IN THE SUPREME COURT OF OHIO

AMANDA BRANDT,	:	Case No. 2021-0497
	:	
Plaintiff-Appellant,	:	On Appeal from the Cuyahoga County
	:	Court of Appeals, Eighth Appellate
v.	:	District Case No. 20 109517
	:	
ROY POMPA,	:	
	:	
Defendant-Appellee.	:	

MERIT BRIEF OF *AMICUS CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF APPELLEE'S POSITION THAT R.C. 2315.18 IS CONSTITUTIONAL

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I. INTRODUCTION AND STATEMENT OF AMICUS INTEREST

Pursuant to Rule VI of Section 5 of the Ohio Supreme Court Rules of Practice, the Product Liability Advisory Council, Inc. ("PLAC") submits this brief as *amicus curiae* in support of Defendant-Appellee's position that R.C. 2315.18 is constitutional and that this Court should not overrule its decision in *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420.

PLAC is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers.[1] These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product litigation defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,100 briefs as amicus curiae in both state and federal courts, including this Court, on behalf of its members, while presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management.

Plaintiff-Appellant and her amici contend that the caps on non-economic damages in R.C. 2315.18 are unconstitutional. While ostensibly making an "as applied" constitutional challenge to R.C. 2315.18, Plaintiff-Appellant and her amici seek much more in an improper facial challenge, asking this Court to reconsider its decision in *Arbino* and ultimately reverse it, thereby striking

[1] *See* PLAC Corporate Membership List: https://plac.com/PLAC/Membership/Corporate_Membership.aspx

down a non-economic damages cap, adopted by the General Assembly, which has stabilized Ohio tort law for nearly 20 years. PLAC's members support laws that protect individuals and businesses, whether large or small, from crippling and arbitrary non-economic damage awards.

It is not unusual for product manufacturers to be sued by hundreds or even thousands of plaintiffs over a single product, in jurisdictions all around the country. In such cases, they face the risk of multiple noneconomic damages awards, and PLAC's members have an interest in laws preventing the imposition of excessive non-economic damages awards. PLAC urges this Court to decline the invitation of Plaintiff-Appellant and her amici to reconsider *Arbino*, and to instead reaffirm *Arbino* and the constitutionality of R.C. 2315.18.

PLAC is not participating in this appeal for the benefit of Defendant-Appellee, Roy Pompa. His actions are beyond reprehensible. But Plaintiff-Appellant's efforts to overturn the law -- passed by the General Assembly and previously upheld by this Court on multiple occasions -- would not only make bad law, but would also have implications far beyond this case. The relief sought by Plaintiff-Appellant and her amici would cast aside the General Assembly's role as the "ultimate arbiter of public policy" and expose manufacturers, local distributors, and retail dealers to excessive non-economic damages awards even if they did nothing wrong. *See* Dan B. Dobb's, 2 LAW OF REMEDIES, 383 (2d ed 1993) ("there is almost no standard for measuring pain and suffering damages, or even a conception of those damages or what they represent"); RESTATEMENT (SECOND) OF TORTS 2d, 2 § 402A (Am. Law Inst. 1965) (explaining strict liability allows juries to render liability on parties who were not even negligent). The resulting economic damage sustained by manufacturers – already reeling from overseas competition, inflation, supply-chain issues, staffing issues, and COVID-19 – would be incalculable. And the impact in Ohio would be significant. Ohio's manufacturing sector is the largest of Ohio's 20 sectors in its economy,

accounting for $112.8 billion worth of goods and 16.6 percent of Ohio's total economic output. Larrick, *Gross Domestic Product from Ohio*, Office of Research, Ohio Development Services Agency, devresearch.ohio.gov/files/research/E1001.pdf, p. 3 (2020).

It was precisely concerns such as these that prompted the General Assembly to enact the non-economic caps in R.C. 2315.18. As pointed out in *Arbino*, the General Assembly "found that the current state of the civil litigation system 'represents a challenge to the economy of the state of Ohio.'" *Arbino*, 116 Ohio St. 3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 53. Non-economic damages presented a particularly acute challenge, as the General Assembly noted that such "damages are difficult to calculate and lack a precise economic value" and "are inherently subjective and susceptible to influence from irrelevant factors." *Id.*, ¶ 54. Ultimately, these inflated awards were "being passed on to the general public." *Id.*

The reasoning in *Arbino* was sound when it was decided and remains sound to this day. *Arbino* has been repeatedly followed by this Court to uphold not only the General Assembly's deployment of non-economic caps in R.C. 2315.18, but also its changes to Ohio's employer intentional tort statute, R.C. 2745.01, and the Ohio's workers' compensation statute, R.C. 4123.931. While Plaintiff-Appellant and her amici describe *Arbino* as defying "practical workability," reversing *Arbino* would instead inject disorder and uncertainty into several long-settled areas of Ohio law, not just statutory damages caps.

And the sweeping relief Plaintiff-Appellant and her amici seek would actually provide no relief at all to Plaintiff-Appellant. While Plaintiff-Appellant and her amici are critical of the trial court's reduction of her $20,000,000 non-economic damages award to $250,000 under R.C. 2315.18, they give short shrift to the fact she was awarded $14 million in compensatory damages for injury prior to R.C. 2315.18's enactment, $250,000 in non-economic damages for injury after

the statute's enactment, $206,861.43 in attorneys' fees and costs, and $100 million in punitive damages, for a total judgment in excess of $114 million. Even after application of the cap, this is a sum Plaintiff-Appellant is unlikely to ever recover from Defendant-Appellee, making this case an inappropriate platform for considering sweeping changes to Ohio's tort law.[2]

This brief focuses on Plaintiff-Appellant's challenge of R.C. 2315.18 under the Open Courts Clause of Article I, Section 16 of Ohio's Constitution. For the reasons set forth below, R.C. 2315.18 is constitutional under the Open Courts Clause and *Arbino* was correctly decided and should be reaffirmed by this Court. In *Arbino*, the Supreme Court analyzed the history of the right to a jury trial. PLAC will now add the history of the Open Courts Clause, which it believes is critical to understanding why *Arbino* was ultimately correctly decided. As also demonstrated below, *Arbino* is consistent with the purpose underlying the Open Courts Clause, which does not, and has never been intended to, interfere with the General Assembly's ability, as the "ultimate arbiter of policy," to make modifications to Ohio's tort remedies to address policy concerns as they arise.

[2] For this reason, PLAC also agrees with Defendant-Appellee that this appeal should be dismissed as having been improvidently granted, as Plaintiff-Appellant seeks what amounts to an advisory opinion.

II. STATEMENT OF THE CASE AND FACTS

The relevant facts are set forth in Brief of Defendant-Appellee Roy Pompa. Those facts are adopted by reference and incorporated herein.

In addition, PLAC points out that, while a portion of Plaintiff-Appellant's non-economic damages award was reduced from $20 million to $250,000 after the application of the non-economic damages cap found in R.C. 2315.18, Plaintiff-Appellant nevertheless obtained a substantial award against Defendant-Appellee. First, Plaintiff-Appellant was awarded attorneys' fees of $194,920.00 and litigation expenses of $11,941.43. (*See* Final Judgment Entry, T.d. 112, p. 1.) Second, she was awarded $14,000,000 for compensatory damages as a result of Defendant-Appellee's acts prior to the effective date of R.C. 2315.18, April 6, 2005. (*Id.*, p. 2.) Third, she was awarded $250,000 for compensatory damages resulting from Defendant-Appellee's acts after April 6, 2005, reduced from $20 million after application of the cap in R.C. 2315.18. (*Id.*) Fourth, she was awarded $100,000,000 in punitive damages. (*Id.*) This resulted in a total judgment of $114,456,861.43 *after* the application of the statutory noneconomic damages cap.

III. ARGUMENT

A. Standard of Review

A challenge to a statute's constitutionality is difficult, as statutes have a "strong presumption of constitutionality." *City of Toledo v. State*, 154 Ohio St.3d 41, 2018-Ohio-2358, ¶ 18 (quoting *Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d 106, 2004-Ohio-357, 802 N.E.2d 632, ¶ 16). "A party may challenge the constitutionality of a statute with either a facial challenge or an as-applied challenge." *Simpkins v. Grace Brethren Church of Delaware*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, ¶ 20 (internal quotes and citations omitted). "A facial challenge asserts that there is no conceivable set of circumstances in which the statute would be valid." *Id.* "An as-applied challenge, on the other hand, alleges that application of the statute in a particular factual context is unconstitutional." *Id.*

Facial constitutional challenges are "the most difficult to bring successfully because the challenger must establish that there exists no set of circumstances under which the statute would be valid." *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, ¶ 37. "[B]efore a court may declare [a statute] unconstitutional, it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *State ex rel. Lloyd v. Lovelady*, 108 Ohio St.3d 86, 2006-Ohio-151, ¶ 13; *Groch v. GMC*, 177 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 25.

The burden for an as-applied constitutional challenge is also steep, as "a party raising an as-applied constitutional challenge must prove by clear and convincing evidence that the statute is unconstitutional when applied to an existing set of facts." *Simpkins* at ¶ 22 (citing *Groch* at ¶ 181).

B. The Non-Economic Damages Caps Under R.C. 2315.18 Do Not Violate the Ohio Constitution's Open Courts Clause in Section 16 Article I Under Either an As Applied or Facial Challenge, As Plaintiff-Appellant Had a Meaningful Remedy.

R.C. 2315.18(B)(2) sets forth a cap on compensatory tort damages for "non-economic loss," which the statute defines as including "pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, disfigurement, mental anguish, or any other intangible loss." R.C. 2315.18(A)(4). The statute provides that damages for non-economic loss "shall not exceed the greater of two hundred fifty thousand dollars or an amount that is equal to three times the economic loss, as determined by the trier of fact, of the plaintiff in that tort action to a maximum of three hundred fifty thousand dollars for each plaintiff in that tort action or a maximum of five hundred thousand dollars for each occurrence that is the basis of that tort action." R.C. 2315.18(B)(2).

Plaintiff-Appellant challenges this cap as unconstitutional under Section 16, Article I of the Ohio Constitution, which is known as the "Open Courts Clause." In particular, Plaintiff-Appellant claims that the non-economic damages cap in R.C. 2315.18 "obliterates" or "emasculates" her common law remedies, thereby violating her right to open courts and a remedy. She claims that, by not affording a "catastrophic injury" exception for those sustaining mental health injuries, victims of sexual assault such as her are not afforded a "meaningful remedy."

In her Merit Brief, Plaintiff-Appellant muddies the waters as to whether she is pursuing an "as applied" challenge to R.C. 2315.18, a facial challenge, or both. She first indicates she is bringing an "as applied" challenge. But she then suggests she is bringing a facial challenge by requesting this Court to overturn *Arbino* in its entirety. However, the facts she presents in support of her position are only with respect to her vantage point as a sexual assault victim. She fails to address the statute's application in other circumstances, including the myriad varieties of tort cases

in Ohio courts not involving sexual assault. This falls far short of her burden on a facial challenge of establishing there is *no set* of circumstances existing under which the statute is valid.

But whether under an "as applied" or "facial" challenge, the non-economic damage cap in R.C. 2315.18 does not deny a meaningful remedy to Plaintiff-Appellant or anyone else and does not violate Ohio's Open Court's Clause. Ohio Constitution, Article I, Section 16 provides that "[a]ll 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." OHIO CONSTITUTION, Art. I, § 16. This Court has noted there are two separate guarantees under Section 16, first, that "legislative enactments may abridge individual rights only by 'due course of law,' a guarantee which is equivalent to that of the Due Process Clause of the Fourteenth Amendment" and, second, that "all courts shall be open to every person with a right to a remedy for injury to his person, property or reputation, with the opportunity for such remedy being granted at a meaningful time and in a meaningful manner." *Sedar v. Knowlton Constr. Co.*, 49 Ohio St.3d 193, 199, 551 N.E.2d 938 (1990). PLAC's brief focuses on this second guarantee.

The meaning of the phrase "shall have a remedy" has been long settled and does not guarantee a plaintiff any particular remedy. *Groch*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, at ¶ 52. The Open Courts Clause thus does not interfere with the General Assembly's ability to set policy and adjust tort remedies as needed. This Court has held that "[t]he Legislature has complete control over the remedies afforded to parties in the courts of Ohio, and it is a fundamental principle of law that an individual may not acquire a vested right in a remedy or any part of it, that is, there is no right in a particular remedy." *State ex rel. Michaels v. Morse*, 165 Ohio St. 599, 605 (1956). Over a century ago, this Court stated:

> No one has a vested right in rules of the common law. Rights of property vested under the common law cannot be taken away without due process, but the law itself

> as a rule of conduct may be changed at the will of the legislature unless prevented by constitutional limitations. The great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to new circumstances. Our constitutions were made in the contemplation that new necessities would arise with changing conditions of society.

Fassig v. State, 95 Ohio St. 232, 248 (1917). In other words, it is the province of the General Assembly, and not the courts, to be the "ultimate arbiter of public policy" to determine what changes need to be made to tort law and the remedies provided therein. *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 21.

"When the Constitution speaks of remedy and injury to person, property, or reputation," it only "requires an opportunity granted at a meaningful time and in a meaningful manner." *Hardy v. VerMeulen*, 32 Ohio St.3d 45, 47 (1987). To that end, this Court has struck down statutes under the Open Courts Clause where the statutes effectively eliminate a remedy *in its entirety*. *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 44 (citing *Brennaman v. R.M.I. Co.*, 70 Ohio St.3d 460, 466, 639 N.E.2d 425 (1994) & *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St.3d 54, 60-61, 514 N.E.2d 709 (1987)). For example, in *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 426, 633 N.E.2d 504 (1995), a statute requiring jury verdicts to be automatically set off by any collateral benefits received by the plaintiff was struck down where "it completely obliterates the entire jury award." This Court concluded the reduction of the entire jury award denied the plaintiff "a meaningful remedy" such that "open courts become hollow rights hardly worth exercising." *Id.*

Where, however, a statute still affords a plaintiff a meaningful remedy, it will be upheld as constitutional. Such was the case with the facial challenge of R.C. 2315.18's non-economic damages cap in *Arbino.* There, this Court noted that the non-economic cap does not "wholly deny persons a remedy for their injuries." *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 47. Even individuals not sustaining catastrophic injuries were permitted to recover their

full economic damages, up to $350,000 in noneconomic damages, and punitive damages. *Id.* This Court upheld the non-economic damage cap, concluding the remedies still available to tort plaintiffs were "meaningful." *Id.*

Since *Arbino*, this Court has repeatedly turned back challenges to statutes (including R.C. 2315.18) under the Open Courts Clause where meaningful remedies are still available to tort plaintiffs. In *Stetter v. R.J. Corman Derailment Servs., LLC*, this Court addressed Ohio's intentional-tort statute, R.C. 2745.01, which restricts intentional tort actions against employers to situations where the employer "committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur." 125 Ohio St. 3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, ¶ 18. The legislature further defined "substantially certain" to only those circumstances where "an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death." *Id.*, ¶ 19 (quoting R.C. 2745.01(B)). In essence, the General Assembly modified the common law intentional tort cause of action "to permit recovery for employer intentional torts *only* when an employer acts with specific intent to cause an injury." *Id.*, ¶ 26. The petitioners in that case claimed the restriction of the intentional tort cause of action violated the Open Courts Clause because it would essentially close the courts to employees injured by employers "acting with something less than deliberate intent." *Id.*, ¶ 45.

This Court rejected the petitioners claim and upheld R.C. 2745.01, finding it did not "violate the right to an open court or the right to a remedy." *Id.*, ¶ 55. In particular, the statute still afforded injured workers a "meaningful remedy," as it allowed employees to recover for injuries from a deliberate intent to injure and other circumstances, such as the deliberate removal of an equipment safety guard, and employees injured by employers acting with less than deliberate intent could still pursue remedies under Ohio's Workers' Compensation Act. *Id.*, ¶¶ 57-59.

In so ruling, this Court again "rejected the notion that 'causes of action as they existed at common law or the rules that govern such causes are immune from legislative attention.'" *Id.*, ¶ 52 (quoting *Hardy*, 32 Ohio St.3d at 49, 512 N.E.2d 626). To strike down the statute would interfere with the separation of powers between the legislature and the courts:

> This court would encroach upon the Legislature's ability to guide the development of the law if we invalidated legislation simply because the rule enacted by the Legislature rejects some cause of action currently preferred by the courts. Such a result 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.

Id. (quoting *Groch*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, at ¶ 118, *Sedar v. Knowlton Constr. Co.*, 49 Ohio St.3d at 202, 551 N.E.2d 938, *Klein v. Catalano*, 386 Mass. 701, 712-13, 437 N.E. 2d 514 (1982), & *Freezer Storage, Inc. v. Armstrong Cork Co.*, 476 Pa. 270, 280-81, 382 A.2d 715 (1978)).

Similarly, in *Groch v. GMC*, this Court followed *Arbino* and upheld Ohio's workers' compensation subrogation statute, R.C. 4123.931, in the face of a challenge under the Open Courts Clause. 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, at ¶ 52. This Court found that the statute afforded workers' compensation claimants a meaningful remedy, as it preserved their right to have some recovery, even after accounting for interests of the subrogee. *Id.*, ¶¶ 72-80.

And, in *Simpkins v. Grace Brethren Church of Del.*, this Court considered nearly the identical scenario presented here: an "as-applied" challenge to the caps on noneconomic tort damages in R.C. 2315.18(B) to a victim of sexual assault in her suit against the perpetrator's former employer. 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, at ¶ 1. In that case, the jury's award of non-economic damages of $3.5 million was reduced to $350,000. The appellant (represented by the same counsel as Plaintiff-Appellant here) advanced the same verbatim legal arguments now advanced by Plaintiff-Appellant, claiming that the reduction of the award denied

her a "meaningful remedy and violates her constitutional rights to open courts and a remedy." *Id.*, ¶ 30. *See also* Merit Brief of Appellant, *Simpkins v. Grace Brethren Church of Del.*, No. 2014-1953, at pp. 24-25. Following *Arbino*, this Court rejected the appellant's challenge and found that R.C. 2315.18 does not "'wholly deny persons a remedy for their injuries.'" *Id.* (quoting *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 47). This Court noted the many remedies still available to the appellant, including unlimited economic damages, up to $350,000 in noneconomic damages, and punitive damages. *Id.* Ultimately, the damages caps did "not foreclose a plaintiff from pursuing a claim nor does it completely obliterate the jury award." *Id.*, ¶ 31. Finally, this Court noted that the appellant in *Simpkins* failed to demonstrate that R.C. 2315.18 affects her differently than it does any other tort plaintiff." *Id.*

Whether Plaintiff-Appellant's challenge is considered an "as applied" or a "facial" challenge, *Arbino* and *Simpkins*, as well as a long line of jurisprudence from this Court, compel sustaining R.C. 2315.18 under the Open Courts Clause of the Ohio Constitution. Under no circumstances was Plaintiff-Appellant foreclosed from pursuing a claim, nor does it completely obliterate the jury's award. Plaintiff-Appellant was entitled to recover *unlimited* economic damages, her full pre-2005 non-economic damages, her post-2005 non-economic damages capped at $250,000, punitive damages, and attorneys' fees and costs. Far from being denied a meaningful remedy, Plaintiff-Appellant was ultimately awarded in excess of $114,000,000.

While Plaintiff-Appellant expresses concern about the application of the non-economic damages cap to victims of sexual assault because she claims victims' damages are more likely to be psychological in nature and not subject to the statute's "catastrophic physical injury" exception, Plaintiff-Appellant has offered no evidence establishing that she is ultimately denied a meaningful remedy under R.C. 2315.18. To the extent victims need medical care or treatment for mental

health issues, both past and future costs of such care are recoverable, uncapped, as economic damages, and capped non-economic damages are available. And the General Assembly has included a "safety-valve" in the statutory scheme for caps in tort actions, permitting victims of sexual violence to receive uncapped punitive damages awards where the perpetrator was "convicted of or pleaded guilty to a criminal offense that is a felony, that had as an element of the offense one or more of the culpable mental states of purposely and knowingly as described in that section, and that is the basis of the tort action." R.C. 2315.21. It was this safety-valve that ultimately permitted Plaintiff-Appellant to obtain a $100 million punitive damages award. In other words, the revised statutory remedy constructed by the General Assembly worked, affording Plaintiff-Appellant the ability to obtain a damages award of in excess of $114 million.

Plaintiff-Appellant's reliance upon a case from Oregon, *Clarke v. Oregon Health Sciences Univ.*, 343 Or. 581, 175 P.3d 418 (2007), for the proposition that R.C. 2315.18 "emasculates" Plaintiff-Appellant's remedy and is unconstitutional under the Open Courts Clause is problematic for several reasons. First, Plaintiff-Appellant's counsel relied upon this very case in its brief in *Simpkins*, *supra*, and this Court declined to follow it. *See* Merit Brief of Appellant, *Simpkins v. Grace Brethren Church of Del.*, No. 2014-1953, at pp. 24-25; *Simpkins*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, at ¶ 1. Second, this Oregon decision is not binding upon this Court, particularly in light of Ohio's well-developed case law interpreting the Clause. *State v, Price*, 162 Ohio St. 3d 609, 2020-Ohio-4926, 166 N.E.3d 1155, ¶28 (noting even United States Supreme Court cases are not binding on this Court on issues of state law). Third, *Clarke* is distinguishable on its face and is not helpful to this Court's resolution of the issues presented here, as the statute at issue in *Clarke* capped both economic and non-economic damages at $100,000 each, a situation

not present here. *Clarke*, 343 Or. at 608. Economic damages remain uncapped in Ohio, affording a meaningful remedy to tort plaintiffs not present under the facts in *Clarke.*

The constitutional threshold for R.C. 2315.18 under the Open Courts Clause is easily met here. The statute affords plaintiffs a "meaningful remedy" under the law. In no common-sense definition of the term could Plaintiff-Appellant's $114 million judgment be deemed not "meaningful." To hold R.C. 2315.18 unconstitutional and reverse *Arbino* would usurp the General Assembly's recognized role as the ultimate arbiter of policy and inject uncertainty into the law by jettisoning the very cap and legal precedent which have provided needed stability to Ohio's tort law for nearly 20 years. PLAC requests this Court affirm the decision below, reaffirm the holding in *Arbino*, and uphold the constitutionality of the non-economic damages caps under R.C. 2315.18.

C. Upholding R.C. 2315.18 Under the Ohio Constitution's Open Courts Clause Is Consistent with the History and Origins of the Clause.

Affirming 2315.18 and *Arbino* is consistent with the historical underpinnings of the Open Courts Clause in Section 16, Article I, which was designed to prevent interference with the courts by the King, as opposed to guaranteeing plaintiffs unlimited remedies. The language in Section 16, Article I has been in Ohio's Constitution since the state's first constitutional convention in 1802. But the roots of the provision go back even further to the Magna Carta. *Antoon v. Cleveland Clinic Found.*, 148 Ohio St.3d 483, 494, 2016-Ohio-7432, 71 N.E.3d 974; *see also* Jonathan Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, 32 RUTGERS L.J. 1005, 1006 (2001); Patrick McGinley, *Results from the Laboratories of Democracy: Evaluating the Substantive Open Courts Clause As Found in State Constitutions*, 82 ALBANY L. REV. 1449, 1455 (2019) (noting that the consensus is that the Open Courts Clauses derive ultimately from the Magna Carta's reforms of the courts).

Chapter 40 of the Magna Carta provided, "To no one will we sell, to no one deny or delay right or justice." Vincent R. Johnson, *The Magna Carta and the Beginning of Modern Legal Thought*, 85 MISS. L.J. 621, 627 (2016); *see also* Jack B. Harrison, *How Open Is Open? The Development of the Public Access Doctrine Under State Open Court Provisions*, 60 U. CIN. L. REV. 1307, 1310 (1992). Chapter 40 was, in part, an attempt to curtail the King's interference with the Courts. McGinley, 82 ALB. L. REV. at 1492. In the decades leading to the Magna Carta, "[b]ribery of the king and his judges, and delays in rendering judgment, had been serious problems." Johnson, 85 MISS. L.J. at 627; Hoffman, 74 OR. L. REV. at 1286. Indeed, the sale of writs had become so pervasive that English courts were unable to act independently. Hoffman, 74 OR. L. REV. at 1286; Harrison, 60 U. CIN. L. REV. at 1309-1310.

Centuries later the renowned English Justice and legal scholar, Sir Edward Coke, restated Magna Carta Chapter 40. Hoffman, 74 OR. L. REV. at 1286; *see also* David Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 OR. L. REV. 35, 39 (1986) (examining the history of an open courts provision in the Oregon Constitution). On the eve of the English Revolution, during the reign of King James I, Coke served stormy tenures as the chief justice of the Court of Common Pleas (1606-1613) and chief justice of the King's Bench (1613-1616). Hoffman, 74 OR. L. REV. at 1291; Daniel J. Hulsbosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence*, 21 L. & HIST. REV. 439, 452 (2003). A key issue that created conflict between Coke and the King was the question of "whether common-law judges, holding office at royal pleasure, were independent or were servants of the Crown who could be influenced or removed at will." Hoffman, 74 OR. L. REV. at 1291. King James I claimed the power to consult judges and even stop or delay proceedings in the common law courts. *Id.* *See* Christian R. Burset, *Advisory Opinions and the Problem of Legal Authority*,

74 VAND. L. REV. 621, 632-35 (2021). Coke objected to this, claiming the Magna Carta and subsequent common law developed from the document precluded the King from interfering with the courts. Hoffman, 74 OR. L. REV. at 1291; *see also* Burset, 74 VAND. L. REV. at 634.

What followed were a series of constitutional crises triggered by Coke, when he issued writs of prohibition against three of the King's ministries that were attempting to interfere with the common law courts. Hoffman, 74 OR. L. REV. at 1291. A conflict was thus borne, for if the King were supreme, how could a judge like Coke prevent the King's ministries from interfering with the courts? *Id.* Coke maintained that even the King was not above the common law. *Id.* at 1293; Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1674 (1994).

King James I's successor, Charles I, continued this pattern of regal interference with the courts. Hoffman, 74 OR. L. REV. at 1293; *see also* M.R.L.L. Kelly, *Common Law Constitutionalism and the Oath of Governance: "an hieroglyphic of the laws,"* 28 MISS. C. L. REV. 121, 137 (2009). To Coke this was an anathema. In response, he wrote the Second, Third, and Fourth Institutes, offering commentaries on the Magna Carta and protecting the prerogatives of the common law courts. Robert W. Gomulkiewicz, *Contracts Mattered As Much As Copyrights*, 66 J. COPYRIGHT SOC'Y 441, 466-67 (2019); Allen Dillard Boyer, *"Understanding, Authority, and Will": Sir Edward Coke and the Elizabethan Origins of Judicial Review*, 39 B.C. L. REV. 43, 92 (1997).

Coke's Second Institute set forth concepts that would be familiar to today's readers of Ohio's Open Courts Clause:

> Every Subject of this Realm, ***for injury done to him in bonis, terris, vel persona [goods, lands, or person]***, by any other Subject, be he Ecclesiastical, or Temporal, Free, or Bond, Man, or Woman, Old, or Young, or be he outlawed, excommunicated, or any other without exception, ***may take his remedy by the***

> ***course of the Law, and have justice, and right for the injury done him, freely without sale, fully without any denial, and speedily without delay***.

Sir Edward Coke, *The Second Part of the Institutes of the Lawes of England*, pp. 55-56 (1642) (1979 Reprint) (emphases added). "These phrases articulate the very abuses against which Coke railed: the sale of common-law justice through corruption and the denial and delay of justice through external interference with the courts by the King and his ministers." Hoffman, 74 OR. L. REV. at 1295; *see also* Dan Friedman, *Jackson v. Dackman Co.: The Legislative Modification of Common Law Tort Remedies Under Article 19 of the Maryland Declaration of Rights*, 77 MD. L. REV. 949, 965 (2018).

That these principles found their way into state constitutions at the time of the American Revolution should come as no surprise, as colonists encountered precisely the same meddling in court affairs as encountered by Coke a century and a half earlier. John Vail, *A Common Lawyer Looks at State Constitutions*, 32 RUTGERS L.J. 977, 981 (2001) (noting that Coke's interpretation of Chapter 40 "is undoubtedly the one that influenced the framers of American constitutions"). Colonists had severe concerns regarding the dispensing of justice by English Courts and "demanded that justice be administered in a more impartial manner . . . than it had been in England." Hoffman, 74 OR. L. REV. at 1297; *see also* Harrison, 60 U. CIN. L. REV. at 1311.

Ultimately, in response to Coke's writings, the Act of Settlement of 1701 guaranteed judicial independence of the English courts from the Crown. But this Act did not extend to the colonies, as judges there served at the pleasure of the King or his appointed governors. Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, *17 (2000). When the Pennsylvania Assembly attempted to grant judges the same tenure as English judges in 1759, the Crown overruled it. Hoffman, 74 OR. L. REV. at 1301. When the Massachusetts colonial

legislature declined to appropriate funds for judges due to the lack of the judiciary's independence from the Crown, the Crown moved the responsibility for paying judges to England, creating "fears that judges, dependent upon the Crown for their salaries, would become enemies to the Constitution." *Id.* at 1302; McGinley, 82 ALB. L. REV. at 1459. The Stamp Act, by rendering invalid decisions without the required stamped papers, closed American courts to civil litigation. Hoffman, 74 OR. L. REV. at 1303; *Town of W. Terre Haute v. Roach*, 52 N.E.3d 4, *9 (Ind. Ct. App. 2016) (citing The Blackwell Encyclopedia of the American Revolution, at 117 (1991)). Following a riot in response to the Townshend Duties, Parliament passed a resolution requesting the Massachusetts Governor identify persons engaged in acts of treason to be prosecuted in England. John Marshall, 2 The Life of George Washington (Philadelphia, C.P. Wayne 1804). And the Crown sought to bypass common pleas courts on trade issues by extending jurisdiction to the vice-admiralty courts to enforce unpopular trade laws. No juries were permitted in these proceedings, leaving litigants subject to the whims of a political judge appointed by the royal governor. Bernard Bailyn, *The Ideological Origins of the American Revolution*, p. 108 (1967).

These grievances ultimately found their way into the Declaration of Independence. In that document, Thomas Jefferson complained of the King's refusal to assent to laws for "establishing Judiciary powers" and his making "Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." DECLARATION OF INDEPENDENCE (1776).

The Crown's refusal to give the colonists the same justice as British citizens inspired the colonists to draft new state constitutions including Open Courts Clauses reiterating the concepts expressed by Coke. Jarom R. Jones, *Mormonism, Originalism, and Utah's Open Courts Clause*, 2015 B.Y.U. L. REV. 811, 811 (2015). Just a few months after the signing of the Declaration of Independence, Delaware adopted its "Declaration of Rights and Fundamental Rules of Delaware

State" containing an Open Courts Clause – the first Open Courts Clause in a state constitution. *Ramunno v. Cawley*, 705 A.2d 1029, n 12 (Del. 1998). Twenty-seven years later, in 1802, Ohio adopted its Open Courts Clause in its first constitution, which remains largely unchanged to this day. *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, ¶ 11. Today, forty states have Open Courts Clauses in their constitutions. McGinley, 82 ALBANY L. REV. at 1455.

Open Courts Clauses thus have their historical underpinnings in protecting the independence and integrity of the judiciary. The purpose of such provision was not, as suggested by Plaintiff-Appellant, to guarantee limitless verdicts. As commentators have opined, "[t]he historical origins of the open courts clause do not support the proposition that it was intended to be a 'remedies' clause, as that term is used today." Hoffman, 74 OR. L. REV. at 1316. The purpose was, instead, to further principles of separation of powers and protect the courts from undue influence from the King. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1686 (2012); McGinley, 82 ALB. L. REV. at 1492.

Consistent with this historical background, and the principle of separation of powers, this Court has consistently held that the General Assembly has great discretion in determining the remedies to be afforded to tort claimants. *State ex rel. Michaels*, 165 Ohio St. at 605, 138 N.E.2d 660 (noting the "Legislature has complete control over the remedies afforded to parties in the courts of Ohio" and that there is "no right to a particular remedy"); *Groch*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, at ¶ 150 (noting the General Assembly determines causes of action and when remedies will be available); *Simpkins*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, at ¶ 33 ("The General Assembly has the authority to determine what causes of action the law will recognize, to alter the common law by abolishing, defining or limiting those causes of action, and to determine what remedies are available."); *Hardy*, 32 Ohio St.3d at 49, 512 N.E.2d

626 ("We do not suggest that causes of action as they existed at common law or the rules that govern such causes are immune from legislative attention.").

To that end, this Court has previously deferred to the legislature in modifying tort remedies. *Strock v. Pressnell*, 38 Ohio St.3d 207, 214, 527 N.E.2d 1235 (1988) (upholding statute removing causes of action for torts relating to promises to marry); *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, ¶ 105 (upholding statute removing torts for workplace injuries). This principle was again reaffirmed in *Arbino*, where this Court deferred to the legislature's prerogative to make policy choices it deems to be in the interest of Ohio's citizens. *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 47. Only when a legislature's provision effectively prevents individuals from pursuing relief for their injuries -- a *de facto* denial of access to the courts -- will a statute be deemed to violate the Open Courts clause. *Id*. *See also Gaines v. Preterm-Cleveland*, 33 Ohio St.3d at 60, 514 N.E.2d 709 (1987) (striking down statute of limitations where it left claimant without a remedy, noting the "[d]enial of a remedy and denial of a *meaningful* remedy lead to the same result: an injured plaintiff ***without legal recourse***.") (emphasis added); *Brennaman v. R.M.I. Co.*, 70 Ohio St.3d 460, 466, 639 N.E.2d 425 (1994), *reversed in part by Groch*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, at ¶ 146) (striking down statute of repose which barred claim before claimant knew of his injuries, noting that open courts doctrine requires "a reasonable period of time to enter the courthouse to seek compensation after the accident"); *Sorrell v. Thevenir*, 69 Ohio St.3d at 426, 633 N.E.2d 504 (1994) (striking down statute requiring collateral benefits to be set off from jury award where the set off "completely obliterates the entire jury award"); *Burgess v. Eli Lilly & Co.*, 66 Ohio St.3d 59, 63, 609 N.E.2d 140 (1993) (statute of repose for claims for injury caused by DES).

Reversing *Arbino* would therefore not only run counter to this Court's well-established precedent, it would be contrary to the fundamental purpose underpinning Ohio's Open Courts Clause. The Open Courts Clause has never been intended to interfere with an elected General Assembly's ability to set policy and modify tort remedies to address changing circumstances over time. R.C. 2315.18 affords litigants meaningful remedies within the meaning of Ohio's Open Courts Clause and meets constitutional muster. PLAC requests this Court again uphold 2315.18 and reaffirm its holding in *Arbino.*

IV. CONCLUSION

Far from being unworkable, R.C. 2315.18 and *Arbino* have stabilized Ohio's tort law, protected Ohio's manufacturing sector from excessive and speculative noneconomic damages verdicts, and are fully consistent with this Court's established precedent and the historical underpinnings of the Open Courts Clause. PLAC strongly urges this Court to uphold the noneconomic damages caps in 2315.18 and reaffirm the sound reasoning of *Arbino.*

Respectfully submitted,

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