In the Supreme Court of Ohio

AMANDA BRANDT,	:	Case No. 2021-0497
	:	
Appellant,	:	On Appeal from the
	:	Cuyahoga County
v.	:	Court of Appeals,
	:	Eighth Appellate District
ROY POMPA,	:	
	:	Court of Appeals
Appellee.	:	Case No. 109517

MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLEE ROY POMPA

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INTRODUCTION

It has been suggested that every judge be "given a stamp that read[s] 'stupid but constitutional.'" *Brown v. Chicago Bd. of Educ.*, 824 F.3d 713, 714 (7th Cir. 2016) (citation omitted). This tragic case "provides another illustration of" the need for such a tool. *Id*.

The psychological trauma of sexual assault can exceed, even overshadow, the physical trauma. So it is surprising—some might even say callous—that Ohio law caps non-economic damages for severe psychic injury, but not for severe physical injury. After all, "psychological injuries can be as real as physical injuries." *McCrone v. Bank One Corp.*, 107 Ohio St. 3d 272, 2005-Ohio-6505 ¶39 (Lundberg Stratton, J., concurring). "Emotional injury can be as severe and debilitating as physical harm"; it is equally "deserving of redress." *Schultz v. Barberton Glass Co.*, 4 Ohio St. 3d 131, 135 (1983). So the damages cap, in its application to the psychological damages of rape victims, is incredibly foolish.

But—and that conjunction is the point of this brief—that foolish policy is nonetheless constitutional. "[T]he people of Ohio conferred the authority to legislate" on the General Assembly. *State v. South*, 144 Ohio St. 3d 295, 2015-Ohio-3930 ¶28 (O'Connor, C.J., concurring). The legislature, therefore, is the branch that must make the hard choices about how to shape "Ohio's tort law to meet the needs of our citizens." *Groch v. Gen. Motors Corp.*, 117 Ohio St. 3d 192, 2008-Ohio-546 ¶102; *New Riegel Local Sch. Dist. Bd. of Educ. v. Buehrer Grp. Architecture & Eng'g, Inc.*, 157 Ohio St. 3d 164, 2019-Ohio-2851 ¶54

(Stewart, J., dissenting). That remains the case even when judges believe legislation "fails to embody the highest wisdom or provide the best conceivable remedies," because the "wisdom and the policy of" legislation is "not for [courts] to judge." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 550–51 (1949). A court might "urge … legislators" to treat physical and mental injuries identically. *McCrone*, 107 Ohio St. 3d 272 ¶42 (Lundberg Stratton, J., concurring). And the Attorney General, for his part, urges the legislature to lift the damages cap in civil cases brought against rapists. But the Constitution permits neither the judiciary nor the executive to change the law—that duty falls to the legislature.

To be sure, the legislature must exercise its policymaking power in a manner consistent with the Constitution. But here, it has. For one thing, the damages cap rationally relates to a legitimate government purpose (as all laws must): even in its application to tragic cases like this one, it protects against the risk that a jury presented with a suffering victim will award more than is necessary to fully compensate that victim. Beyond that, the law does not run afoul of any other constitutional provisions. The law accords with the remedy language in Article I, Section 16 because it does not reduce a jury award to zero. The law does not invade the jury right, because it merely assigns the legal consequences to a jury's factual conclusions rather than replace those conclusions with those of another decisionmaker. Finally, the law satisfies equal-protection principles because it is rational to distinguish physical from non-physical harm.

STATEMENT OF *AMICUS* INTEREST

The State has an interest in any case alleging a conflict between laws passed by the People's representatives in the General Assembly and the Constitution. And the State has a duty to defend laws against constitutional attack. Some duties are more difficult than others; some, like the Attorney General's duty to file this brief, are personally repugnant. But revulsion does not change the nature of a duty, much less create an excuse—indeed, it is the worst duties that are most important to perform well, such as observing an autopsy or notifying next-of-kin of a line-of-duty death. (Or, for that matter, conducting the legal defense of a rapist.)

The State submits this brief to suggest both the mode of analysis and the result.

STATEMENT OF THE CASE AND FACTS

The undisputed facts here are heinous. The same could be said of the appellant, Roy Pompa—a convicted rapist serving life in prison. *State v. Pompa*, 2008-Ohio-3672, ¶¶7, 9 (8th Dist.). Amanda Brandt is among Pompa's many victims. *Brandt v. Pompa*, 2021-Ohio-845 ¶2 (8th Dist.) ("App. Op."). The aftershocks of Pompa's abuse ravaged Brandt's mental health. At one point "she tried to commit suicide by overdosing on heroin." *Id.* ¶15.

Brandt has persevered. She is now married, has two kids, and "completed the necessary classes to obtain to her real estate license." *Id.* ¶16. But she justifiably wanted redress for the terrible harms Pompa inflicted upon her. So she sued Pompa in the

Cuyahoga County Court of Common Pleas. A jury there eventually returned a verdict totaling $134 million in damages. That included: $14 million for non-economic damages that predated the effective date of Ohio's 2005 Tort Reform Law; $20 million for non-economic damages for the period after that effective date; and $100 million in punitive damages. *Id*. ¶20. The trial judge applied R.C. 2315.18, which this brief will call the Non-economic Damages Statute, and reduced the $20 million part of the award to $250,000, leaving Brandt with $114,250,000 in damages. *Id.*

Brandt challenged that statutorily compelled reduction as unconstitutional. But the Eighth District found "no reason to reach a different result," *id.* ¶20, than the result this Court reached in *Simpkins v. Grace Brethren Church of Delaware*, 149 Ohio St. 3d 307, 2016-Ohio-8118. That case rejected a rape victim's as-applied challenge to the Non-economic Damages Statute.

ARGUMENT

Proposition of Law:

The Ohio Constitution permits the General Assembly to cap damages for specific kinds of injuries.

This case raises several constitutional challenges. But a few principles govern the resolution of each argument. The first of these principles is that duly enacted statutes enjoy a "strong presumption" of constitutionality. *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948 ¶25. In an as-applied challenge, "the party making the challenge bears the burden" of overcoming that strong presumption. *Harrold v. Collier*, 107

Ohio St. 3d 44, 2005-Ohio-5334 ¶38. Further weighting the scales against invalidating statutes, this Court must uphold acts of the General Assembly "in cases of doubt." *Flagstar Bank, F.S.B. v. Airline Union's Mortg. Co.*, 128 Ohio St. 3d 529, 2011-Ohio-1961 ¶29. In short, "[i]t is difficult to prove that a statute is unconstitutional." *Arbino*, 116 Ohio St. 3d 468 ¶25.

The second key principle implicates the separation of powers. Specifically, because "the General Assembly is the final arbiter of public policy, judicial policy preferences may not be used to override valid legislative enactments." *State ex rel. CNN, Inc. v. Bellbrook-Sugarcreek Local Sch.*, 163 Ohio St. 3d 314, 2020-Ohio-5149 ¶33 (citation omitted); *Painter v. Graley*, 70 Ohio St. 3d 377, 385 (1994). That core principle has a corollary: "It is not this court's role to establish legislative policies or to second-guess the General Assembly's policy choices." *Groch v. GMC*, 117 Ohio St. 3d 192, 2008-Ohio-546 ¶212; *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St. 3d 250, 2010-Ohio-1027 ¶61. The separation of powers means that objections to the "policy implications" of statutes "are properly addressed to the General Assembly, not to the courts." *State v. Bryant*, 160 Ohio St. 3d 113, 2020-Ohio-1041 ¶22. Arguments that a statute is unwise or unfair are not legal arguments, and they are therefore "best made to the General Assembly." *Bureau of Workers' Comp. v. Verlinger*, 153 Ohio St. 3d 492, 2018-Ohio-1481 ¶16; *State ex rel. Wolcott v. Celebrezze*, 141 Ohio St. 627, 632 (1943).

Against this general background, Brandt challenges the Non-economic Damages Statute on multiple grounds.

I. The Ohio Constitution's remedy language does not countermand the General Assembly's policy choice to cap non-economic damages.

This case presents the question whether the Non-economic Damages Statute violates Section 16 of the Ohio Bill of Rights. Ohio Const. art. I, §16. The answer—both as an original matter and as a matter of this Court's precedent—is "no." Because judicial precedent should always be read "in light of and in the direction of the constitutional text and constitutional history," *Free Enter. Fund v. PCAOB*, 537 F.3d 667, 698 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *rev'd by* 561 U.S. 477 (2010), this brief considers the Clause's original meaning before turning to the precedent.

A. As originally understood, the remedy language did not restrict legislative power at all.

Section 16's remedy language, properly understood, requires that courts be available to adjudicate causes of action the legislature chooses to recognize. The section *does not* take from the legislature the power to define causes of action or to specify the damages available. Because the Non-economic Damages Statute merely limits the damages available, it does not violate Section 16's remedy language as that provision was originally understood.

1. The clause containing the remedy language states:

> All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and

> shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

Ohio Const. art. I, §16. On its face, this language focuses on the *process* available for existing causes of action—the language does not confer any right to *substantive* relief. *See Ruther v. Kaiser*, 134 Ohio St. 3d 408, 2012-Ohio-5686 ¶12. In other words, the remedy language guarantees regular process for recognized causes of action, but "does not prevent the General Assembly from defining a cause of action." *Id*. And this straightforward reading finds support in pre-ratification history, in the subsequent history of the language in later constitutional debates, and in the Constitution's structure.

History before 1802. The pre-ratification history of the remedy language shows that it governs the operation of courts, not legislatures. The history starts in the thirteenth century. The remedy language "derives ultimately" from Article 40 of Magna Carta. David Schuman, *The Right to Remedy*, 65 Temple L. Rev. 1197, 1199 (1992); *see also* Note, Garrett v. Sandusky: *Justice Pfeifer's Fight for Full & Fair Legal Redress. Does Sovereign Immunity Violate Ohio's "Open Court" Provision?*, 27 U. Tol. L. Rev. 729, 740–41 (1996) (tracing Ohio's remedy language to Magna Carta). King John of England ran a system of justice for sale. The more a litigant paid, the quicker and more favorable the outcome. Schuman, *Right to Remedy*, 65 Temple L. Rev. at 1199. These and other abuses led feudal barons to rebel, ultimately forcing King John to sign Magna Carta in 1215. *See* A.E. Dick Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* 6–7 (1968). Magna

Carta's Article 40, in language framed as a promise from the King, instructed courts to stop selling writs: "To no one will we sell, to no one will we refuse or delay, right or justice." Magna Carta art. 40.

This provision did not limit Parliament's ability to enact substantive law. "There is little dispute that Article 40 of the Magna Carta was intended to restore the integrity of the courts by curtailing the selling of writs." Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 Or. L. Rev. 1279, 1286 (1995). Later interpretations of Article 40 by two of England's leading legal scholars confirm this reading. In the seventeenth century, Lord Edward Coke explained the effect of Article 40 in words reminiscent of Section 16, Article I of Ohio's Constitution: "[E]very subject of this realm, for injury done to him in bonis, terris, vel persona [in person, land, or goods], by any other subject … may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay." 1 Edward Coke, *The Second Part of the Institutes of the Laws of England* 55 (W. Clarke & Sons 1809) (1628). Eighteenth-century scholar Sir William Blackstone also interpreted Article 40 as speaking to the processes of courts. Article 40, he said, protected the "right ... of applying to the courts of justice for redress of injuries." 1 William Blackstone, *Commentaries on the Laws of England* 81 (Banks & Co. 1910) (1785). According to Blackstone, the guarantee made sure that "courts of justice must at all times be open to the subject, and the law be duly administered therein." *Id*.

Both of these prominent English scholars read Article 40 as directed at the operation of courts. And that is no surprise. Courts during the lives of Coke and Blackstone did not possess the power to strike down legislative enactments as contrary to Magna Carta. The idea that Article 40 bound only the judiciary was therefore inherent in Coke's and Blackstone's interpretations. Their writings bear out that they viewed Magna Carta as a check only on the Crown and its courts—*not* as a check on parliament. In Coke's view, Parliament's power was "transcendent and absolute" and "[could] not be confined." Edward Coke, *The Fourth Part of the Institutes of the Laws of England* 36 (W. Clarke & Sons 1809) (1644). Blackstone likewise "kn[e]w of no power that can control" Parliament, even if it enacts a law that is "unreasonable." 1 Blackstone, *Commentaries*, at 58. These writings confirm that Coke and Blackstone both interpreted Article 40 to concern only the operation of the judiciary.

Coke's and Blackstone's interpretations of Article 40 made their way into several early state constitutions, as both writers' works had "considerable influence" on the founding generation. *Reid v. Covert*, 354 U.S. 1, 26 (1957); *see also Payton v. New York*, 445 U.S. 573, 594 & n.36 (1980); Hoffman, 74 Or. L. Rev. at 1287. And that generation shared Coke's and Blackstone's concerns about judicial overreaching in their own time: "the colonial grievance that the Crown was seeking to corrupt the courts … was the unifying thread connecting the drafters of the state constitutions with both Magna Carta Chapter 40 and Coke's reformulation of it." Hoffman, 74 Or. L. Rev. at 1287.

Among the state constitutions written in this era was Tennessee's. According to the Tennessee Supreme Court, the remedy language in that State's founding charter serves as "a mandate to the judiciary and not as a limitation upon the legislature." *Harrison v. Schrader*, 569 S.W.2d 822, 827 (Tenn. 1978); *Scott v. Nashville Bridge Co*. 223 S.W. 844, 852 (Tenn. 1919).

Tennessee's interpretation of its remedy clause should inform this case. After all, Tennessee's Constitution of 1796 was the immediate predecessor to Ohio's, and the remedy language in the Ohio Constitutions is taken almost "verbatim" from the Tennessee document. *See* Steven H. Steinglass and Gino J. Scarselli, *The Ohio Constitution* 106 (2004); *see id*. at 15 (Tennessee Constitution "most influential" source for Ohio's 1802 Constitution); Julia Perkins Cutler, *The Life and Times of Ephraim Cutler* 69 (1890) (same) (Cutler was a delegate to the 1802 convention; this work reproduces his letters and journal). Ohio's 1802 borrowing from Tennessee provides further evidence that the remedy language does not bar the General Assembly from enacting substantive law.

As all this shows, by the time the People of Ohio adopted Section 16, its language would have been well understood as guaranteeing a right to process in the courts, not as limiting the legislature's power to create or curtail rights and remedies.

Framing-era evidence. The context in which Ohio adopted the remedy language reinforces this conclusion. *Cf.* R.C. 1.49(B). Direct evidence about the 1802 Constitution is almost nonexistent. "No record of the debates of the convention is available, from

either official records or newspapers of the era." G. Alan Tarr, The Ohio Constitution of 1802: An Introduction 1 (February 2000), https://perma.cc/F7SJ-H5W2. Instead, the journal of that convention records only votes and a handful of proposed revisions to the text. *See* Journal of the Convention of the Territory of the United States North West of the Ohio (G. Nashee 1827). Even so, two contemporaneous clues indicate that the remedy language does not restrict legislative power.

First, the 1802 Constitution in Article I reflected "the understanding that state legislative power [was] plenary." Tarr, The Ohio Constitution of 1802, at 2. What is more, and unlike almost all other contemporary state constitutions, Ohio's 1802 founding document gave the governor no veto power. *Id*. at 3. The power of the General Assembly under the 1802 Constitution was thus nearly unlimited and included the power to appoint the secretary, the treasurer, the auditor, the Supreme Court justices, and the common pleas judges; the power to grant divorces and incorporate businesses; and even the power to block a constitutional convention absent a supermajority vote of its members. Randolph C. Downes, *Ohio's Second Constitution*, 25 Northwest Ohio Q. 71, 72 (Spring 1953); *see also* 11 Ohio Constitutional Revision Commission, *Final Report* 483–84 (June 30, 1977). Indeed, this "excessive power given to the legislature" in 1802 was a motivating force behind the vote for the constitutional convention in 1850. Downes, *Ohio's Second Constitution*, at 72. As all this shows, the drafters of the 1802 Constitution intended to create a powerful legislature subject to very few checks. If they had wanted to check that

broad power, they would have done so clearly—constitutions tend not to "hide elephants in mouseholes." *California Redevelopment Ass'n. v. Matosantos*, 53 Cal. 4th 231, 260 (2011) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)). And, given the just-discussed history, Section 16's language would have been an awfully obscure way of creating a critically important check on an otherwise-unchecked legislature.

Consistent with that insight, the early legislature did not understand Section 16 as curtailing its power to limit or abolish causes of action. In 1805, the Third General Assembly passed a statute providing that "the common law of England" and "all statutes or acts of the British parliament" would form the substantive law of Ohio "*until repealed* by the general assembly of this state." 3 Ohio Laws 248 (emphasis added). Thus, just three years after Ohio adopted the remedy language that is now Section 16, the General Assembly recognized its broad authority to define what injuries Ohio law recognizes—an authority that permitted it to contradict the received common law. An act passed by an early legislature "is contemporaneous and weighty evidence of" a Constitution's "true meaning." *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (citation omitted); *see also Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014); *Myers v. United States*, 272 U.S. 52, 175 (1926) (collecting cases). So this early statute sheds strong light on the meaning of the remedy language as originally understood.

Evidence from Ohio's later history. Subsequent history confirms that Section 16 does not restrict legislative power to refine or eliminate causes of action. Consider, for

example, evidence from the 1851 constitutional convention. The framers of Ohio's second constitution substantively discussed the clause only twice. Both discussions involved *the judiciary's* inability to administer justice without delay; neither discussion addressed the General Assembly's power to define substantive law. Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio 1850–51 337, 365 (Jan. 16 & 21, 1851) (S. Medary 1851). Certainly nothing in the record of the 1851 convention suggests that the framers understood themselves to be changing the Section's meaning from the historical meaning outlined above. To the contrary, they treated it as an afterthought—the committee assigned to study the bill of rights initially omitted it from its draft. *Id* at 337.

The clause received scarcely more attention during the debates over the never-adopted 1874 Constitution. It came up during discussions about a backlog of cases at this Court. During that discussion, a delegate invoked the clause as a promise observed in the breach—he said *courts* (rather than the legislature) were failing to live up to their obligation, imposed by Section 16, to efficiently disburse justice. 1 Official Report of the Proceedings and Debates of the Third Constitutional Convention of Ohio 756–57 (July 16, 1873) (W.S. Robison & Co. 1873). Another delegate cited the clause during debates about how to divide the common-pleas jurisdictions across the state. *Id*. at 951–52 (July 22, 1873). Again, the reference had nothing to do with limiting legislative power; and again, the delegate treated the clause as bearing on the efficiency of courts. Ohio's most recent

constitutional convention likewise contained little discussion about the remedy language. Instead, delegates in 1912 focused on adding a clause to Section 16 that would authorize suits against the State. 2 Proceedings and Debates of the Constitutional Convention of the State of Ohio 1432 (Apr. 29, 1912) (F.J. Heer Printing Co. 1913).

Fast-forwarding more than half a century, the General Assembly, in 1970, tasked the Constitutional Revision Commission with analyzing every section of the Constitution. The Commission's work product—ten volumes of commentary and recommendations—has been called one of the most important works about Ohio's Constitution. Steinglass & Scarselli, The Ohio Constitution, at 378. The Commission's final report on Article I, Section 16 describes it as containing two guarantees—an Open Courts Clause, which promises public trials and access to courts, and a Due Course of Law Clause, which assures *procedural fairness* in adjudicative settings. 11 Ohio Constitutional Revision Commission, *Final Report*, at 468. Tracing the same history, one appeals judge similarly concluded that Article I, Section 16 has "a twofold purpose: (1) to insure that justice should be administered in open court and (2) that all persons should be guaranteed the rights of due process of law." *E. W. Scripps Co. v. Fulton*, 100 Ohio App. 157, 174 (8th Dist. 1955) (Hurd, J., concurring). Neither the Commission nor that later court treated the clause as limiting legislative power in any way.

Constitutional Structure. "What history suggests, the structure of the Constitution confirms." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1227 (2018) (Gorsuch, J., concurring in

part and in the judgment). The Constitution's structure matters because courts must "give a construction to the Constitution as will make it consistent with itself, and will harmonize and give effect to all its various provisions." *Smith v. Leis*, 106 Ohio St. 3d 309, 2005-Ohio-5125 ¶59. The structure of Ohio's Constitution belies reading more into the remedy language than a command about court process.

One structural clue comes from a clause specifically about damages available in tort cases. Section 19a in the Bill of Rights prohibits the General Assembly from "limit[ing]" the "amount of damages recoverable" for wrongful death. Ohio Const. art. I, §19a. That language prohibits the General Assembly from reducing the "amount of recovery" available in wrongful-death suits. *Kennedy v. Byers*, 107 Ohio St. 90, 96 (1923). This more-specific guarantee would be unnecessary if the more-general remedy language in Section 16 blocked the General Assembly from adjusting the amount of damages available in any tort action. In other words, reading Section 16 as prohibiting the legislative curtailment of damage awards makes Section 19a superfluous. Superfluity is to be avoided in constitutional interpretation. *See State v. Anderson*, 148 Ohio St. 3d 74, 2016-Ohio-5791 ¶26 (plurality op.). And in fact, the Montana Supreme Court relied on a similar principle to hold that its Section-16 analogue placed no substantive limits on the Montana legislature. *Meech v. Hillhaven W.*, 238 Mont. 21, 34–35, 40 (1989).

Another structural clue is found in the broad constitutional arrangement of separated powers. A clause that empowered the judiciary to second guess economic

legislation would "alter which branch of government has the final say on economic policy decisions." Patrick John McGinley, *Results from the Laboratories of Democracy: Evaluating the Substantive Open Courts Clause as Found in State Constitutions.*, 82 Albany L. Rev. 1449, 1493 (2019). But this branch is not supposed to have the final say on such matters. To be sure, it was fashionable for courts to give themselves the final say on these matters during the *Lochner* era, when courts had no qualms about invalidating legislation that set, for example, limits on working hours. *See, e.g.*, *Lochner v. New York*, 198 U.S. 45, 64 (1905); *Cleveland v. Clements Bros. Const. Co.*, 67 Ohio St. 197, 206, 223 (1902). That era has passed, however, and most refer to it now "deprecatingly." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 721 (2010) (plurality op.). The Michigan Supreme Court specifically invoked the errors of that era when it upheld a damages cap; it was "unwilling" to "usher in a new *Lochner* era." *Phillips v. Mirac, Inc.*, 470 Mich. 415, 437–38 (2004) (citation omitted). Just so. Separation-of-powers principles protect the judiciary from the other branches, but they also "protect the power and constitutional authority of the executive and legislative branches from improper interference by the judiciary." *State v. Radcliff*, 142 Ohio St. 3d 78, 2015-Ohio-235 ¶33. Reading Section 16 as permitting a free-floating analysis of what damages ought to be available for any type of injury would run roughshod over those principles.

2. Following the lessons of history and structure does not require a pioneering opinion from this Court. Three sister supreme courts have already concluded that their

States' remedy clauses are not aimed at substantive lawmaking by the legislatures. We have already mentioned Tennessee in this regard. *See Schrader*, 569 S.W.2d at 827. We likewise mentioned that, according to the Montana Supreme Court, the analogous provision in its constitution is "aimed at the judiciary, not the legislature." *Meech*, 238 Mont. at 30. Add to that the North Carolina Supreme Court, which held, interpreting a remedy clause nearly identical to Ohio's, that the "legislature has the power to define the circumstances under which a remedy is legally cognizable and those under which it is not." *Lamb v. Wedgewood S. Corp.*, 308 N.C. 419, 444 (1983). Finally, a concurring Justice of the Oregon Supreme Court recently surveyed the historical evidence and concluded "[n]othing in the wording of" the Oregon Constitution's remedy clause "suggests that its purpose is to constrain the otherwise plenary authority of the legislature." *Horton v. Or. Health & Sci. Univ.*, 359 Or. 168, 262 (2016) (Landau, J., concurring); *cf. Maurin v. Hall*, 274 Wis. 2d 28, 72 n.18 (2004) (clause "cannot be used to enlarge a restricted cause of action") (dicta), *overruled in part on other grounds by Bartholomew v. Wisconsin Patients Comp. Fund & Compcare Health Servs. Ins. Corp.*, 293 Wis. 2d 38 (2004).

3. Adhering to the remedy clause's original meaning hardly leaves it toothless. It required, for example, invalidating a prison regulation that interfered with inmates' access to their lawyers. Such a provision, this Court held, keeps inmates from exercising their right of access to the courts. *Thomas v. Mills*, 117 Ohio St. 114, 120 (1927). And an appeals court held, consistent with the original meaning, that a trial court violated Section

16 by citing America's war with Germany as an excuse for repeatedly continuing a German citizen's case. *Leiberg v. Vitangeli*, 70 Ohio App. 479, 486 (5th Dist. 1942). That too makes sense: the court in that case violated Section 16 by blocking a litigant from litigating an established cause of action.

4. Applying the remedy language's original meaning, Brandt's challenge to the Non-economic Damages Statute does not leave the starting gate. The remedy language as originally understood placed no substantive limits on the General Assembly's power to change the remedies available for any cause of action.

B. The remedy language's acquired meaning leaves the General Assembly with substantial leeway to change common-law rights and remedies.

1. Although the original meaning points the other way, this Court's cases treat Section 16's remedy language as placing some substantive limits on legislative power to define causes of action. *See, e.g.*, *Arbino*, 116 Ohio St. 3d 468 ¶44; *Groch*, 117 Ohio St. 3d 192 ¶109. It has described the limits in various ways. For example, the Court has said that the remedy language forbids the enactment of statutes that leave plaintiffs "wholly foreclosed from relief after a verdict is rendered in his or her favor." *Arbino*, 116 Ohio St. 3d 468 ¶45; *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St. 3d 280, 2010-Ohio-1029 ¶42. It has also said that the remedy language entitles a would-be plaintiff to "an opportunity [for relief] granted at a meaningful time and in a meaningful manner." *Groch*, 117 Ohio St. 3d 192 ¶52.

But of most importance here, the Court has said that a "plain reading" of the remedy language "reveals that it *does not* provide for remedies without limitation or for any perceived injury." *Ruther*, 134 Ohio St. 3d 408 ¶12 (emphasis added). Instead, according to this line of reasoning, the remedy language "protects only those causes of action that the General Assembly identifies." *Antoon v. Cleveland Clinic Found.*, 148 Ohio St. 3d 483, 2016-Ohio-7432 ¶27 (citation omitted); *Ruther*, 134 Ohio St. 3d 408 ¶13; *Groch*, 117 Ohio St. 3d 192 ¶150. Under this approach, nothing in the remedy language strips the General Assembly of its "authority to modify … [a] cause of action." *Stolz v. J & B Steel Erectors*, 155 Ohio St. 3d 567, 2018-Ohio-5088 ¶18. These more-recent statements accord with the core principle that there is no "vested right in rules of the common law," meaning the General Assembly may pass statutes to "adapt" the common law "to new circumstances." *Stetter*, 125 Ohio St. 3d 280 ¶52 (citation omitted). That is, "the General Assembly has the right to determine what causes of action the law will recognize and to alter the common law by abolishing the action, by defining the action, or by placing a time limit after which an injury is no longer a legal injury." *Ruther*, 134 Ohio St. 3d 408 ¶14.

Putting all of these statements together, the rule seems to be as follows: the General Assembly may modify the common law, including by adjusting the remedies available for any still-recognized cause of action; but the Assembly may not "wholly" eliminate an award "after a verdict is rendered." *Arbino*, 116 Ohio St. 3d 468 ¶45; *see also, e.g.*, *State ex rel. Christian v. Barry*, 123 Ohio St. 458, 463–64 (1931) (invalidating regulation that

required police officers to pre-clear any planned civil suits with the police chief). That is what must be meant by affording litigants an opportunity to litigate "at a meaningful time and in a meaningful manner." *Groch*, 117 Ohio St. 3d 192 ¶52. To give any more substance to that meaningful-time-and-meaningful-manner formula would conflict with the Court's repeated holdings that the General Assembly may eliminate or modify common-law torts. *See, e.g.*, *Antoon*, 148 Ohio St. 3d 483 ¶27; *Ruther*, 134 Ohio St. 3d 408 ¶13; *Groch*, 117 Ohio St. 3d 192 ¶150. Any more-expansive reading of that formulation would put a substantive gloss on language that is best known for securing procedural rights. *See, e.g.*, *Ferguson v. State*, 151 Ohio St. 3d 265, 2017-Ohio-7844 ¶42; *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). What is more, an expansive reading would "offend our notion of the checks and balances between the various branches of government, and the flexibility required for the healthy growth of the law," because it would mean subverting the choices of the General Assembly to "some cause of action currently preferred by the courts." *Groch*, 117 Ohio St. 3d 192 ¶118 (citation omitted).

2. Applying these precedents forecloses Brandt's challenge. Recall that this is an as-applied challenge. An "as-applied challenge depends upon [a] particular set of facts." *Wymsylo v. Bartec, Inc.*, 132 Ohio St. 3d 167, 2012-Ohio-2187 ¶22. The relevant facts here are as follows. *First*, Brandt is disputing the Statute's application to psychological injuries rather than physical injuries, meaning the damage cap's exception for physical harms does not apply. *Second*, Brandt is entitled to a significant amount of money no matter

how this case is resolved. The trial court, relying on the Non-economic Damages Statute, reduced from $20 million to $250,000 a damages award for psychological injuries that postdated the statute's effective date. According to Brandt, that reduction violates Section 16. Yet despite this reduction, Brandt is still entitled to all $14 million that the jury awarded for non-economic injuries that predate the effective date of the statutory cap. And, because she seeks damages relating to sexual assault, she is also entitled to the $100 million punitive-damages award regardless of how this case is resolved. *See* Jur. Mem. 1–2; R.C. 2315.21(D)(6) (no cap for punitive damages when defendant convicted of certain crimes); *State v. Pompa*, 2008-Ohio-3672 ¶7 (8th Dist.). So the question can be framed like this:

> Does a statute that reduces a tort judgment against a life-imprisoned rapist from $134,000,000 to $114,250,00 violate the Ohio Constitution's language guaranteeing a "remedy" by "due course of law"?

Under any interpretation of the Constitution's remedy language, the answer is "no." Even putting aside the original-meaning and structural points that indicate the clause places no limits on legislative power to redefine torts, it is hard to describe modestly trimming a nine-figure award—which remains a nine-figure award against a likely judgment-proof defendant—as invading a substantive right to a remedy.

For one thing, this Court has rejected both facial and as-applied challenges to this identical statute and its near-clone for torts against political subdivisions. The reasoning of those cases is well summarized in the lead case: "While the statute prevents some

plaintiffs from obtaining the same dollar figures they may have received prior to the effective date of the statute, it neither forecloses their ability to pursue a claim at all nor completely obliterates the entire jury award." *Arbino*, 116 Ohio St. 3d 468 ¶47 (internal quotation marks omitted); *see also Simpkins*, 149 Ohio St. 3d 307 ¶¶29–31 (lead op.); *Oliver v. Cleveland Indians Baseball Co. Ltd. P'ship*, 123 Ohio St. 3d 278, 2009-Ohio-5030 ¶13.

Arbino and its follow-on cases fit comfortably into the larger picture of this Court's precedent. For example, the Court has upheld the General Assembly's power to eliminate common-law torts. *See, e.g.*, *Strock v. Pressnell*, 38 Ohio St. 3d 207, 214 (1988) (alienation-of-affection torts); *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St. 3d 250, 2010-Ohio-1027 ¶102 (common-law version of employer intentional tort); *Thompson v. Ford*, 164 Ohio St. 74, 79–80 (1955) (replacing common-law duties relating to automobiles with statute). It has upheld statutes that eliminate a cause of action for all potential plaintiffs who do not discover the injury before a statute of limitations or repose forever bars their ability to sue. *See, e.g.*, *Antoon*, 148 Ohio St. 3d 483 (medical malpractice); *Ruther*, 134 Ohio St. 3d 408 (same); *Groch*, 117 Ohio St. 3d 192 (products liability); *Shover v. Cordis Corp.*, 61 Ohio St. 3d 213 (1991) (wrongful death), *overruled as to statutory interpretation by Collins v. Sotka*, 81 Ohio St. 3d 506 (1998); *Flagstar Bank*, 128 Ohio St.3d 529 (appraiser malpractice); *cf. Investors REIT One v. Jacobs*, 46 Ohio St. 3d 176 (1989) (accountant malpractice); *see id.* at 183 (A. Sweeney, J., concurring in part and dissenting in part). The Court has also upheld statutes that replaced a common-law cause of action with a more-limited remedy.

See, e.g., *Stolz*, 155 Ohio St. 3d 567 (eliminating tort suit by worker against third-party contractor on same project); *State ex rel. Yaple v. Creamer*, 85 Ohio St. 349 (1912) (eliminating negligence torts for workers against employers).

If all of these statutes are consonant with the remedy language as this Court has interpreted it, the Non-economic Damages Statute must be as well. The greater power to eliminate causes of action must include the lesser power to define the remedies for causes of action not eliminated. In other words, the power to alter the common law "necessarily includes the power to modify any associated remedy." *Stetter*, 125 Ohio St. 3d 280 ¶60. (quoting *Arbino*, 116 Ohio St. 3d 468 ¶132 (Cupp, J., concurring)). That is precisely the reasoning this Court used when it upheld a similar damage limit on tort claims against municipalities, explaining that the power to "prohibit[] *all* tort actions against political subdivisions" implies the lesser power to limit recovery in such actions. *Oliver*, 123 Ohio St. 3d 278 ¶15; *cf. Patchak v. Zinke*, 138 S. Ct. 897, 906 (2018) (making a similar greater-lesser argument).

In light of the widely accepted view that legislatures have the power to alter the common law, it should be no surprise that several sister state supreme courts reject the argument that a damage cap abridges some right to a common-law remedy. Courts in Utah, Nebraska, Minnesota, Indiana, and Idaho have directly rejected the same kind of argument Brandt advances here. *See Judd ex rel. Montgomery v. Drezga*, 103 P.3d 135, 141 (Utah 2004); *Gourley ex rel. Gourley v. Neb. Methodist Health Sys.*, 265 Neb. 918, 952 (2003);

Schweich v. Ziegler, Inc., 463 N.W.2d 722, 734 (Minn. 1990); *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 397 (1980), *abrogated on other grounds by Collins v. Day*, 644 N.E.2d 72, 75 (Ind. 1994); *cf. Robinson v. Charleston Area Med. Ctr.*, 186 W. Va. 720, 727 (1991) (dicta).

Finally, note that many statutes shielding valuable activities from tort liability would fall away if Section 16 were read to constitutionalize the common law. If the Constitution ossifies the common law such that the General Assembly cannot limit damages, then the General Assembly is also barred from erecting defenses that were unavailable at common law. Several statutes impose defenses with no common-law analogue. *See, e.g.*, R.C. 2305.23 (the "Good Samaritan" statute); R.C. 2305.37 (liability limitation for donors of food or consumer goods to charities); R.C. 2305.38 (for uncompensated volunteers of charitable organizations); R.C. 2305.40 (for land owners who injure certain trespassers); R.C. 2305.401 (for "member[s] of the firearms industry" for injuries allegedly caused by the "operation or discharge of a firearm"). Under Brandt's reading of Section 16, the legislature would be barred from enacting these laws.

3. To be sure, this Court (and courts in other States) have sometimes expanded Section 16 beyond its original meaning, and beyond recent precedent. For example, it has treated Section 16 as though it imposes substantive limits on the General Assembly's power to modify common-law torts. *See, e.g.*, *Primes v. Tyler*, 43 Ohio St. 2d 195, 204–05 (1975); *Byers v. Meridian Printing Co.*, 84 Ohio St. 408, 422 (1911); *cf. Williams v. Marion Rapid Transit, Inc.*, 152 Ohio St. 114, 129 (1949). But those cases did not consider the

historical and structural arguments made here. So there is little value in following those cases and their "scant justification[s]" for their own sake. *Groch*, 117 Ohio St. 3d 192 ¶138. In the words of one Oregon Supreme Court justice confronting a similar clash of precedent and history, "stubborn adherence to case law that is in conflict and demonstrably in error is not costless. It produces its own threats to stability and predictability—the very virtues that *stare decisis* is supposed to promote." *Horton*, 359 Or. at 282 (Landau, J., concurring). The law's stability ultimately rests on its predictability. Predictability follows from precedent only when prior cases are thoroughly reasoned. Past cases that gave an expansive reading to the remedy language cannot claim that mantle.

C. Brandt's view of the Constitution's remedy language veers from its original meaning and this Court's current precedent.

Brandt frames the remedy-language argument in terms of what award would have been available at common law. Br.16–17. As we have shown above, however, the Ohio Constitution's remedy language does not freeze the common law of torts in place as it existed in 1802. If Brandt is right that the General Assembly cannot alter the available money damages for a tort, many of this Court's cases are wrong, and many statutes must fall away. *See above* at 23–24.

Unable to ground her argument in the Ohio Constitution or Ohio law, Brandt cites an Oregon case that invalidated a damage cap for certain medical-malpractice claims. The Oregon statute, though, "eliminate[d] entirely any claim against the individual tortfeasors." *Clarke v. Oregon Health Scis. Univ.*, 343 Or. 581, 608 (2007). The Ohio statute does

not eliminate entirely Brandt's claims. Instead, Brandt's judgment for $100,000,000 in punitive damages, her $14,000,000 in non-economic damages for the period not covered by the statute, and her $250,000 non-economic damages remain untouched.

II. The Ohio Constitution's jury guarantee divides power between judge and jury in particular cases, and therefore places no substantive limits on the General Assembly's policy choices about what remedies are available generally.

Now consider the question whether the Non-economic Damages Statute violates the right to a jury trial. The answer is, again, "no." While the Constitution entitles civil plaintiffs to a jury trial, it does not entitle juries to award damages in excess of what statutory law allows.

A. The jury guarantee is about process, not substance.

The Ohio Constitution says "[t]he right of trial by jury shall be inviolate." Ohio Const. art. I, § 5. This "inviolate" right, though, "is not absolute." *Arbino*, 116 Ohio St. 3d 468 ¶32. The jury right in civil cases is limited in at least two major ways.

First, the right applies only to certain causes of action. *Id*.; *Belding v. State ex rel. Heifner*, 121 Ohio St. 393, syl. ¶1 (1929); *Brown v. Reed*, 56 Ohio St. 264, 270 (1897). The jury-trial right does not extend to "all controversies," but applies only to those cases where the right existed "under the principles of the common law" as "it existed previously to the adoption of the Constitution." *Belding*, 121 Ohio St. at 396. For example, "the right applies to both negligence and intentional-tort actions," *Arbino*, 116 Ohio St. 3d 468 ¶32, but not to statutory claims of more recent vintage, like those seeking participation in

Ohio's worker's compensation fund, *Arrington v. DaimlerChrysler Corp.*, 109 Ohio St. 3d 539, 2006-Ohio-3257 syl. ¶1.

Second, the right does not extend the jury's role to all aspects of a case. Instead, the right more narrowly "protects a plaintiff's right to have a jury determine all issues of *fact*." *Arbino*, 116 Ohio St. 3d 468 ¶34 (emphasis added); *see also Dunn v. Kanmacher*, 26 Ohio St. 497, 502–03 (1875). A claim that a statute violates the jury right "can succeed only if the statute actually intrudes upon the jury's *fact-finding function*." *Arbino*, 116 Ohio St. 3d 468 ¶90 (emphasis added). Because of this focus on fact-finding, the jury-trial guarantee does not countermand the General Assembly's power "to alter, revise, modify, or abolish the common law as it may determine necessary or advisable for the common good." *Stetter*, 125 Ohio St. 280 ¶64 (citation omitted). In circumstances where the legislature modifies a common-law cause of action, the jury retains its fact-finding function only to the extent that the cause of action remains "legally available." *Id*. ¶67. A federal court put the point this way: "[I]t is not the role of the jury to determine the legal consequences of its factual findings. That is a matter for the legislature." *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989).

Under these general principles the Court has upheld statutes that cap non-economic damages against both private and public defendants. In the first of these cases, the Court reasoned that a cap accords with the jury right because "the fact-finding process is not intruded upon" and the jury's "findings of fact are not ignored or replaced by another

body's findings." *Arbino*, 116 Ohio St. 3d 468 ¶37. In other words, a jury's evaluation of damages may be "altered *as a matter of law*." *Id.* In the second case, the Court reaffirmed this reasoning, holding that a statute does "not usurp the role of the jury … when it applies a statutory limit on non-economic damages to the facts found by the jury. *Oliver*, 123 Ohio St. 3d 278 ¶8. Finally, in an as-applied challenge to the private-party cap, the Court affirmed a judgment reducing an award of non-economic damages tenfold—from $3.5 million to $350,000. That reduction, the Court held, "simply applied the law to the facts." *Simpkins*, 149 Ohio St. 3d 307 ¶25 (lead op.); *see id.* ¶58 (O'Connor, C.J., and O'Donnell, J., voting to affirm by dismissing as improvidently accepted); *id.* ¶59 (Lanzinger, J., concurring in judgment).

B. The Non-economic Damages Statute does not invade the jury function by assigning legal consequences to the jury's fact-finding.

The statute challenged here caps certain damages. That is, it declares an economic policy that the legal consequence of certain injuries extends only so far. By assigning legal consequences (or lack of consequences) to the jury finding, the Statute steers clear of the functions historically reserved for the jury. The Non-economic Damages Statute does not, for example, purport to resolve factual issues in any case; it instead defines the maximum damages to which a party is legally entitled as a matter of law. The challenge here is the same one rejected in *Arbino*, *Oliver*, and *Simpkins*.

Beyond precedent of *Arbino*, *Oliver*, and *Simpkins*, consider an analogy to criminal law. It is well known that the jury must make all the findings necessary to establish guilt.

See, e.g., *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856; *United States v. Booker*, 543 U.S. 220 (2005). At the same time, "the General Assembly has the plenary power to prescribe crimes and fix penalties" that are the consequences of the jury's guilty verdicts. *State v. Morris,* 55 Ohio St. 2d 101, 112 (1978); *see also Municipal Court v. State ex rel. Platter,* 126 Ohio St. 103, 109–110 (1933); *Gore* v. *United States*, 357 U.S. 386, 393 (1958). Translate that to civil cases: a civil jury's liability and damage assessments are matters of fact that they alone can perform; the final judgment must account for any substantive limits on the consequence of those fact-findings. And so what this Court said about sentencing applies equally to civil jury awards: "the people of Ohio conferred the authority to legislate solely on the General Assembly," including "the important and meaningful role of defining" the consequences of misconduct, so a court cannot deviate from those legislative policy choices without violating the separation of powers. *South*, 144 Ohio St. 3d 295 ¶28 (O'Connor, C.J., concurring).

Arbino, *Oliver*, and *Simpkins* also line up with the common-sense insight that the greater legislative power to abolish a cause of action includes the lesser power to limit the damages recoverable for a cause of action the legislature does not abolish. Former Justice Cupp, for one, thought it "illogical" to conclude that a jury right that permits the General Assembly to eliminate a cause of action "nevertheless prevents the legislature from defining by statute the remedies available for a cause of action." *Arbino*, 116 Ohio St. 3d 468 ¶132 (Cupp, J., concurring). The federal Fourth Circuit made the same point when

evaluating a Virginia damages cap. "If a legislature may completely abolish a cause of action without violating the right of trial by jury, we think it permissibly may limit damages recoverable for a cause of action as well." *Boyd*, 877 F.2d at 1196. If a jury's conclusions about liability are not inviolate, how are its conclusions about the extent of that liability?

Arbino, *Oliver*, and *Simpkins* also find support in the debates over the 1851 Constitution. Those debates may "aid in removing doubts" about the Constitution's meaning. *Toledo City Sch. Dist. Bd. of Educ. v. State Bd. of Educ.*, 146 Ohio St. 3d 356, 2016-Ohio-2806 ¶27 (internal quotation marks omitted); *Cass v. Dillon*, 2 Ohio St. 607, 621 (1853). In the 1851 debates, the delegates defeated a measure to append language to the jury right that would guarantee redress. The proposed language was as follows: "And the right of redress for injuries to person, property, character or morals, shall be secured by legislative enactment." Proceedings of 1850–51 327 (Jan. 15, 1851). That language may well have limited the General Assembly's ability to trim damages awards. But it never made it into the Constitution. Proposals "considered and rejected," this Court has said, can inform the meaning of the language not amended. *Anderson v. Barclay's Capital Real Estate, Inc.*, 136 Ohio St. 3d 31, 2013-Ohio-1933 ¶¶24–25. The unamended language of Ohio's jury right simply does not insulate jury awards from legislatively imposed limits.

Arbino, Oliver, and *Simpkins* also align with permitting the opposite of damage caps, as no court has suggested that damage enhancers invade the jury right. If Brandt is

right, then then General Assembly has no power to *increase* jury awards to double or treble damages. Such increases-as-a-matter-of-law are common in Ohio. *See Arbino* 116 Ohio St. 3d 468 ¶39 (listing examples). And this Court has never suggested that they violate the Constitution. *See id*. What is more, these kinds of damage enhancers were well known by the time of Ohio's 1802 Constitution, as "[a]wards of double or treble damages authorized by statute date back to the 13th century." *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 274 (1989). Brandt has no answer to a federal appellate court's insightful question: "If a judge cannot limit damages found by a jury in accordance with a statute, how can a judge impose statutorily mandated double or treble damages without also imposing on the jury's province as sole factfinder?" *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1202 (9th Cir. 2002). Indeed, the Michigan Supreme Court explained that juries have never had the power to "determine the legal effect of [damages] findings, whether it be that … damages are capped, reduced, increased, tripled, reduced to present value, or completely unavailable." *Phillips*, 470 Mich. at 431.

Arbino, *Oliver*, and *Simpkins* are consistent with rulings from around the country. In 2021, the New Mexico Supreme Court "failed to see how the right to a jury incorporate[s] a right to maximum recovery." *Siebert v. Okun*, 485 P.3d 1265, 1277 (N.M. 2021) (internal quotation marks omitted; alteration in original). A few years earlier, the Oregon Supreme Court conducted an exhaustive review of the history behind its jury guarantee. That history pointed to "a procedural right," one that "guarantees the right to a trial by a

jury (as opposed to a trial by a judge)." *Horton*, 359 Or. at 243. And, the court continued, the history of the guarantee contains no hints that it "limits 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." *Id*. Many other state supreme court decisions are in accord. *See, e.g.*, *Phillips*, 470 Mich. at 431; *Maurin*, 274 Wis. 2d at 73; *Judd*, 103 P.3d at 145; *Gourley*, 265 Neb. at 954; *Kirkland v. Blaine Cnty. Med. Ctr.*, 134 Idaho 464, 469 (2000); *Murphy v. Edmonds*, 325 Md. 342, 374 (1992); *Robinson*, 186 W. Va. at 731; *English v. New England Med. Ctr.*, 405 Mass. 423, 426 (1989); *Etheridge v. Med. Ctr. Hosp.*, 237 Va. 87, 96 (1989); *Johnson*, 273 Ind. at 401.

Finally, federal courts have rejected arguments making the parallel claim under the Seventh Amendment. According to the U.S. Supreme Court, the "Seventh Amendment is silent on the question whether a jury must determine the remedy in a trial in which it must determine liability." *Tull v. United States*, 481 U.S. 412, 425–26 (1987). As a result, "[f]ederal courts uniformly have held that statutory damage caps do not violate the Seventh Amendment." *Estate of Sisk v. Manzanares*, 270 F. Supp. 2d 1265, 1277–78 (D. Kan. 2003); *see also In re W.R. Grace & Co.*, 475 B.R. 34, 169 n.145 (D. Del. 2012) (cataloging cases). And while the U.S. Supreme Court has never addressed the specific question about statutes that limit damages, one Justice has opined that "[i]f an award is excessive as a matter of law[,] … if it is larger than applicable state law permits—a trial judge has a duty to set it aside." *Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 442 (1996) (Stevens, J.,

dissenting). Justice Stevens's approach lines up with the views of Hamilton, who explained in an essay that the jury has no role in substance, only procedure. Hamilton explained that a jury "can have no influence upon the legislature in regard to the *amount* of taxes to be laid, to the *objects* upon which they are to be imposed, or to the *rule* by which they are to be apportioned. If it can have any influence, it must be upon the mode of collection …" Federalist No. 83 (Hamilton) 563 (Cooke ed. 1961). Hamilton may have been talking about taxation, but the divide he described between substance and procedure is as true of tax policy as it is of tort reform.

*

In some past cases, this Court has treated the jury right as more expansive than the history and structure above support. For example, in *Sorrell v. Thevenir*, the Court declared a statute modifying the collateral-source rule "unconstitutional *in toto*" because the statute, in some applications, eliminated the entire award. 69 Ohio St. 3d 415, 422 & syl. (1994); *see also Galayda v. Lake Hosp. Sys., Inc.*, 71 Ohio St. 3d 421, 426 (1994). But the constitutional fault of the statutes in those cases—as this Court later described them in *Arbino*—was that the statutes "alter[ed] the findings of facts themselves." 116 Ohio St. 3d 468 ¶40. On the other hand, statutes that merely assign the legal consequences of a particular jury finding—as the statute Brandt attacks does—"avoid[]" a "constitutional conflict[]" with the jury right. *Id.* *Sorrell* and *Galayda* are hard to square with cases like *Arbino*, *Oliver*, and *Simpkins*, which each upheld a statute that reduced a verdict below an

amount a jury assessed. At bottom, "[a]ny argument that the … cap on non-economic damages violates the right to a trial by jury is meritless." *Jones v. MetroHealth Med. Ctr.*, 2017-Ohio-7329 ¶77 (8th Dist.) (per Stewart, J.).

C. Brandt's counterarguments fail to account for the lessons of text and history.

Brandt brings two main attacks against the holdings in *Arbino*, *Oliver*, and *Simpkins* that damages-limiting statutes do not invade the jury guarantee. She first points to Georgia and Kansas cases agreeing with her position, but never acknowledges the mountain of authority pointing the other way. Br.21–22. Second, she attacks caricatured versions of *Arbino's* rationale.

Brandt cites Georgia and Kansas decisions that feature inch-deep excavations of the relevant history. The Georgia decision, for example leaps directly from the observation that non-economic damages were *available* at common law to the conclusion that a cap on such awards "clearly nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function." *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731, 735 (2010). The Kansas decision Brandt cites similarly overreads the jury's role in setting the specific amount of damages as overriding the legislature's power to decide whether damages are available as a matter of law. *See Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 1148 (2019). Contrast the Georgia and Kansas cases' approach with the New Mexico Supreme Court's and Oregon Supreme Court's deep historical excavations. *See Siebert*, 485 P.3d at 1275–77; *Horton*, 359 Or. at 235–50.

Brandt also takes issue with some of *Arbino's* rationale. Drawing on *Arbino's* dissent, she criticizes the majority for its analogies to remittitur and treble-damage awards, and its use of cases interpreting the U.S. Constitution's Seventh Amendment. Her criticisms are wide of the mark. Brandt thinks *Arbino* mis-stepped by pointing to remittitur because a plaintiff must consent. Br. 28. But *Arbino* qualified the analogy by making exactly that point. 116 Ohio St. 3d 468 ¶38. Brandt also downplays the comparison to statutes that *increase* jury awards because those increases are not in common-law actions. Many of those statutes, though, rest on common-law foundations that guarantee a jury trial. *See, generally Arrington*, 109 Ohio St. 3d 539 ¶22; *Whitaker v. M.T. Auto., Inc.*, 111 Ohio St. 3d 177, 2006-Ohio-5481 ¶8 (noting jury award of Consumer Sales Practices Act damages); *Curtis v. Loether*, 415 U.S. 189, 194 (1974) (noting that jury right covers antitrust suits for damages). So *Arbino's* observation is correct: a jury right that tolerates statutes adding to a damage award must tolerate statutes that subtract from them. Last, Brandt shrugs off *Arbino's* citation to federal authority with the non-sequitur that the Seventh Amendment does not apply in state court. Br.29. That is beside the point. The federal cases are instructive by analogy because the Seventh Amendment and the Ohio Constitution both protect a right defined by its common-law scope.

Nor can Brandt get any mileage from highlighting the as-applied nature of her challenge. *E.g.*, Br.22; 25–26. The jury right either does or does not prohibit the legislature from assigning the legal consequence to the jury's finding. The constitutional analysis is

the same whether a statute reduces an award by $1 or $10 million. That all-or-nothing reality is why this Court earlier held that "application of the damage caps does not affect [one litigant's] right to a jury trial any differently than it affects any tort claimant whose damages are capped as a matter of law." *Simpkins*, 149 Ohio St. 3d 307 ¶25 (lead op.).

At bottom, Brandt wants to reshape the jury guarantee into an immunity against legislative adjustments to tort remedies. But "[t]he claim that the jury must decide the measure of damages does not seem in line with the usual notion that the law prescribes the remedy and its measure." 2 D. Dobbs, Law of Remedies §8.8 n.23, p. 526 (2d ed. 1993). The Eighth District correctly rejected Brandt's arguments.

III. The Non-economic Damage Statute offends no due-process protections.

Brandt also claims that the Non-economic Damage Statute violates Section 16's "due course of law" language. More precisely, she seeks to have the law held unconstitutional under the substantive-due-process doctrine. This Court should reject her argument.

A. Article I, Section 16's "due process" component imposes only rational-basis review.

When a damages cap "violates neither the right to a jury trial nor the right to a remedy," as is the case here, any substantive-due-process challenge to the cap must be reviewed under a rational-basis standard. *Arbino*, 116 Ohio St. 3d 468 ¶49. Under rational-basis analysis, a statute need only have some rational connection to a legitimate state interest, which ensures that courts' "ability to invalidate legislation is a power to be

exercised only with great caution and in the clearest of cases." *Yajnik v. Akron Dep't of Health, Hous. Div.*, 101 Ohio St. 3d 106, 2004-Ohio-357 ¶16. Under this review, a "law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955).

The rational-basis standard for due process gives legislatures a long leash. The list of laws that pass this test is nearly endless. It is rational, for example, to impose a tax on income, even when the earner cannot vote on that tax. *Desenco, Inc. v. Akron*, 84 Ohio St. 3d 535, 545 (1999). It is rational to insulate municipalities from tort liability to avoid a drain on municipal resources, even when municipalities cause injury. *Fabrey v. McDonald Vill. Police Dep't*, 70 Ohio St. 3d 351, 354 (1994). It is rational to impose housing inspections on all of an owner's many properties after a code violation at a single property because lax standards at one property may signal the same at others. *Yajnik*, 101 Ohio St. 3d 106 ¶¶17-19. It is rational to limit ownership of pit bulls because some owners of that breed are irresponsible. *Toledo v. Tellings*, 114 Ohio St. 3d 278, 2007-Ohio-3724 ¶¶25–26, 33. It is rational to ban pinball machines because they promote gambling and loitering. *Benjamin v. City of Columbus*, 167 Ohio St. 103, 108, 115–16 (1957). In fact, since the 1930s, the U.S. Supreme Court has not invalidated a single economic or social-welfare law as

irrational under the substantive Due Process Clause. *See* Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 641 (4th ed. 2011).

B. The Non-economic Damages Statute rationally limits subjective awards.

The Statute easily passes muster. This Court has already twice concluded that statutes limiting non-economic damages rationally advance state interests, such as "economic concerns" about large awards dampening business investment and the "inherently subjective" nature of such awards. *Arbino*, 116 Ohio St. 3d 468 ¶54; *id.* at ¶¶55–60; *Simpkins*, 149 Ohio St. 3d 307 ¶38 (lead op.).

Concerns about subjectivity are applicable here, and make the Statute rational even in its application to a case where the defendant is sued for rape. This Court recognized that non-economic awards are both "difficult to calculate and lack a precise economic value." *Arbino*, 116 Ohio St. 3d 468 ¶54. *Arbino's* observation accords with the common judicial sentiment that these damages are, "of course … notoriously difficult to quantify." *Leininger v. United States*, 499 F. Supp. 3d 973, 997 (D. Kan. 2020). For their part, anthropologists observe that attitudes about suffering range from the view that it is a way in which victims "pass from a worse to a better place" to the view that it should be "wholly eliminated." James Davies, *Positive and Negative Models of Suffering: An Anthropology of Our Shifting Cultural Consciousness of Emotional Discontent*, 22 Anthropology of Consciousness 188–208 (2011).

Research confirms these observations. A classic study of non-economic damages revealed "uncontrolled variability of awards" even after controlling for type of injury. Randall R. Bovbjerg, Frank A. Sloan, and James F. Blumstein, *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 Nw. U.L. Rev. 908, 924 (1989). Another study, this time of victims of the 1983 Korean Airlines disaster, revealed non-economic damage awards ranging from $0 to $1.4 million for victims of the identical tort. Aaron J. Broder, *Judges, Juries and Verdict Awards*, 211 N.Y. L.J. 34 (Jan. 3, 1994). Even hypothetical studies trying to assign values to pain produce wide variation. One study reported values from $0 to $500 that parents would pay to shield their infants from the pain of vaccines at a doctor's visit. Allen S. Meyerhoff, Bruce G. Weniger, Jake R. Jacobs, *Economic Value to Parents of Reducing the Pain and Emotional Distress of Childhood Vaccine Injections*, 20 Pediatric Infectious Disease J. S57, S59 (Nov. 2001). According to some observers, this variability in non-economic damages arises from litigants and juries seeking to punish defendants despite statutes and U.S. Supreme Court precedent limiting the size of punitive-damage awards. Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into "Punishment,"* 54 S.C. L. Rev. 47, 48–49 (2002). In light of these many challenges in matching pain to dollars, the General Assembly could rationally conclude that a cap on some victims' non-economic damages is warranted in the interest of fairness.

The cap also rationally promotes fairness between multiple plaintiffs injured by the same defendant. With no cap on damages, the first plaintiff to judgment might deplete money that would otherwise compensate other plaintiffs. Wrongdoers with multiple victims are common. Two of this Court's notable medical-malpractice decisions involved "many actions" against the same doctor. *Browning v. Burt*, 66 Ohio St. 3d 544, 545 (1993); *see also Wilson v. Durrani*, 164 Ohio St. 3d 419, 2020-Ohio-6827 ¶2. In such cases, caps on non-economic damages can promote horizontal fairness across all victims by preventing the first award from depleting the defendant's ability to pay. That kind of fairness helps fulfill "the promise of equal justice under law," which "is an important justification for our legal system." Oscar G. Chase, *Helping Jurors Determine Pain & Suffering Awards*, 23 Hofstra L. Rev. 763, 769 (1995).

Promoting horizontal fairness is a common feature in other areas of law. For example, victims of toxic torts often file claims against trusts funded by wrongdoers that are "designed to satisfy the claims of all … victims, both present and future" without depleting the funds by payouts to the earliest victims. *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 640 (2d Cir. 1988). The same rationale animates one of this Court's own rules. Civil Rule 23(b)(1)(B) permits limited-fund class actions, "in which numerous persons make claims against a fund insufficient to satisfy all claims." *Amchem Prods. v. Windsor*, 521 U.S. 591, 614 (1997); *see, e.g.*, *Herrera v. Charlotte Sch. of Law, LLC*, 818 F. App'x 165, 168 (4th Cir. 2020) (affirming such a class). If this Court may constitutionally write a rule

that constrains damages to achieve horizontal equity, surely the General Assembly may do the same.

One last indicia of rationality is that several sister supreme courts have turned aside the argument that legislative damage caps violate substantive due process. *Phillips*, 470 Mich. at 436; *Maurin*, 274 Wis. 2d at 77; *Judd*, 103 P.3d at 144; *Evans ex. rel Kutch v. State*, 56 P.3d 1046, 1055 (Alaska 2002); *Fein v. Permanente Med. Grp.*, 38 Cal. 3d 137, 160 (1985); *English*, 405 Mass. at 430–31; *Etheridge*, 237 Va. at 100.

C. Brandt offers no argument that proves the Statute is irrational.

Brandt thinks the Statute is irrational because minor sexual-assault victims rarely suffer economic damages on par with other tort victims. Br.12–13. That is undoubtedly true, but it hardly makes irrational a statute that treats alike all tort victims who suffer grave emotional distress. Adult tort victims whose only injury is emotional would also be subject to the Statute's limits. *See, e.g.*, *Schultz v. Barberton Glass Co.*, 4 Ohio St. 3d 131, 136 (1983). And, as we detailed above, those limits further the goals of fairness to plaintiffs and defendants alike. *See above* at 37–40.

IV. The Non-economic Damages Statute rationally distinguishes dissimilar plaintiffs.

Finally, Brandt challenges the Non-economic Damages Statute as abridging equal-protection guarantees. That challenge tests the Statute—again—only for a rational basis. For the same reasons already discussed, *see above* at 37–40, the Statute easily survives. Brandt offers no reason to think otherwise.

A. As with due process, equal-protection review assesses the Statute for a rational basis.

This Court has always read the precatory language in Article I, Section 2 as equivalent to the Fourteenth Amendment's Equal Protection Clause. *See, e.g.*, *State ex. rel Schwartz v. Ferris*, 53 Ohio St. 314, 336, 341 (1895); *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.*, 87 Ohio St. 3d 55, 59–60 (1999). And, despite recent opinions suggesting that the clauses are not equivalent, *see, e.g.*, *State v. Moore*, 154 Ohio St. 3d 94, 2018-Ohio-3237 ¶40 (Fischer, J., concurring in judgment), the State sees no reason in this case to reexamine that assumption. Brandt has made no argument that the equal-protection language in the Ohio Constitution functions as anything other than an equivalent of the guarantee in the Fourteenth Amendment.

Under this long-held view, this Court "will set aside legislative classifications" as violating equal-protection guarantees "only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them." *Ferguson*, 151 Ohio St. 3d 265 ¶40; (internal quotation marks omitted); *McCrone v. Bank One Corp.*, 107 Ohio St. 3d 272, 2005-Ohio-6505 ¶9; *see also F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993); *Clements v. Fashing*, 457 U.S. 957, 963 (1982). This standard for challenging legislative classifications springs from a recognition that the "problems of government are practical ones and may justify, if they do not require, rough accommodations,—illogical, it may be, and unscientific." *McCrone*, 107 Ohio St. 3d 272 ¶32 (citation omitted). Given these practical problems facing legislatures, the courts' task is

to decide only "whether there exist any reasonable bases for the disputed legislative classification." *Id.*

It is a basic principle of review for rationality that courts afford "great deference" to legislative judgments. *Conley v. Shearer*, 64 Ohio St. 3d 284, 289 (1992). Courts must therefore refrain from judging the "wisdom, fairness, or logic" of legislative choices. *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 319 (1993) (citation omitted). A "legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Pickaway Cnty. Skilled Gaming, L.L.C. v. Cordray*, 127 Ohio St. 3d 104, 2010-Ohio-4908 ¶32 (internal quotation marks omitted). This wide deference to legislative choice and policymaking translates to a high threshold for those challenging a law. A challenger's burden is "to negate every conceivable basis that might support the legislation." *Columbia Gas Transmission. Corp. v. Levin*, 117 Ohio St. 3d 122, 2008-Ohio-511 ¶91; *Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012).

One way to approach the question of rationality is to ask whether the law distinguishes persons or things that are dissimilar. If it does, it is rational. *See, e.g., Levin*, 117 Ohio St. 3d 122 ¶97 (energy companies not similarly situated); *In re A.G.*, 139 Ohio St. 3d 572, 2014-Ohio-2597 ¶58 (parents and child not similarly situated).

Another way to approach the question is by looking to the possible justifications for the distinction. Courts routinely uphold laws that draw distinctions to serve pedestrian state interests such as administrative convenience or the lack of resources necessary

to draw a more precise line. *See, e.g.*, *T. Ryan Legg Irrevocable Tr. v. Testa*, 149 Ohio St. 3d 376, 2016-Ohio-8418 ¶73 (pass-through versus non-pass-through entities); *Armour*, 566 U.S. at 679, 682 (administrative convenience of not equalizing wildly different citizens' costs for sewer project); *Phillips v. McCollom*, 788 F.3d 650, 654 (6th Cir. 2015) (per Sutton, J.) (higher tax rates for some filers to save enforcement costs).

B. The Non-economic Damages Statute rationally promotes fairness to defendants and plaintiffs alike.

The Statute easily passes this test. For starters, the "analysis of [Brandt's] substantive-due-process claim gives away the ending as to [her] equal-protection claim," as a statute rational under one is rational under the other. *Stolz v. J & B Steel Erectors*, 155 Ohio St. 3d 567, 2018-Ohio-5088 ¶26; *cf. Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 n.12 (1981) (a law held rational under equal protection is "a fortiori" rational under due process). Regardless, the distinction the statute draws between those with serious *physical* injuries versus serious *mental* injuries is the same kind of distinction this Court upheld in *McCrone*. As in that case, whatever the policy merits of extending the regime for physical injuries to mental ones, this Court should not "mandate" that change "by judicial fiat." 107 Ohio St. 3d 272 ¶42 (Lundberg Stratton, J., concurring). Given the difficulty associated with quantifying and properly calibrating awards of mental injuries, *see above* 38–39, the General Assembly could rationally have concluded that the damages cap advances the valid interest in fairness to civil defendants.

Once again, many other state supreme courts have rejected the argument Brandt makes here. *See, e.g.*, *Phillips,* 470 Mich. at 435; *Maurin*, 274 Wis. 2d at 78; *Evans,* 56 P.3d at 1054–55; *Gourley*, 265 Neb. at 950; *Fein,* 38 Cal. 3d at 162–64; *Scholz v. Metro. Pathologists, P.C.,* 851 P.2d 901, 907 (Colo. 1993); *Murphy,* 325 Md. at 364–65; *English*, 405 Mass. at 430; *Johnson*, 273 Ind. at 400.

C. Brandt offers no reason to doubt the Statute's rational foundations.

Brandt's view that the Statute is irrational under equal-protection principles covers the same ground as her due-process argument. *See* Br.18–19. And the response is the same. The Statute rationally advances the goals of predictability, fairness from plaintiff to plaintiff, and fairness to defendants.

One *amicus* makes a point worth covering here. The Ohio Association for Justice insists that any law that "regulates in the field" covered by a constitutional provision triggers strict (or at least heightened) scrutiny. OAJ Br.25; *id*. at 26–27. The *amicus* is wrong, as seen both in well-settled doctrine and in the case it cites to advance this argument.

First, long-settled doctrine tells us that a law may well "regulate" in a field without triggering heightened scrutiny. Take just one example. Several restrictions on "speech" "have never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571–72 (1942); *see United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (listing the categories). In other words, a law that directly regulates speech (true death

threats, for example) may not be subject to heightened scrutiny despite the fact that it "regulates in the field," OAJ Br.25, of speech.

Second, the *amicus*'s own authority rejects its argument. In *Weber* all seven Justices accepted that a law survives constitutional review, and triggers no heightened scrutiny, if the law regulates outside the right's "scope." *State v. Weber*, 163 Ohio St. 3d 125, 2020-Ohio-6832 ¶14 (lead op.); *id.* ¶69 (DeWine, J., concurring in judgment); *id.* ¶¶111, 119 (Fischer, Kennedy, and French, JJ., dissenting). In that case, as Justice DeWine explained, a law that prohibited handling a firearm while intoxicated did not fall within the scope of the right to bear arms. *Id*. ¶108. Surely the statute "regulate[d] in the field" of the right to bear arms. OAJ Br.25. Nonetheless, the Court did not automatically apply heightened scrutiny.

CONCLUSION

For the foregoing reasons, the Court should affirm the Eighth District's decision.

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