. *Arbino*, 2007-Ohio-6948, ¶¶ 53-56, 68-71. These concerns remain today. *See* Rice, *Nuclear Verdicts Drive Need for Insurers' Litigation Change*, https://www.law360.com/insurance-authority/articles/1418518 (accessed November 22, 2021) (noting that "between 2010 and 2018, the average size of verdicts exceeding $1 million rose nearly 1,000% from $2.3 million to $22.3 million" and "2019 saw a 300% spike in verdicts of $20 million or more"). Circumstances have not changed.

Brandt focuses solely on the last concern, insisting "Ohio has not economically prospered as a result of R.C. 2315.18" and citing rankings that purportedly show 13 states without noneconomic damages caps outperform Ohio by certain metrics. Appellant Br. at 31. But unlike the studies the General Assembly relied on to enact R.C. 2315.18, *see Arbino*, 2007-Ohio-6948, ¶ 53, these rankings do not consider civil litigation, let alone discuss the effect of

noneconomic damages. *See Economy Rankings: Measuring States' Economic Stability and Potential*, U.S. News & World Rep., https://www.usnews.com/news/best-states/rankings/economy (accessed November 22, 2021). The rankings thus do not address, much less refute, the studies the General Assembly cited that showed rising litigation costs were harming Ohio's economy. Nor do the rankings address the other concerns addressed by R.C. 2315.18, all of which remain today. *Arbino* is not obsolete.

Equally flawed is Brandt's contention that *Arbino* "opened the door for perpetrators of intentional torts to victimize others without full legal redress." Appellant Br. at 31-32. *First*, the General Assembly determined that "full legal redress" is best achieved by allowing uncapped punitive damages, not inflated noneconomic damages. *See* R.C. 2315.21(D)(6) (allowing uncapped punitive damages for crimes that are a felony with the mental state of purposely or knowingly); *cf.* R.C. 2315.18(C) (jury "shall not consider" evidence of wrongdoing or other evidence "offered for the purpose of punishing the defendant" when awarding compensatory damages for noneconomic loss). That hardly opens the door for perpetrators of intentional torts. Brandt does not (and cannot) explain how two damages caps passed at the same time, *which entitle her to a judgment exceeding $100 million*, will encourage intentional torts like the one she experienced.

Second, this argument does not show circumstances have changed. The cap on noneconomic damages always applied to intentional torts, and that determination had nothing to do with *Arbino*. *Wayt v. DHSC, L.L.C.*, 155 Ohio St.3d 401, 2018-Ohio-4822, ¶¶ 15-34 (holding that R.C. 2315.18's plain language caps noneconomic damages for defamation).

2. *Arbino* and R.C. 2315.18 set forth a practically workable standard.

Brandt conflates practical workability with "changed circumstances." Appellant Br. at 32-33. She cites Justice Breyer's dissent in *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S.Ct. 1485, 1506 (2019), claiming a rule is not "practically workable" if the "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." Appellant Br. at 32. Not true. The dissent's point is that "practical workability" and changed facts are *separate* factors:

> It is one thing to overrule a case when it "def[ies] practical workability," when "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine," *or when* "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."

(Emphasis added). *Franchise Tax Bd. of Cal.*, 139 S.Ct. at 1506 (Breyer, J., dissenting).

In any event, *Arbino* is workable. A standard that courts can understand and apply is workable. *See, e.g.*, *State ex rel. Stevens v. Indus. Comm.*, 110 Ohio St.3d. 32, 2006-Ohio-3456, ¶ 11 (overruling prior holdings because they were "confusing and unworkable from a practical perspective."). *Arbino* is not at all confusing and has been applied by many Ohio courts, including this Court. *See, e.g.*, *Oliver v. Cleveland Indians Baseball Co. Ltd. Partnership*, 2009-Ohio-5030, 123 Ohio St.3d 278, ¶ 8 (applying *Arbino* and upholding the noneconomic damages cap R.C. 2744.05 as constitutional on its face); *Simpkins*, 2016-Ohio-8118, ¶ 19 (applying *Arbino* and holding R.C. 2315.18 constitutional as-applied to the petitioner); *Giebel v. Lavalley*, N.D.Ohio No. 5:12-CV-750, 2013 WL 6903784, at *6 (Dec. 31, 2013) (collecting cases applying *Arbino*). This factor does not support overruling *Arbino*.

3. Overruling *Arbino* would cause undue hardship by upending more than a decade of constitutional jurisprudence.

Finally, overruling *Arbino* would cause undue hardship. This factor considers reliance interests and whether overruling prior precedent would "cause chaos[.]" *Galatis*, 2003-Ohio-5849, ¶ 58. Chaos would result if *Arbino* were overruled.

After all, many cases over the past 14 years relied on *Arbino* and its core teachings on the General Assembly's role. *See* p. 2 & n. 1, *supra; see also Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, ¶ 60 (relying on *Arbino* for the proposition that the General Assembly can alter, revise, modify, or abolish the common law); *Barton v. Barton*, 2017-Ohio-980, 86 N.E.3d 937, ¶ 119 (2d Dist.) (relying on *Arbino* to find that Civ.R. 75 did not violate the right to a jury trial in divorce cases). This Court also relied on *Arbino* to uphold the constitutionality of another noneconomic damages cap. *Oliver*, 2009-Ohio-5030, ¶ 8.

Overruling *Arbino* would upend this well-established constitutional jurisprudence and cast doubt on other statutes previously declared constitutional. This undue burden reinforces the point that *Arbino* should be followed, not overruled.

Proposition of Law No. 1:

R.C. 2315.18, as applied to a minor victim of sexual assault who received a judgment over $100 million, violates no constitutional rights.

Brandt's First Proposition of law must be analyzed in the context of her case. An as-applied challenge focuses on whether a statute can be constitutionally applied to the challenger's claim. *See Ruther*, 2012-Ohio-5686, ¶ 9 (as-applied constitutional challenge alleges that "the application of the statute in the particular context would be unconstitutional"), quoting *Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d 106,

2004-Ohio-357, ¶ 14. In other words, Brandt must show by clear and convincing evidence, *id.*, that applying the noneconomic damages cap to "limit" her total judgment to over $114 million is unconstitutional.

Brandt cannot do this. R.C. 2315.18 contains objective criteria for whether an injury is so catastrophic that it is exempt from the cap. Brandt, as a minor victim of sexual assault, sustained injuries including post-traumatic stress disorder (PTSD), anxiety, depression, and nightmares. Yet she made great strides to recover from her injuries, getting married, pursuing a career, and raising children. And while she still suffers some manifestations of her injuries, they are not similar in degree or kind to physical injuries that meet R.C. 2315.18(B)(3)'s criteria. So even if treating a catastrophic psychological injury differently than a similar physical injury could show the cap is arbitrary as applied to the psychological injury, *but see Simpkins*, 2016-Ohio-8118, ¶¶ 39-44, 49-51, the cap would not be unconstitutional as applied to Brandt.

What is more, Pompa's criminal acts did not go unpunished. The jury awarded Brandt $100 million dollars in uncapped punitive damages under R.C. 2315.21(D)(6), showing the noneconomic and punitive damages caps work together in a rational and reasonable way. The noneconomic damages cap ensured the jury did not inflate these damages by considering criminality, while R.C. 2315.21(D)(6) allowed the jury to punish and deter sexual assault with an award of $100 million.

In sum, the judgment of over $114 million is more than enough to compensate and punish. Concerns with how R.C. 2315.18 may apply to other minor victims of sexual assault are for the General Assembly or courts in future cases. The issue here is whether Brandt's $114 million judgment is unconstitutional. It is not.

A. Rational basis review applies.

To begin with, Brandt's as-applied due process and equal protection challenges implicate no fundamental right. *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, ¶ 18, citing *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter*, 87 Ohio St.3d at 57. As discussed above, *Arbino* correctly held that R.C. 2315.18 does not violate the fundamental right to a jury trial on its face. *Arbino*, 2007-Ohio-6948, ¶ 42.

This analysis does not change when addressing Brandt's as-applied challenges. The reason is simple: in every case, the trial court applies the law to the jury's factual findings the same way. In other words, "application of the damage caps does not affect [Brandt's] right to a jury trial any differently than it affects any tort claimant whose damages are capped as a matter of law." *Simpkins*, 2016-Ohio-8118, ¶ 25. Thus, Brandt cannot show the noneconomic damages cap violated her right to trial by jury and rational basis review applies to her due process and equal protection challenges.

B. R.C. 2315.18 is presumed to be constitutional and does not violate Brandt's due process or equal protection rights.

All legislation presumptively is constitutional. *Groch*, 2008-Ohio-546, ¶ 25. And this Court already (and correctly) rejected due process and equal protection challenges to the constitutionality of R.C. 2315.18 on its face, *Arbino*, 2007-Ohio-6948, ¶¶ 48-72, and as applied to another minor victim of sexual assault, *Simpkins*, 2016-Ohio-8118, ¶¶ 34-51. Against this backdrop, Brandt cannot show by clear and convincing evidence that R.C. 2315.18 is unreasonable, arbitrary, or not rationally related to a legitimate government purpose as applied to her. *Heller v. Doe*, 509 U.S. 312, 319 (1993); *Arbino*, 2007-Ohio-6948, ¶¶ 49, 66.

1. R.C. 2315.18 is rationally related to a legitimate governmental purpose and bears a real and substantial relationship to the public.

Arbino held, and *Simpkins* affirmed, that R.C. 2315.18's noneconomic damages cap is rationally related to a legitimate governmental purpose and bears a real and substantial relationship to the general welfare. *Simpkins*, 2016-Ohio-8118, ¶¶ 38, 48-51; *Arbino*, 2007-Ohio-6948, ¶¶ 53-58, 67-72. Caps address civil litigation costs straining Ohio's economy by confining "the uncertain and subjective system of evaluating noneconomic damages" and thus limiting the deleterious economic effects this subjectivity causes. *Arbino*, 2007-Ohio-6948, ¶¶ 54-55.

While Brandt may question whether the cap is the best way to address these concerns, questions about "the wisdom of legislation are for the legislature." *State v. Blankenship*, 145 Ohio St.3d 221, 2015-Ohio-4624, ¶ 37. The General Assembly is "'the ultimate arbiter of public policy.'" *Arbino*, 2007-Ohio-6948, ¶ 21, quoting *State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, ¶ 21.

To be sure, Brandt experienced events no child (or person) should have to endure. But neither her status as a minor then nor the criminality of Pompa's conduct changes R.C. 2315.18's real and substantial relationship to the general welfare:

> [T]he status of a plaintiff does not diminish either the economic benefits of limiting noneconomic damages, as found by the General Assembly, or the substantial relationship that we found in *Arbino* between the statutory limitations and the benefits to the general public welfare.

Simpkins, 2016-Ohio-8118, ¶ 38.

Nor does an inability to use noneconomic damages to punish change R.C. 2315.18's substantial relationship to the general welfare. Appellant Br. at 13. First, concerns over an

inability to use noneconomic damages to punish are misguided. Noneconomic damages compensate; punitive damages punish. *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 651 (1994). Brandt's argument that uncapped noneconomic damages should punish merely shows why the General Assembly adopted the cap:

> Pain and suffering awards are intended to compensate a person for the person's loss. They are not intended to punish a defendant for wrongful conduct.
> * * *
> While pain and suffering awards are inherently subjective, it is believed that this inflation of noneconomic damages is partially due to the improper consideration of evidence of wrongdoing in assessing pain and suffering damages.

Am. Sub. S.B. 80 § 3(A)(6)(a)-(e).

Second, Brandt's focus on the need for uncapped punishment shows the wisdom of allowing uncapped punitive damages for certain crimes, while reserving uncapped noneconomic loss for injuries that manifest in defined, objective physical impediments. As Brandt's case shows, caps do not limit the jury's ability to punish horrific crimes. *See* R.C. 2315.21(D)(6).

In short, as applied to Brandt, the caps addressed the likelihood that the jury's award for noneconomic damages after April 2005 ($20 million) was inflated by improper consideration of wrongdoing, while leaving undisturbed the jury's substantial ($100 million) punishment of Pompa. Brandt thus cannot show that, as applied to her, R.C. 2315.18 is unrelated to a legitimate governmental purpose or bears no real and substantial relationship to the public welfare.

2. R.C. 2315.18 is not unreasonable or arbitrary as-applied to Brandt.

Brandt and her amici ask for a blanket rule that it is unreasonable and arbitrary to require a minor victim of sexual assault to sustain a physical injury to invoke an exception to the cap. Appellant Br. at 12 (noting "minor victims do suffer real, substantial, noneconomic injuries"); *id.* at 14 (stating it is "clearly irrational to require that minor victims suffer a physical injury of the kind set forth in R.C. 2315.18"). But (1) constitutional avoidance makes this the wrong case to consider this rule, as Brandt forfeited arguments on whether current cap exceptions apply to severe psychological injuries; and (2) she cannot establish the cap is unconstitutional as applied to *her*, making any opinion on whether the cap applies to *other* minor sexual assault victims advisory only.

First, constitutional avoidance counsels against considering Brandt's proposed rule: she forfeited an alternative statutory construction that, if adopted, would avoid her constitutional question. *See United Air Lines, Inc. v. Porterfield*, 28 Ohio St.2d 97, 100 (1971). Some courts construe the cap to allow juries to consider (1) whether changes to the brain allegedly caused by PTSD are a "physical functional injury"[4] and (2) whether PTSD symptoms satisfy the rest of R.C. 2315.18(B)(3)(b)'s exception.[5] But Brandt did not argue for this

[4] *See, e.g.*, *Ozmun v. Customer Engineering Servs., Inc.*, Cuyahoga C.P. No. CV 14-824745 (July 31, 2015) (allowing the jury to determine whether the damages cap applied after a plaintiff offered an expert report finding that her PTSD was a physical functional injury because it caused physical harm including: brain cell damage; atrophy to the hippocampal gyrus and other areas of the brain).

[5] *See, e.g.*, *Giebel*, 2013 WL 6903784, at *11 (finding a jury could conclude that a plaintiff could not independently care for herself and perform life-sustaining functions under R.C. 2315.18(B)(3)(b) after suffering a brain injury that led to PTSD and suicidal thoughts); *Hay v. Shirey*, N.D.Ohio No. 1:19 CV 2645, 2021 WL 2210565, at *2 (June 1, 2021) ("Ohio law lifts the damages cap where psychological injuries arising from a physical injury result in the

construction here or below, or ask for jury findings needed to recover under it, and thus forfeited her right to argue that the cap's exception applies.[6] Because Brandt forfeited any argument that an exception applies, the Court should decline to reach her argument that the cap is unreasonable and arbitrary as applied to minor victims of sexual assault. Skipping over the scope of the cap's exception to decide whether the cap is unreasonable or arbitrary in that circumstance turns constitutional avoidance on its head.

Second, Brandt's as-applied challenge focuses on *her specific*, *unique injuries*—not injuries experienced by other minor victims of sexual assault. *Ruther*, 2012-Ohio-5686, ¶ 9; *Yajnik*, 2004-Ohio-357, ¶ 14; *Groch*, 2008-Ohio-546, ¶ 181. When viewed through the lens for an as-applied challenge, Brandt cannot meet her burden.

The lens for Brandt's as-applied challenge is crafted by *Arbino*, which rejected the argument that limiting noneconomic damages for the "second-most severely injured" is arbitrary or unreasonable. *Arbino*, 2007-Ohio-6948, ¶ 61 ("At some point, * * * the General Assembly must be able to make a policy decision to achieve a public good."); *see also Simpkins*, 2016-Ohio-8118, ¶ 43 (explaining that "[t]he exceptions to the damage caps in R.C. 2315.18 require 'extreme qualifications'"), citing *Weldon v. Presley,* N.D.Ohio No. 1:10 CV 1077, 2011 WL 3749469, *6 (Aug. 9, 2011). Brandt thus must show that she is like the "most severely injured" persons who are exempt from the cap. That means she had to prove by

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inability to care for oneself and perform life-sustaining activities[,]" but declining to apply the cap because a plaintiff could care for himself independently).

[6] An amicus brief argues that Brandt's injuries are a "permanent physical deformity" and "physical functional injury." Amicus Br. of Child USA, et al. at 19-21. But "[a]mici curiae * * * may not * * * interject issues and claims not raised by the parties." *Wellington v. Mahoning Cty. Bd. of Elections*, 117 Ohio St.3d 143, 2008-Ohio-554, ¶ 53, quoting *Lakewood v. State Emp. Relations Bd*., 66 Ohio App.3d 387, 394 (8th Dist. 1990).

clear and convincing evidence that her injuries are so similar in degree and kind to R.C. 2315.18(B)(3)(b)-covered injuries that the failure to include them in that exception is arbitrary or unreasonable.

But Brandt did not prove this. Her injuries include: PTSD, anxiety, depression, and nightmares. On the assumption that PTSD cannot qualify as a "physical functional injury" (the point she waived), Brandt's injuries, on this record, are not like R.C. 2315.18(B)(3)(b)-covered injuries "that permanently prevent[] the injured person from being able to independently care for self and perform life sustaining activities."

Taking the second requirement first, an inability to independently care for self and perform life sustaining activities refers to more than just difficulties performing certain daily or weekly tasks. *See, e.g.*, *Weldon*, 2011 WL 3749469, at *8 (finding inability to "running a sweeper, moving furniture around in her home, and performing yard maintenance including weed whacking and cutting the grass" were not "life sustaining activities"); *Sheffer v. Novartis Pharmaceuticals Corp.*, No. 3:12-CV-238, 2014 WL 10293816, at *2 (S.D. Ohio July 15, 2014) (finding a plaintiff could perform life-sustaining activities because she could take care of herself, animals, and her grandchildren).

To meet this high bar, the injuries must keep a person from performing basic functions needed to live. *E.g.*, Merriam-Webster's Dictionary, *Life-sustaining*, https://www.merriam-webster.com/dictionary/life-sustaining (accessed Nov. 24, 2021) (defining "life-sustaining" as "helping someone or something to stay alive."); *see also Dillon v. OhioHealth Corp.*, 2015-Ohio-1389, 31 N.E.3d 1232, ¶ 56 (10th Dist.) (evidence was sufficient given the plaintiff "cannot walk any significant distance, cannot dependably make his way into the bathtub

without assistance, cannot accomplish even the most basic of homemaking tasks by himself, and cannot even make it to the toilet every time without having accidents").

No one doubts Brandt's injuries. But her hard work to overcome them allowed her to get married, have children, maintain a part-time job, and take classes to become a real-estate agent. While she has nightmares and difficulty being in crowded places, these limitations do not keep her from performing "life sustaining" functions or "independently caring" for herself. Brandt's injuries thus are not like the physical injuries that exempt a plaintiff from the cap under R.C. 2315.18(B)(3)(b).

On top of this, Brandt has not shown her injuries are permanent. R.C. 2315.18(B)(3) requires the injury to "*permanently* prevent the injured person" from caring for herself. In other words, an inability to recover from the injury is key to its cap status. Brandt's expert, however, opined only that "Brandt's injuries would persist 'with *some degree of intensity*' for a '*significant*' period of time." (Emphasis added.) Appellant Br. at 6, quoting Dr. Patrick Yingling Dep. at 42. A showing that injuries will last for an indeterminate period does not prove permanence. For this reason too, Brandt has no clear and convincing evidence that her emotional and psychological injuries are like the injuries exempted by R.C. 2315.18(B)(3).

In sum, Brandt's grievance with R.C. 2315.18 is that she believes (i) noneconomic damages should be used to punish wrongdoers and (ii) psychological and emotional injuries should not have to meet the same criteria that a physical injury must meet to be exempted. Her beliefs on punishment, however, ignore the $100 million uncapped punitive damages award she received, and her arguments over dissimilar treatment of psychological and emotional injuries cannot show the cap is unreasonable or arbitrary as applied to her

injuries, which are unlike the physical injuries exempted from the cap. Brandt's as-applied due process and equal protection challenges thus fail.

IV. Conclusion

The over $100 million judgment entered here shows Ohio's noneconomic and punitive damages caps are rational, reasonable and work as intended, allowing jurors to severely punish criminal conduct while reserving uncapped noneconomic loss awards for injuries with objective earmarks of permanency and severity. This Court should follow *Arbino* and confirm that R.C. 2315.18 is constitutional on its face, reject Brandt's as-applied constitutional challenge, and affirm the decision of the Eighth District Court of Appeals.

Respectfully submitted,

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