SUPREME COURT
STATE OF NEW MEXICO

No. S-1-SC-37231

SUSAN L. SIEBERT,

Plaintiff-Appellee,

VS.

REBECCA C. OKUN, M.D., AND
WOMEN'S SPECIALISTS OF NEW MEXICO, LTD.,

Defendants-Appellants.

On Appeal from the Second Judicial District Court, Bernalillo County
No. D-202-CV-2013-05878, Hon. Victor S. Lopez, Presiding

APPELLANTS' BRIEF IN CHIEF

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(A)(1)(c) NMRA, defendants-appellants Rebecca C. Okun, M.D., and Women's Specialists of New Mexico, Ltd., state that this Appellants' Brief in Chief complies with the length limitations of Rule 12-213(F) NMRA. The brief uses a proportionately spaced font, has a typeface of 14 points, and contains 10,655 words. The word count is obtained using Microsoft Word 2010.

/s/ Dana S. Hardy

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SUMMARY OF PROCEEDINGS

A. Nature of the Case

After the trial of Plaintiff Susan Siebert's Medical Malpractice Act ("MMA") claim, Defendants Rebecca C. Okun, M.D., and her employer, Women's Specialists of New Mexico, Ltd. ("WSNM"), moved to conform the judgment to the MMA's damages cap. Over Defendants' objection, the district court held a two-and-a-half-day evidentiary hearing on Siebert's equal-protection and due-process challenges to the cap. But both sides' evidence showed that the MMA cap continues to serve its original purpose of ensuring the availability of malpractice insurance in New Mexico, and continues to insulate New Mexico from cyclic changes in the national insurance market. Moreover, under this Court's MMA precedent, Siebert lacks standing to assert those challenges, and the expert evidence showed that she in fact recovered more under the MMA than she likely would have through a common-law cause of action.

With the equal-protection and due-process challenges foreclosed by the evidence and the law, the district court struck down the MMA cap on a fact-free ground—that the cap violated Siebert's right under the New Mexico Constitution to a jury trial. But the New Mexico Court of Appeals had squarely rejected that jury-right challenge to the MMA cap in *Salopek v. Friedman*, 2013-NMCA-087, ¶¶ 59-61, 308 P.3d 139. The district court contumaciously refused to follow that controlling decision, which had recognized that an MMA claim is a new statutory

cause of action to which the constitutional jury right does not apply. The district court also failed to address the basis on which most federal and state courts have rejected jury-right challenges to statutory damages caps, namely, that caps do not interfere with the jury's factual findings, but merely establish, on a broad policy basis applicable to all covered claims, the *legal consequences* of the jury's findings.

The district court's invalidation of the MMA cap on jury-right grounds is incorrect as a matter of law and should be reversed. Its intimation, without deciding, that the cap may violate equal protection, due process, or the separation of powers should be rejected as contrary to law and fact. As it has for over forty years, the cap continues to serve the people of this state, and the cloud over its constitutional validity should be lifted once and for all.

B. The Proceedings Below

Siebert brought this action under the MMA against Dr. Okun and WSNM (together, "Defendants"). (1 RP 1-9.) Her claim was tried to a jury from March 7 to March 14, 2016. (5 RP 1157.) The jury awarded $2,600,000 in damages. (5 RP 1117.) The district court entered judgment in that amount on April 11, 2016. (5 RP 1157-58.)

Defendants moved to amend the judgment to conform the award to the MMA's limitations on recovery. (6 RP 1419-28.) Defendants explained that the total award should be $1,535,916.15, reflecting the *uncapped* (and stipulated) value of Siebert's accrued medical care and

related benefits ($935,916.15), and $600,000 of Siebert's capped nonmedical damages. (5 RP 1131, 1420.) It is undisputed that this capped amount covers all of the economic losses Siebert claimed at trial (lost earning capacity in a present value of $313,607.00) and over $286,000 in general damages for her pain and suffering. (4 RP 838 ¶ 3(A)(z); Trial Ex. 42, McDonald Report 1.)

In response to Defendants' motion, Siebert challenged the constitutionality of the cap. (6 RP 1464-84.) Over Defendants' objection, the district court *sua sponte* set an evidentiary hearing on the constitutional issues. (7 RP 1562-63, 1573; 7 RP 1574-75, 1579-80, 1595-604; 8 RP 1786-87.) After expert discovery, the court held the hearing from May 30 to June 1, 2017.[1] (8 RP 1934-40, 1972-73.) The parties then submitted simultaneous post-trial briefs and proposed findings of fact and conclusions of law. (10 RP 2295-333, 2334-69; 10 RP 2370-402, 2403-18.)

On March 23, 2018, the district court issued its Memorandum Opinion and Order, holding that the MMA cap violated Siebert's constitutional right to a jury trial. (10 RP 2463-78.) The court rejected the court of appeals' conclusion in *Salopek* that the MMA created a new statutory cause of action, in favor of its own view that the MMA merely modified the common-law claim to which the jury right attaches. (10 RP

[1] The transcripts of the evidentiary hearing are cited respectively as "1 Tr.," "2 Tr.," and "3 Tr."

2473.) The court intimated, without deciding, that the cap also might violate the New Mexico Constitution's provisions on equal protection, due process, and separation of powers. (10 RP 2468.)

On April 6, 2018, Defendants timely appealed to the New Mexico Court of Appeals. (10 RP 2481-500.) In light of *Salopek*, Defendants moved, with Siebert's concurrence, for certification of the appeal to this Court under Rule 12-606 NMRA 2018 and NMSA 1978, § 34-5-14(C) (1996). The court of appeals certified the appeal, recognizing it had already "addressed the constitutional issues presented by the district court's decision in *Salopek*," and the district court's decision has a "destabilizing effect ... on healthcare, practitioners, and the bar." (Order 3, filed Aug. 30, 2018.) This Court accepted certification.

In November 2016, over six months before the evidentiary hearing, the district court issued an order granting in its entirety Siebert's extraordinary cost bill of over $85,000. (8 RP 1819.) The court did so without a hearing, even though both sides requested one, and without addressing specific cost items or Defendants' objections. Some of the costs were legally unrecoverable, including, among other items, thousands of dollars for each of the following:

- trial witness fees under Rule 1-054(D)(2)(g) NMRA 2018 for three treating physicians who were not qualified as expert witnesses
- fees for a court-ordered mediation, and
- video editing costs.

Defendants timely noticed an appeal from this order (8 RP 1864-66), and the court of appeals consolidated that appeal with Defendants' appeal of the damages-cap ruling before certifying the appeal to this Court. Defendants do not wish to distract this Court from the critical constitutional issues raised by the district court's erroneous invalidation of the cap. They therefore respectfully submit that all cost issues should be remanded to the court of appeals upon completion of this Court's review of the cap.

C. Summary of Facts

Dr. Okun was a board-certified obstetrician/gynecologist practicing in Albuquerque, where she was employed by WSNM. (4 RP 833 ¶ 2(c)-(d).) Both Dr. Okun and WSNM were qualified health care providers ("QHCPs") under the MMA. (4 RP 833 ¶¶ 2(f)-(g).)

In February 2011, Dr. Okun performed a hysteroscopy on Susan Siebert at Lovelace Women's Hospital in Albuquerque. (4 RP 834 ¶ 2(k).) As a result of perforations in her uterus and intestine, Siebert, who was then 62, required emergency surgery the next day to remove her uterus, fallopian tubes, and ovaries. (4 RP 834-35 ¶ 2(p)-(r); 5 RP 1131.) Siebert remained hospitalized until late May 2011 and later received outpatient rehabilitation therapy. (4 RP 835 ¶ 2 (r), (u)-(v).)

At the trial of Siebert's MMA claim against Defendants, the jury was instructed, per the parties' stipulation, that Siebert's expenses for medical care and related benefits incurred as the result of the alleged

malpractice were $935,916.15. (5 RP 1131.) Siebert also claimed loss of earnings capacity in the present value of $313,607.00, representing the period from her initial surgery through 2017, when she would be 69 years old. (4 RP 838 ¶ 3(A)(z); Trial Ex. 42, McDonald Report 1.) Aside from medical-care costs and loss of earning capacity, Siebert did not present evidence of other economic losses. (10 RP 2297 ¶10.)

ARGUMENT

I. The district court erred in striking down the MMA damages cap based on the right to a jury trial.

The district court erroneously held that the MMA damages cap infringed Siebert's right to a jury trial under the New Mexico Constitution, which provides, "The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate." N.M. Const. art. II, § 12. This Court reviews de novo a constitutional challenge to a statute. *Bounds v. State ex rel. D'Antonio*, 2013-NMSC-037, ¶ 11, 306 P.3d 457. The Court has long recognized "the strong presumption in favor of constitutional validity which attaches to legislative enactments." *Otto v. Buck*, 1956-NMSC-040, ¶ 16, 61 N.M. 123, 295 P.2d 1028. And it remains true that "[t]he majority of courts which have considered the issue agree that legislative caps upon recoverable tort damages do not violate the constitutional right to a jury trial." *Murphy v. Edmonds*, 601 A.2d 102, 117 (Md. 1992).

There are two independent reasons why the MMA cap does not violate the jury right. First, even where there is an "inviolate" right to a jury trial, statutory damages caps do not infringe that right because they affect only the legal consequences of the jury's factual findings. Second, as the court of appeals held in *Salopek*, the MMA created a statutory cause of action to which the constitutional jury right does not apply.

A. The MMA merely creates a broad legal rule limiting the scope of remedies in all MMA cases.

The MMA cap does not infringe the constitutional right to a jury trial because it does not affect the jury's role as fact-finder. Instead, the cap restricts the scope of the available remedy by establishing, on a broad policy basis, the *legal effect* of the jury's findings. Under the statute, "[e]xcept for punitive damages and medical care and related benefits, the aggregate dollar amount recoverable by all persons for or arising from any injury or death to a patient as a result of malpractice shall not exceed six hundred thousand dollars ($600,000) per occurrence." NMSA 1978, § 41-5-6(A) (1992). In an action against a QHCP, the MMA provides a partial, fixed cap that does not turn on the facts of the case. In doing so, the MMA allocates responsibility for recoverable amounts between the QHCP and the Patient Compensation

Fund ("PCF"), which the MMA established.[2] A QHCP's personal liability for monetary damages, medical care, and related benefits is limited to $200,000 per occurrence. NMSA 1978, § 41-5-6(D). The PCF pays any additional recoverable amounts beyond that $200,000 limit. NMSA 1978, § 41-5-6(D). The MMA does *not* cap the recovery of accrued or future costs of medical care and related benefits,[3] nor does it cap punitive damages, which are recoverable solely from the QHCP. NMSA 1978, §§ 41-5-6(A), 41-5-7(H).

This statutory framework does not infringe the right to a jury. Under New Mexico law, the jury right encompasses only a jury's determination of "true issues of fact." *Sanchez v. Gomez*, 1953-NMSC-053, ¶8, 57 N.M. 383, 259 P.2d 346. Litigants are "entitled to have a jury resolve 'any disputed facts relevant to the legal issues.'" *N.M. Law Grp., P.C. v. Byers*, 2018-NMCA-023, ¶ 6, 413 P.3d 875 (2017) (quoting *Blea v. Fields*, 2005-NMSC-029, ¶ 37, 138 N.M. 348, 120 P.3d 430). The MMA cap does not determine any "true issue of fact" or resolve any

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[2] The PCF is funded by an annual surcharge levied on all QHCPs and determined based on actuarial principles by the Superintendent of Insurance. NMSA 1978, § 41-5-25(B) (1997).

[3] The MMA defines "medical care and related benefits" as "all reasonable medical, surgical, physical rehabilitation and custodial services and includes drugs, prosthetic devices and other similar materials reasonably necessary in the provision of such services." NMSA 1978, § 41-5-3(D) (1977).

factual dispute; it applies a legal restriction on the scope of the remedy after the jury has found the facts.

In *Wachocki v. Bernalillo County Sheriff's Department*, 2010-NMCA-021, 147 N.M. 720, 228 P.3d 504, the New Mexico Court of Appeals relied on this distinction in rejecting a jury-right challenge to the Tort Claims Act ("TCA") damages cap, explaining that the court could not see how "the right to a jury incorporate[s] a right *to maximum recovery*." *Id.* ¶ 45 (emphasis added).[4] The court "fail[ed] to see how the right to a jury … changes the analysis of or the result reached" by this Court when it concluded that the New Mexico Constitution did not "'purport[] to control the scope or substance of remedies afforded.'" *Id.* (quoting *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 23, 125 N.M. 721, 965 P.2d 305).

For this reason, federal and state courts have overwhelmingly rejected jury-right challenges to statutory damages caps. As the North Dakota Supreme Court recently held, "the damage cap … does not preclude a jury from determining facts, including whether and to what extent a claimant was injured; rather, the damage cap limits the scope of recovery." *Larimore Pub. Sch. Dist. No. 44 v. Aamodt*, 908 N.W.2d

[4] Although *Wachocki* involved a claim against the government, the court of appeals did not limit its analysis of the jury right to such claims, and the principle underlying the court's conclusion extends to suits against private parties.

442, 454 (N.D. 2018). "Once the jury has made its findings of fact with respect to damages, it has fulfilled its constitutional function; it may not also mandate compensation as a matter of law." *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989) (upholding Virginia cap). Quoting *Boyd*, the Eighth Circuit recently held that Nebraska's malpractice-damages cap did not violate the jury right because "'it is not the role of the jury to determine the legal consequences of its factual findings.'" *Schmidt v. Ramsey*, 860 F.3d 1038, 1045-46 (8th Cir. 2017). Instead, "[t]he legal consequences and effect of a jury's verdict are a matter for the legislature (by passing laws) and the courts (by applying those laws to the facts as found by the jury)." *Kirkland v. Blaine Cty. Med. Ctr.*, 4 P.3d 1115, 1120 (Idaho 2000) (upholding cap).[5] The Pennsylvania Supreme Court put it bluntly: "the plaintiff's right to seek to have the

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[5] Cases similarly upholding damage caps are too numerous to include here. *E.g.*, *Learmonth v. Sears, Roebuck & Co.*, 710 F.3d 249, 260 (5th Cir. 2013) (Mississippi cap did "not ... alter a jury's factual damages determination, but instead ... impose[d] a strictly legal limitation on the judgment that provides the remedy for a noneconomic injury"); *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1202 (9th Cir. 2002) (upholding Title VII cap); *Davis v. Omitowoju*, 883 F.2d 1155, 1162 (3d Cir. 1989) (Virgin Islands' malpractice cap "was merely implementing a policy decision of the legislature"); *Pulliam v. Coastal Emergency Servs. of Richmond, Inc.*, 509 S.E.2d 307, 312 (Va. 1999) ("once the jury has ascertained the facts and assessed the damages, ... the constitutional mandate is satisfied"). As one court summarized, "[t]he federal courts regularly uphold ... jury verdict caps" because they do not "impose their own factual determinations." *In re W.R. Grace & Co.*, 475 B.R. 34, 169 (D. Del. 2012).

merits of her cause determined by a jury, rather than some other *process*," and "the limited amount of recovery allowed" are "obviously not the same thing." *Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1132-33 (Pa. 2014).

Rather than address this body of law, the district court merely opined, in a footnote bereft of supporting authority, that "[l]imiting a plaintiff from recovering or enforcing the full measure of damages awarded under the verdict would violate the constitutional mandate that the jury right remain inviolate." (10 RP 2477 n.4.) The court elsewhere cited a Washington decision that has been widely rejected by other courts, *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 721 (Wash. 1989), and two other cases that did not involve damages caps. *Hous. Fin. & Dev. Corp. v. Ferguson*, 979 P.2d 1107 (Haw. 1999); *Dep't of Revenue v. Printing House*, 644 So. 2d 498 (Fla. 1994). (10 RP 2477-78.)

Nothing about New Mexico law requires a departure from the majority rule. While the New Mexico Constitution makes the jury right "inviolate," at least ten other states with similar provisions have upheld damages caps, recognizing that the "inviolate" nature of the jury right "does not answer the question of what that right encompasses." *Horton v. Ore. Health & Sci. Univ.*, 376 P.3d 998, 1036 (Ore. 2016).[6] Moreover,

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[6] *See also Larimore*, 908 N.W.2d at 454 (North Dakota); *Zauflik*, 104 A.3d at 1132-33 (Pennsylvania); *Learmonth*, 710 F.3d at 260 (Mississippi law); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 431 (Ohio 2007); *Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43,

pursuant to the MMA, NMSA 1978, § 41-5-6(A), the district court gave no instruction to the jury relating to the damages cap, which ensured that the cap in no way interfered with the jury's deliberations or fact-finding. *See Kirkland*, 4 P.3d at 1120 (praising similar jury-instruction provision).

The district court's ruling is further undermined by the court of appeals' rejection, in *Salopek* and *Wachocki*, of the parallel argument that a damages cap constitutes a "legislative remittitur" in violation of the separation of powers. *Salopek* reasoned that the MMA cap does not interfere with the judicial branch's ability to administer its own rules and procedures based on the facts and evidence, but instead constitutes a legislative limitation that "requires no determination of the proportionality of a particular jury's response to a particular party." 2013-NMCA-087, ¶ 61. Similarly, *Wachocki* explained that a statutory cap created no "irreconcilable conflict" with the judge's ability to order a remittitur under Rule 1-059(A) because a "cap is based on a broad legislative policy, rather than on any consideration of whether a damages award is unsupported by evidence or the result of some undue

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75 (Neb. 2003); *Kirkland*, 4 P.3d at 1117 (Idaho); *Univ. of Miami v. Echarte*, 618 So. 2d 189, 191 (Fla. 1993); *Fein v. Permanente Med. Grp.*, 695 P.2d 665, 681 (Cal. 1985); *Johnson v. St. Vincent Hospital, Inc.*, 404 N.E.2d 585, 592 (Ind. 1980), *overruled on other grounds*, *In re Stephens*, 867 N.E.2d 148 (Ind. 2007); *Murphy*, 601 A.2d at 117 (Maryland).

influence." 2010-NMCA-021, ¶¶ 47, 49.[7] Just as a cap "does not interfere with the 'judicial machinery administered by the courts for determining the facts upon which the substantive rights of the litigant rest and are resolved,'" *id.* ¶ 49 (quoting *Ammerman v. Hubbard Broad., Inc.*, 1976-NMSC-031, ¶ 8, 89 N.M. 307, 551 P.2d 1354), the cap does not interfere with the jury's determining the facts to which the cap's "broad legislative policy" will be applied. While the district court suggested that the MMA cap "interferes with ... the Court's independence from legislative interference of its decision making" and that "[t]he separation of powers rights may also be implicated" (10 RP 2467-68), the court failed to acknowledge the controlling case law that had thoroughly rejected its insinuation.

In enacting the MMA cap, the Legislature simply exercised its authority to supplant or modify a common-law cause of action. "[T]he Legislature, as the policy-making branch of government, can alter or abrogate the common law ...." *City of Albuquerque v. N.M. Pub.*

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[7] Numerous courts have rejected the separation-of-powers challenge, which rests on the "outlandish assumption" that "damages fall within the exclusive province of the court system," when caps are better characterized as the modification of causes of action. *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1055 (Alaska 2002); *see, e.g.*, *Learmonth*, 710 F.3d at 264-65 (Mississippi law); *Miller v. Johnson*, 289 P.3d 1098, 1121-22 (Kan. 2012); *MacDonald v. City Hosp., Inc.*, 715 S.E.2d 405, 415 (W. Va. 2011); *Garhart v. Columbia/HealthONE, LLC*, 95 P.3d 571, 581 (Colo. 2004); *Kirkland*, 4 P.3d at 1122 (Idaho); *Gourley*, 663 N.W.2d at 77 (Nebraska); *Pulliam*, 509 S.E.2d at 313 (Virginia).

Regulation Comm'n, 2003-NMSC-028, ¶ 16, 134 N.M. 472, 79 P.3d 297. This Court has "long recognized" that the Legislature has "*plenary power* to alter the common law." *Jones v. Murdoch*, 2009-NMSC-002, ¶ 25, 145 N.M. 473, 200 P.3d 523 (emphasis added). This is true for the MMA. *See Cummings v. X-Ray Assocs. of N.M., P.C.*, 1996-NMSC-035, ¶ 33, 121 N.M. 821, 918 P.2d 1321 (recognizing that the Legislature can "legitimately foreclose[]" a cause of action in upholding the MMA statute of repose).

Notably, New Mexico's constitution is unlike those in some other states that expressly prohibit the legislature from abrogating common-law causes of action[8] or limiting the recovery of damages.[9] When the New Mexico and Arizona constitutional conventions drafted their constitutions in late 1910, the Arizona delegates included an anti-abrogation clause, but the New Mexico delegates did not. And the courts have "no power by construction to enlarge the scope of constitutional provisions beyond their intent" by turning the jury-right clause into an

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[8] *E.g.*, Ariz. Const. art. 18, § 6 ("The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation ....").

[9] *E.g.*, Ariz. Const. art. 2, § 31 ("No law shall be enacted in this State limiting the amount of damages to be recovered for causing the death or injury of any person."); Ark. Const. art. 5, § 32 (providing that, apart from worker's-compensation statute, "[n]o law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property").

anti-abrogation clause. *Bd. of Educ. v. Robinson*, 1954-NMSC-055, ¶ 14, 57 N.M. 445, 259 P.2d 1028 (1953) (quotation omitted). Accordingly, in enacting the MMA, the Legislature did not violate the New Mexico Constitution, but set a broad legislative policy for future remedies in all MMA cases.

B. The MMA damages cap does not violate the jury right because the MMA cause of action is statutory.

The district court also erroneously refused to follow the court of appeals' controlling decision in *Salopek*.[10] The court of appeals squarely held that the MMA cap does not violate the constitutional jury right because the MMA "creates a new statutory cause of action, which did not exist when the Constitution was adopted and is not recognized under the common law." *Salopek*, 2013-NMCA-087, ¶ 53. In New Mexico, "[i]t is settled that 'where the Legislature creates a right of action pursuant to a special statutory proceeding, there is no right to a jury trial under our constitution unless the statute so provides.'" *Id.* (quoting *Smith v. First Alamogordo Bancorp,* 1992-NMCA-095, ¶ 12, 114 N.M. 340, 838 P.2d 494). In *Salopek*, the court catalogued the statutory benefits and restrictions for patients and QHCPs that distinguish the MMA claim from a common-law malpractice claim. *Id.*

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[10] *See Alexander v. Delgado*, 1973-NMSC-030, ¶ 9, 84 N.M. 717, 507 P.2d 778 ("a court lower in rank ... cannot deviate [from] ... precedent, irrespective of whether it considers the rule laid down therein as correct or incorrect" (quotation omitted)).

¶¶ 53-57. The court concluded, "When we consider why the Act was adopted, and how the Act as a whole accomplishes its purposes, we are confident in concluding that the Act created a new statutory cause of action not recognized under the common law." *Id.* ¶ 58.

The district court conceded *Salopek*'s premise when it stated that, "[s]ifted down to the MMA's bare essentials, the Act provides a *statutory substitute* for the common law cause of action" (10 RP 2466 (emphasis added)), but the court tossed aside as "conclusory language" (10 RP 2470) *Salopek*'s holding that the MMA actually "created an entirely new statutory cause of action that was not recognized under the common law." *Salopek*, 2013-NMCA-087, ¶ 50. Instead, the district court claimed that the MMA merely "renam[ed]" or "re-defined the pre-existing common law cause of action." (10 RP 2469, 2476.) The court concluded that "[t]he MMA malpractice claim is essentially a negligence claim, except for the legislative modification," and "[a] common law medical negligence cause of action is not sufficiently distinct from a medical malpractice claim under the MMA as might overcome the intended inviolate constitutional protection." (10 RP 2473.)

The *ipse dixit* character of the district court's analysis is obscured by its lengthy but gratuitous discussions of the obvious propositions that the constitutional jury right attaches to *common-law* malpractice claims and therefore continues to attach to such claims against *non-QHCPs*. (10 RP 2466-67, 2471-77.) The court asserted that "Plaintiff's

overriding constitutional right to a jury trial is based on preexisting *common law* rights in medical negligence cases" (10 RP 2471), but that is true only if *Salopek* was wrong and the MMA claim remains, for constitutional purposes, a common-law claim. The district court's conclusion that *Salopek* had "fail[ed] to consider this historical common law status of the medical negligence cause" (10 RP 2475) simply missed the point of *Salopek*.

The district court also disregarded *Salopek*'s explicit holding by falsely implying that the court of appeals was concerned about "the MMA statutory jury right." (10 RP 2474.) *See* NMSA 1978, § 41-5-4 (1977) (providing that an MMA claimant may "demand right of trial by jury"). But *Salopek* was entirely concerned about the *constitutional* jury right. *Salopek*, 2013-NMCA-087, ¶¶ 50-51, 53, 58. So is Siebert's constitutional challenge here. The district court acknowledged that the MMA cap "would presumably apply" if only the statutory jury right were at issue. (10 RP 2465.)

In rejecting *Salopek*'s explicit holding, the district court cited no intervening decision of this Court, but instead relied on the Court's prior decision in *Lisanti v. Alamo Title Insurance of Texas*, 2002-NMSC-032, 132 N.M. 750, 55 P.3d 862. (10 RP 2469.) *Salopek*, however, was consistent with *Lisanti*—*Salopek* cited *Lisanti* for the governing test. 2013-NMCA-087, ¶ 51. In *Lisanti*, this Court held that the jury right continued to attach to contract, bad faith, and fiduciary-duty claims

involving title-insurance coverage because the title-insurance aspect was simply "a *factual context* that could not have existed in 1912. It is unreasonable, for example, to say that no jury trial right attaches to a breach of contract claim concerning the purchase of a computer simply because computers did not exist when the New Mexico Constitution was adopted." 2002-NMSC-032, ¶ 13 (emphasis added). The Court held that "the relevant question" was whether "the more generally described cause of action, such as breach of contract or breach of fiduciary duty, was triable to a jury in 1912." *Id.* In other words, "[t]he type of claim, not its subject matter, controls." *Id.* ¶ 15.

The MMA is not about any "factual context," such the type of medical care provided. *Salopek* correctly recognized that the MMA so fundamentally changed the scheme for malpractice claims that, taken as a whole, an MMA claim against QHCPs constitutes a new cause of action. When one "closely examine[s] the overall structure of the statute ..., as well as the particular statute's function within a comprehensive legislative scheme," *Salopek*'s conclusion is well supported because "a statutory subsection may not be considered in a vacuum." *State v. Rivera*, 2004-NMSC-001, ¶ 13, 134 N.M. 768, 82 P.3d 939 (quotation and internal citations omitted).

The MMA cap is not a stand-alone limitation imposed on an otherwise-unchanged system for recovering tort damages, as caps are in many other states. As this Court recognized, the MMA created a "quid

pro quo" arrangement, *Cummings*, 1996-NMSC-035, ¶ 27, as part of a "balanced scheme to encourage health care providers to opt into the Act by conferring certain benefits to them, which it then balanced with the benefits it provided to their patients," *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 17, 309 P.3d 1047 (quotation omitted).

> In exchange for the burdens placed on patients who receive medical care from [QHCPs], the Act provides the following benefits to them: the ability to recover from the [PCF]; assurance that future medical costs will be covered; assistance in retaining a medical expert; and the ability to seek punitive damages outside of the MMA."

Id. ¶ 19 (internal statutory citations omitted).

The district court simply ignored many of the key features of the MMA scheme that this Court has highlighted. First, the Court identified "establishing minimum levels of insurance" as one of the benefits for patients in "assuring that health care providers are adequately insured." *Cummings*, 1996-NMSC-035, ¶ 28. The MMA requires QHCPs to maintain malpractice insurance coverage of at least $200,000 if they wish to receive any benefits under the MMA, including the damages cap. NMSA 1978, § 41-5-5(A) (1992) (QHCP coverage requirement); NMSA 1978, § 41-5-5(A), (C) (1992) (non-QHCP sued for malpractice "shall not have the benefit of any of the provisions" of the MMA). Outside of the MMA, New Mexico law does not require health-care providers to carry *any* malpractice coverage as a condition of practicing medicine. Moreover, the QHCP (and thus the QHCP's

patients) receives broader "occurrence" coverage, which requires the insurer to provide coverage for acts that occur during the policy period even though a claim is made long after the policy expired, rather than the standard "claims made" coverage available under private insurance. (Glenn Randolph Marshall, Executive Director, N.M. Medical Society, 2 Tr. 198:6-199:5; J. Robert Hunter, 1 Tr. 62:22-63:2, 121:14-25.)

Second, while the MMA uses a negligence-based standard of care and provides for court trial for breach and causation issues, it provides a blended system for determining and funding medical costs and related benefits, with a guarantee of coverage for future medical needs unavailable outside the MMA. *See Cummings*, 1996-NMSC-035, ¶ 27. The MMA created the PCF to ensure a public source of funds to pay damages in excess of the QHCP's liability, up to $600,000. NMSA 1978, § 41-5-6(A). The MMA also shifted responsibility for accrued and future medical care and related benefits in excess of the QHCP's liability to the PCF, without any limitation on recovery whatsoever—something no conventional insurance policy would offer. NMSA 1978, §§ 41-5-6(A)-(B) & (D), 41-5-7(C).

Moreover, under the MMA, the value of future medical care and related benefits is not submitted to the jury at all, as it would be on a common-law claim. NMSA 1978, § 41-5-(7)(A) (1992) (providing that "[n]o inquiry shall be made … and evidence … shall not be admissible"). Instead, the court is charged with making an "estimate" of the value "in

a supplemental proceeding" (for the PCF's actuarial planning), and that "figure shall not be included in any award or judgment." NMSA 1978, § 41-5-7(G). Regardless of whether that estimate is accurate, *uncapped* future expenses are recoverable from the QHCP or, above the cap, the PCF as they "are incurred." NMSA 1978, § 41-5-7(C)-(E). Thus, patients receive payment regardless of whether the expenses were *foreseen, foreseeable, or even possible at the time of judgment.* Patients bringing MMA claims are protected against inadequate lump-sum amounts awarded at trial and inflation in health-care costs (Hunter, 1 Tr. 142:18-21), and they can recover for future benefits that are unavailable today, including new drugs, tests, procedures, and other medical advances.

Siebert's witnesses at trial conceded that the MMA is a unique statutory scheme: no other states have enacted reforms like the MMA that include unlimited, funded coverage for past and future medical care and related benefits. (Hunter, 1 Tr. 136:18-137:10; Robert Peck, 1 Tr. 251:7-252:14; *accord* Marshall, 2 Tr. 259:16-22.) The MMA is also unique in that it provides an opt-in system under which those who meet the statutory requirements for a QHCP may elect to obtain coverage under the MMA. (Hunter, 1 Tr. 141:2-6.) This Court has explained, "By providing benefits and imposing burdens, the Legislature created a system that inspires widespread participation to ensure that patients would have adequate access to health care services and that they would

have a process through which they can recover for any malpractice claims." *Baker*, 2013-NMSC-043, ¶ 20.

Salopek is not alone in focusing the jury-right inquiry on whether the legislature has effectively provided a new cause of action embodying a *quid pro quo* of benefits and limitations. The Kansas Supreme Court employed a similar analysis in upholding that state's medical-malpractice cap against a jury-right challenge, explaining that the "damages cap operates within the context of the comprehensive statutory scheme created in the Health Care Provider Insurance Availability Act." *Miller v. Johnson*, 289 P.3d 1098, 1116-17 (Kan. 2012). First, as the MMA does with QHCPs, the Kansas statute "mandates that all health care providers ... maintain professional liability insurance with an approved company of not less than $200,000 per claim." *Id.* Second, like the PCF, the Kansas statute provides for "excess coverage from the Health Care Stabilization Fund, ranging from $100,000 to $800,000." *Id.* Third, like the MMA, the Kansas statute operates in way that ensures that "health care providers who are entitled to insurance, but unable to acquire it through ordinary methods, may obtain insurance." *Id.* (citations omitted). The Kansas Supreme Court concluded, in words that could be said of the MMA, "These provisions make the prospects for recovery of at least the statutory minimums directly available as a benefit to medical

malpractice plaintiffs when there is a finding of liability. This is something many other tort victims do not have." *Id.*[11]

In fact, the MMA cause of action left Siebert better off than she would have fared under the common law, despite her $2.6-million judgment. Siebert has recovered over $935,000 in medical-care costs, plus $600,000 in capped recovery, which covers all of her $313,000 in nonmedical economic losses and $287,000 of her noneconomic damages. *See supra* pp. 14, 17.[12] That latter amount was more than, or close to, other states' $250,000 and $300,000 caps for noneconomic malpractice damages that those states' courts have upheld against constitutional challenges.[13]

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[11] Indeed, the MMA provides more-generous recovery for most injured patients than would be available to those injured by the roughly 880 physicians employed by the University of New Mexico Hospital (Marshall, 2 Tr. 190:25-191:-2) and subject to the Tort Claims Act's absolute limit of $750,000 for the "total liability for all claims that arise out of a single occurrence." NMSA 1978, § 41-4-19(A)(2)-(3) & B (2008); *see Leger v. Leger*, 2018-NMCA-___, ¶ 51, 2018 WL 6293481 (No. 35,807, Nov. 28, 2018) (malpractice "claims against government actors [are] subject to the limitations and restrictions of the Tort Claims Act").

[12] The expert evidence at trial indicated that such enhanced coverage for past and future medical expenses prioritizes the components of damages that are the least subjective and most highly valued by patients. (10 RP 2310-12 ¶¶ 66-75; Viscusi, 2 Tr. 84:4-86:16, 91:22-92:16, 103:5-15, 148:21-150:5.)

[13] *See, e.g.*, Alaska Stat. Ann. § 09.55.549(d) (2005) ($250,000); Cal. Civ. Code § 3333.2(b) (1975) ($250,000); Colo. Rev. Stat. Ann. § 13-64-302(1)(c) (2005) ($300,000); Idaho Code Ann. § 6-1603(1) (2003) ($250,000); Kan. Stat. Ann. § 60-19a01(b) (1988) ($300,000); Mont. Code

At the hearing, Defendants presented Dr. W. Kip Viscusi, a Harvard-trained economist and University Distinguished Professor of law, economics, and business at Vanderbilt University. He has been conducting research and analysis and publishing peer-reviewed articles in this area for decades. (Hr'g Ex. A.) Dr. Viscusi testified that Siebert's $1.5-million recovery under the MMA was more than 97% of health-care providers would have covered with an insurance policy. (2 Tr. 103:16-21.) Siebert's own expert, J. Robert Hunter, agreed that Siebert received more compensation than she would have under a policy that provided coverage of $1 million per occurrence (1 Tr. 161:2-15), and that the MMA provides greater benefits than a $1-million-per-occurrence policy for patients who require more than $1 million in medical care (1 Tr. 160:11-23).[14]

Ann. § 25-9-411(1)(a) (1995) ($250,000); Nev. Rev. Stat. Ann. §§ 41A.035 (2015) ($350,000); Tex. Civ. Prac. & Rem. Code Ann. § 74.301(a) ($250,000) (2003); W. Va. Code Ann. § 55-7B-8(a) (2015) ($250,000).

[14] Because the New Mexico Office of Superintendent of Insurance does not maintain data on coverage under non-MMA policies in New Mexico, there are several gaps in the evidence underlying Siebert's challenges. First, the percentage of New Mexico physicians insured under the MMA is unclear, although that number appears to be growing. (Alan R. Seeley, OSI Chief Actuary, 2 Tr. 281:13-17; Hunter, 1 Tr. 137:11-16; Marshall, 2 Tr. 256:10-24.) Second, no data exist about coverage limits for non-MMA, claims-made policies in New Mexico, or about how many New Mexico physicians practice without coverage. (Seeley, 2 Tr. 275:21-24, 277:6-9, 277:20-23.) Third, no data exist about the relative cost of MMA and non-MMA policies in New Mexico (Seeley, 2 Tr. 277:10-19), though Hunter surmised that, in the long run, the

There is no evidence that Siebert could have recovered more on a common-law claim subject to non-MMA insurance. The only reliable evidence offered at trial of non-MMA coverage is a study by Professor Charles Silver and others at the University of Texas,[15] who found that, while "[t]he conventional wisdom posits that most physicians buy medical malpractice policies with $1 million (nominal) per occurrence limits," that "conventional wisdom" is wrong.[16] Instead, only 31% of policies had $1 million in nominal limits, and only 3 percent had limits of more than $1 million. Silver found that 32% had nominal limits of *$200,000 or less*, and the median policy limit for all claims was $500,000.[17] In contrast, the MMA secures a $600,000 cap amount for nonmedical damages that is *higher than the median policy limits for all damages*, and the MMA supplements its policies with uncapped, funded recovery for accrued and future medical care and related benefits.

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costs of occurrence and claims-made policies are "pretty close" (1 Tr. 63:14-15, 139:10-19). Fourth, there is no evidence from which the Court may conclude that those providers currently insured under the MMA could obtain comparable coverage outside of the MMA.

[15] (Hr'g Ex. J, Charles Silver et al., *Malpractice Payouts and Malpractice Insurance*, The Geneva Papers (2008), *updated and confirmed*, Charles Silver et al., *Policy Limits, Payouts, and Blood Money: Medical Malpractice Settlements in the Shadow of Insurance*, 5 U.C. Irvine L. Rev. 559 (2015); *see* Seeley, 2 Tr. 275:21-24, 277:6-9; Hunter, 1 Tr. 140:2-18.)

[16] (Hr'g Ex. J, Charles Silver et al., *supra* note 15, at 184.)

[17] (Hr'g Ex. J., Charles Silver et al., *supra* note 15, at 185, table 2 n.(a); Viscusi, 2 Tr. 94:18-24, 98:3-15.)

There is also no evidence that additional amounts above policy limits would have been recoverable from Defendants' assets. Silver showed that any recovery from personal assets in malpractice cases is rare, and physician out-of-pocket payments are uncommon, for at least four reasons, including that "many physicians have limited assets or use asset protection strategies to insulate their wealth."[18] The study concluded that "[p]olicy limits seem to act as *de facto* caps on malpractice recoveries, even when plaintiffs' damages exceed the limits."[19]

The substitute cause of action provided by the MMA thus has assured Siebert, like most other plaintiffs, *more* protection than she would have had under the common law. The MMA did not just "renam[e]" or "re-define[] the pre-existing common law cause of action," as the district court held. (10 RP 2469, 2476.) As *Salopek* concluded, the MMA created a new cause of action to which the constitutional jury right did not attach.

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[18] (Hr'g Ex. J, Charles Silver et al., *supra* note 15, at 188-89; Viscusi, 2 Tr. 93:19-94:18, 99:1-10.)

[19] (Hr'g Ex. J, Charles Silver et al., *supra* note 15, at 188.)

D. The district court left unanswered several critical issues relating to the impact of its ruling.

The district court left undecided critical issues that must be resolved if this Court were to strike down the MMA cap.

1. The district court failed to explain who would be liable for the amount of Siebert's judgment in excess of the MMA cap. The court seemingly invalidated only the MMA's $600,000 limit on total recovery, NMSA 1978, § 41-5-6(A), but not its $200,000 limit on QHCPs' personal liability, which reflects the limit of their insurance coverage, NMSA 1978, §§ 41-5-5(A), 41-5-6(D). (10 RP 2478 (ruling the cap violates jury right by "placing a damage cap on the ultimate amount of damages that a plaintiff might recover through a proper jury verdict" and "limiting the verdict to the $600,000 statutory cap").) The district court apparently anticipated, without stating, that the PCF would pay *all* amounts above $200,000. *See* NMSA 1978, § 41-5-6(D).

2. This is particularly problematic because the court also failed to address whether the rest of the MMA—including the PCF and its uncapped coverage of accrued and future medical care and related benefits—is void under its ruling. Both sides told the district court that, for purposes of constitutionality, the cap is not severable from the rest of the MMA. (9 RP 2061 ¶¶ 9-11, 2204 ¶ 33, 2212-13 ¶¶ 61-65 & 10 RP 2322 ¶ 33, 2337 (Defendants); 9 RP 2226 ¶ 35 (Siebert).)

The parties agreed on this point for good reason. The absence of an express severability provision in the MMA raises a presumption that

the damages limitation is not severable. *Baca v. N.M. Dep't of Pub. Safety*, 2002-NMSC-017, ¶ 8, 132 N.M. 282, 47 P.3d 441. The cap also is an essential element of the MMA's "quid pro quo" of benefits and obligations, *Cummings*, 1996-NMSC-035, ¶ 27, that are extended to QHCPs as part of the Legislature's "balanced scheme," *Baker*, 2013-NMSC-043, ¶ 17. The Legislature would not have enacted the MMA scheme without the cap because uncapped coverage for *nonmedical* damages would threaten the solvency of the PCF and explode the cost of MMA coverage, defeating one of the MMA's core purposes.

3. In light of these concerns, the district court further erred by failing to address, despite Defendants' briefing, whether any invalidation of the cap should apply only prospectively. (9 RP 2212-13 ¶¶ 61-65; 10 RP 2330-32 ¶¶ 62-67.) To guide that decision, this Court in *Hicks v. State*, 1975-NMSC-056, ¶ 16, 88 N.M. 588, 544 P.2d 1153, looked to *Linkletter v. Walker*, 381 U.S. 618 (1965), which identified the relevant considerations as "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Id.* at 629, *disapproved of by Griffith v. Kentucky*, 479 U.S. 314 (1987).

Retrospective application in this case would not further any constitutional rights and, in fact, would only adversely affect past victims of malpractice, including Siebert. Because the cap is not severable, invalidating it would require invalidating the MMA as a

whole, including the PCF. At the least, striking the cap threatens the PCF's solvency and ability to pay benefits to past victims who currently rely on it for the cost of continuing medical care. *See Trujillo v. City of Albuquerque*, 1990-NMSC-083, ¶ 34, 110 N.M. 621, 798 P.2d 571 (governmental entities' lack of resources to pay uncapped judgments "constitutes a justification for giving some form of prospective application to any final determination that the [TCA] damage cap at issue in this case is unconstitutional"), *overruled in later appeal*, 1998-NMSC-031 (upholding TCA cap). Moreover, given Siebert's own enhanced recovery under the MMA, declining to apply the cap to her would create an inequitable circumstance. In that scenario, Siebert would have recovered from the PCF—a source of recovery her constitutional challenge would invalidate—while also recovering outside the MMA. This would result in a total recovery greater than she could have recovered in either circumstance alone. Any invalidation of the cap therefore should apply only prospectively.

II. The MMA damages cap does not violate Siebert's right to equal protection of the law or substantive due process.

The district court did not rule on Siebert's equal-protection or due-process challenges to the MMA cap, but merely noted that "[e]qual protection and due process issues may also be implicated here." (10 RP 2468.) The court's dictum is unsurprising because Siebert lacks standing to assert such claims, and the evidence shows that the MMA

cap remains fully constitutional. Moreover, Siebert never articulated a distinct theory of due process. Like the similar due-process challenge rejected in *Salopek*, her argument "relies on an analysis of the fairness of legislative classification" and therefore calls for "the same analysis" as her equal-protection argument." *Salopek*, 2013-NMCA-087, ¶ 71 (citing *Marrujo v. N.M. State Hwy. Transp. Dep't*, 1994-NMSC-116, ¶ 21, 118 N.M. 753, 887 P.2d 747 (applying an "identical" analysis where "no clear due process argument is raised").

A. Siebert lacks standing to assert an equal-protection or due-process claim.

Siebert's equal-protection claim failed below because she could not establish her standing to bring it. The Court "must first decide 'whether the legislation at issue results in dissimilar treatment of similarly-situated individuals.'" *Rodriguez v. Brand W. Dairy*, 2016-NMSC-029, ¶ 11, 378 P.3d 13 (quoting *Madrid v. St. Joseph Hosp.*, 1996–NMSC–064, ¶ 35, 122 N.M. 524, 928 P.2d 250 (rejecting equal protection challenge)). The MMA's dissimilar treatment of claims against QHCPs versus other providers was the only classification that seemingly concerned the district court. (*See* 3 Tr. 81:14-82:8, 100:3-102:3.) As this Court explained in *Cummings*, that "is a classification based upon the character of defendant-health-care-providers," not one "based upon the character of plaintiff-patients." *Cummings*, 1996–NMSC–035, ¶ 26. As a result, "it does not implicate the equal protection rights of medical

malpractice plaintiffs," and the patient "has no standing to raise an equal protection objection to this classification." *Id.* (rejecting equal-protection challenge to MMA statute of repose).[20]

Moreover, as a factual matter, Siebert cannot raise many of the MMA features that she challenged below "the sections attacked" had not been "applied adversely to plaintiff." *Otero v. Zouhar*, 1984-NMCA-054, ¶ 20, 102 N.M. 493, 697 P.2d 493 (plaintiff lacked standing to challenge constitutionality of MMA), *aff'd in part and rev'd in other part*, 1985-NMSC-021, 102 N.M. 482, 697 P.2d 482. Similarly, Siebert cannot challenge the application of the cap in factual circumstances that she did not face, even if "others not before the court" did. *State v. James M*, 1990-NMCA-135, ¶ 22, 111 N.M. 473, 806 P.2d 1063.

B. Siebert's constitutional claims are factually meritless.

On the merits, Siebert's equal-protection claim failed because of the high burden of proof for constitutional challenges to New Mexico statutes, the low level of scrutiny applied to damages caps like the MMA's, and the compelling evidence that caps achieve the legislative

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[20] Siebert also cannot raise the dissimilar treatment of medical malpractice and other torts because this Court has recognized that "[i]t is within the competence of the legislature to determine that the high costs of malpractice insurance distinguish the class of health care providers from the class of tortfeasors generally." *Garcia ex rel. Garcia v. La Farge*, 1995-NMSC-019, ¶ 24, 119 N.M. 532, 893 P.2d 428, *overruled on other grounds*, *Cahn v. Berryman*, 2018-NMSC-002, 408 P.3d 1012.

purposes. This Court has reaffirmed that "a statute will not be declared unconstitutional unless the court is satisfied beyond all reasonable doubt that the legislature went outside the constitution in enacting the challenged legislation." *Rodriguez*, 2016-NMSC-029, ¶ 10 (quotation omitted). Under that standard, the statute is presumed constitutional: "The party challenging the legislation ... bears the burden of demonstrating that the law is unconstitutional," and the courts will not "question the wisdom, policy, or justness of legislation enacted by our Legislature." *Id.* (quotations omitted).

In addition, the MMA cap is subject to only rational-basis scrutiny. *See Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶¶ 2, 26, 125 N.M. 721, 965 P.2d 305 (holding under TCA that "rational basis will be the constitutional test applied to cap challenges of this nature from this point forward"); *Salopek*, 2013-NMCA-087, ¶ 64 (applying rational-basis review). Indeed, this Court had previously rejected heightened scrutiny of the MMA statute of repose in *Cummings* because "a medical malpractice claim generally does not, for the patient, implicate any fundamental rights," nor does it involve an inherently suspect classification. *Cummings*, 1996-NMSC-035, ¶¶ 18, 36; *see Trujillo*, 1998-NMSC-031, ¶ 15.

As *Salopek* recognized, the challenger has the burden of proving "'that the law lacks a reasonable relationship to a legitimate governmental purpose.'" *Salopek*, 2013-NMCA-087, ¶ 67 (quoting

Marrujo, 1994-NMSC-116, ¶ 12). "[T]his is a high burden for the party contesting the legislation," because "'[t]hey must demonstrate that the challenged legislation is clearly arbitrary and unreasonable, not just that it is possibly so.'" *Id.* (quoting *Marrujo*, 1994-NMSC-116, ¶ 12).

Following *Trujillo*'s unambiguous instruction, both the court of appeals and the District of New Mexico have upheld the MMA cap. In *Salopek*, the court concluded that "[t]he cap on damages is not an arbitrary response to the malpractice insurance issues," and "is rationally related to its stated goals." 2013-NMCA-087, ¶ 69. The District of New Mexico likewise concluded that "the statute is not arbitrary and capricious in limiting deserving plaintiffs from deserved relief, and that it is rationally related to the legislative goal of ensuring a source of recovery." *Fed. Express Corp. v. United States*, 228 F. Supp. 2d 1267, 1271 (D.N.M. 2002). These holdings comport with this Court's recognition that the MMA "achieves the legislative purposes of assuring that health care providers are adequately insured so that patients may be reasonably compensated for their malpractice injuries." *Cummings*, 1996-NMSC-035, ¶ 28.

To prevail under the rational-basis test, Siebert must show beyond all reasonable doubt that the MMA "'is not supported by a firm legal rationale or evidence in the record.'" *Rodriguez*, 2016-NMSC-029, ¶ 25 (quoting *Wagner v. AGW Consultants*, 2005–NMSC–016, ¶ 24, 137 N.M.

734, 114 P.3d 1050 (upholding worker's-compensation fee cap)). Siebert has failed to carry that burden.

1. A firm legal rationale supports the MMA damages cap.

The "firm legal rationale" of the MMA cap is stated in the statute: "The purpose of the Medical Malpractice Act is to promote the health and welfare of the people of New Mexico *by making available professional liability insurance for health care providers in New Mexico.*" NMSA 1978, § 41-5-2 (1976) (emphasis added); *see Salopek* 2013-NMCA-087, ¶ 68 (rejecting equal-protection challenge in light of "the Legislature's stated purpose"). "An obvious goal of the legislature in enacting this legislation was to address certain factors adversely affecting the cost of medical malpractice insurance, to encourage continued availability of professional medical services, and to provide incentives for the furnishing of professional liability insurance." *Moncor Tr. Co. ex rel. Flynn v. Feil*, 1987-NMCA-015, ¶ 9, 105 N.M. 444, 733 P.2d 1327.

The Legislature enacted the MMA in response to the announced withdrawal of Travelers, which insured 90% of New Mexico's doctors. *Salopek*, 2013-NMCA-087, ¶ 68. This Court noted most recently, "The insurance crisis prompted concerns about the departure of medical providers from New Mexico as well as the availability of recovery for New Mexicans who suffer injuries resulting from medical malpractice."

Cahn v. Berryman, 2018-NMSC-002, ¶ 13, 408 P.3d 1012. *Salopek* recognized that the Legislature specifically "hoped that the limitations on liability would provide an incentive for insurance companies to continue to provide malpractice insurance." 2013-NMCA-087, ¶ 68. Correspondingly, this Court recognized that, "by offering to qualified health care providers certain benefits that are not available to those who are not qualified, the legislature furthers its stated goal of assuring adequate malpractice insurance coverage in the New Mexico medical profession." *Cummings*, 1996-NMSC-035, ¶ 30. Thus, the "firm legal rationale" against which the MMA cap must be evaluated is the availability and affordability of medical-malpractice insurance in New Mexico.

2. Evidence in the record supports the MMA cap.

As noted, the district court avoided ruling on the fact-intensive equal-protection challenge, even though that was the rationale for the evidentiary hearing in the first place. Nevertheless, the evidence offered at the hearing establishes a solid foundation for the Legislature's conclusion that damages caps would have—and continue to have—the desired beneficial effects. Indeed, the evidence showed a direct benefit in reducing the size of damages awards, and indirect benefits in reducing the cost and increasing the availability of malpractice insurance and in increasing the supply of physicians.

The legal sufficiency of this evidentiary foundation becomes manifest under the "beyond all reasonable doubt" standard. *Rodriguez*, 2016-NMSC-029, ¶¶ 10, 25. In upholding the MMA statute of repose, this Court stated that, "when employing the rational-basis test, courts will not consider the controversies surrounding the academic examination of legislative policy." *Cummings*, 1996-NMSC-035, ¶ 40. The Court made this pronouncement even as it acknowledged that "[t]he validity and severity of [New Mexico's] medical malpractice insurance crisis of the 1970's as well as the effectiveness of the legislation enacted in response to it has been disputed." *Id.* As the Utah Supreme Court recognized in upholding its state's malpractice cap, "When an issue is *fairly debatable*, we cannot say that the legislature overstepped its constitutional bounds when it determined that there was a crisis needing a remedy." *Judd v. Drezga*, 103 P.3d 135, 140 (Utah 2004) (emphasis added).

The evidence supporting the efficacy of the MMA cap and similar legislation comes from Defendants' expert Dr. Viscusi; Siebert's expert, J. Robert Hunter; and a raft of academic studies. In particular, both experts approved of what they called "studies of studies" or "meta-analyses," which compare methodologies, weigh results, and synthesize all of the individual studies. (Hunter, 1 Tr. 68:19-24, 154:13-21, 155:3-7; Viscusi, 2 Tr. 126:21-127:24.) Dr. Viscusi relied on the most recent meta-analysis, a December 2016 paper by Professor Michelle M. Mello

of Stanford Law School and Dr. Allen Kachalia of Harvard Medical School ("Mello & Kachalia (2016)").[21] Hunter had relied on Mello's prior meta-analysis. (1 Tr. 68:15-23, 154:13-21.) Mello and Kachalia's study *alone* provides adequate support to defeat Siebert's equal-protection claim.

The following briefly describes the evidence offered at the hearing, which is stated in Defendants' proposed amended findings of facts and conclusions of law. (10 RP 2295-33.) Given the efficacy of caps, since 2000 alone, at least twenty states enacted or reenacted limits on the recovery of noneconomic damages in malpractice cases.[22]

1. **Damages caps reduce losses on malpractice claims by, among other things by affecting total liability amounts.** (10 RP 2303-04 ¶¶ 38-42.) Mello & Kachalia (2016) concluded that, "[w]ith limited exceptions, studies of the effects of caps on claims payouts consistently find a significant effect, typically on the order of a 20 to 30 percent reduction in average indemnity payments."[23] Similarly,

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[21] (Hr'g Ex. H, Michelle M. Mello & Allen Kachalia, *Medical Malpractice: Evidence on Reform Alternatives and Claims Involving Elderly Patients, Report for the Medicare Payment Advisory Commission* (Dec. 2016); *see* Viscusi, 2 Tr. 124:25-127:24.)

[22] American Medical Association, *Medical Liability Reform NOW!* 14-19 (2018 ed.), *available at* https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/premium/arc/mlr-now.pdf (last visited Feb. 20, 2019).

[23] (Hr'g Ex. H, Mello & Kachalia (2016) at 33.)

Dr. Viscusi found that, among tort reform measures, damages caps have proven to be the most consistently influential in affecting losses. (2 Tr. 57:18-24.)[24] Hunter agreed that damages caps have this effect on claim payouts. (1 Tr. 148:6-8.)

2. **Damages caps reduce the frequency of malpractice claims.** (10 RP 2304-05 ¶¶ 43-44.) Mello & Kachalia (2016) found that "[t]he evidence increasingly suggests that noneconomic damages caps are associated with a statistically significant decrease in the frequency of claims, whether the measure used is paid claims or all claim filings."[25] Their suggested link is that caps discourage plaintiffs' attorneys from filing claims by lowering the expected value of the case, which in a contingent-fee system affects the attorney's expected return on investment.[26]

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[24] Dr. Viscusi coauthored a 1995 study that found that damages caps reduced losses by 16% to 29%. (2 Tr. 59:3-13, 60:1-61:8, 61:15-62:20.) He also coauthored a 2009 study that found that damages caps reduced losses by 17%. (2 Tr. 62:21-63:17, 64:21-66:11; Hr'g Ex. D, & P. Born, *Medical Malpractice Insurance in the Wake of Liability Reform*, 24 J. Legal Studies 463, 485, 488 (1995); *see also* Hr'g Ex. EE, W. Viscusi & P. Born, 72 J. Risk & Ins. 23, 32 (2005); Hr'g Ex. G, W. Viscusi & P. Born, *The Effects of Tort Reform on Medical Malpractice Insurers' Ultimate Losses*, 76 J. Risk & Uncertainty 197, 209-10 (2009).)

[25] (Hr'g Ex. H, Mello & Kachalia (2016) at 33.) Dr. Viscusi finds this effect of caps to be consistent with his own research and with general economic theory. (2 Tr. 69:25-70:10, 74:6-24.)

[26] (Hr'g Ex. H, Mello & Kachalia (2016) at 33.)

3. **Damages caps improve the profitability of insurers and encourage insurers to enter and remain in the malpractice-insurance market, making the market more competitive.** (10 RP 2305 ¶¶ 45-47.) Dr. Viscusi's 2005 study focused on insurers' loss ratios, which are an inverse measure of profitability by comparing claim payouts to premiums collected, and it found that a noneconomic-damages cap lowers loss ratios by 10% to 13%.[27] Hunter agreed that damages caps increase insurer profitability. (1 Tr. 148:12-14.)

4. **Damage caps reduce uncertainty and volatility in insurance market, which drive up costs, thereby making it easier for insurers to write coverage.** (10 RP 2306-08 ¶¶ 52-59.) Dr. Viscusi testified that caps decrease variability so that writing insurance coverage is more predictable and insurers can better anticipate their exposure. (2 Tr. 110:23-111:10.) Dr. Viscusi's conclusion is supported by his empirical research showing that caps reduce the variability of loss and, thus, the uncertainty of insurers' risk.[28]

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[27] (Hr'g Ex. EE, W. Viscusi & P. Born, *Damages Caps, Insurability, and the Performance of Medical Malpractice Insurance*, 72 J. Risk & Ins. 23, 38 (2005); Viscusi, 2 Tr. 106:23-108:15.)

[28] (2 Tr. 61:18-62:16, 113:20-114:2; Hr'g Ex. D, W. Viscusi & P. Born, *Medical Malpractice Insurance in the Wake of Liability Reform*, 24 J. Legal Studies 463, 490 (1995); Hr'g Ex. EE, W. Viscusi & P. Born, *Damages Caps, Insurability, and the Performance of Medical Malpractice Insurance*, 72 J. Risk & Ins. 23, 41-42 (2005).)

Hunter testified regarding "hard" and "soft" cycles in the national insurance markets. During a hard market, insurers' investment income declines, competition among insurers breaks down, premium prices increase, and reinsurance companies raise prices, putting further pressure on the primary insurance market.[29] Hunter predicted that the current national soft market, which is more profitable and characterized by stable premium prices, will continue until at least 2020. (Hr'g Ex. 10, Hunter Report 16; 1 Tr. 77:23-78:2, 100:2-15.) Critically, Hunter admitted that, since the mid-1970s when New Mexico's hard market prompted the Legislature to enact the MMA, *New Mexico has not had the economic cycle* of the insurance market nationally and in many of the larger states, *and has not experienced even a "muted hard market."*[30]

Hunter agreed that the MMA "has, in fact, insulated New Mexico from the national economic cycles." (1 Tr. 150:1-5.) The country will "probably" experience a hard market again, he testified, but when it does, *New Mexico will not*. (1 Tr. 152:20-23, 152:1-9.) He explained that this stability results from the MMA cap's limiting private insurers' exposure to $200,000 and the responsibility of the PCF, a government-run program that does not engage in the competitive practices causing

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[29] (Hr'g Ex. 10, *Medical Malpractice Insurance in New Mexico*, Report of J. Robert Hunter 7-22; Hunter, 1 Tr. 72:6-13.)

[30] (1 Tr. 150:1-19, 151:2-6; Hr'g Ex. 10, Hunter Report 24.)

the national cycles, for the remainder of the coverage provided by the MMA. (1 Tr. 120:12-25, 150:20-151:1, 153:10-11.) He testified that New Mexico gains a benefit through the PCF when there is a national hard market because it "softens the upward premium increases." (1 Tr. 151:10-17.)

5. **Damages caps restrain the growth in premiums over time through market competition.** (10 RP 2305-06 ¶¶ 48-51.) Mello & Kachalia (2016) and other studies have reached this conclusion.[31] Based on the data from his 2005 study, Dr. Viscusi concluded that caps have resulted in a roughly 6 percent decrease in premium rates.[32] Relying in part on Dr. Viscusi's 2005 study, Mello concluded in her own meta-analysis that controlled studies show that caps constrain the growth of premiums between 6% and 13%, on average, in a given year.[33]

6. **Damages caps positively correlate with physician supply.** (10 RP 2308-09 ¶¶ 60-65.) Mello & Kachalia (2016) and other studies so found.[34] For example, a 2005 study by Daniel Kessler and

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[31] (Hr'g Ex. H, Mello & Kachalia (2016) at 34; *see* Viscusi, 2 Tr. 124:25-126:11.)

[32] (2 Tr. 118:21-119:23, 120:11-19, 122:1-124:23; Hr'g Ex. EE, W. Viscusi & P. Born, *Damages Caps, Insurability, and the Performance of Medical Malpractice Insurance*, 72 J. Risk & Ins. 23, 36-37 (2005).)

[33] (Hr'g Ex. 96, Michelle M. Mello, *Medical Malpractice: Impact of the crisis and effect of state tort reforms*, Robert Wood Johnson Foundation Research Synthesis Report No. 10, at 10, 12 (May 2006).)

[34] (Hr'g Ex. H, Mello & Kachalia (2016) at 3, 36.)

others concluded that, three years after adoption, direct reforms, including damages caps, increased physician supply by 3.3%, controlling for fixed differences across states, populations, state healthcare markets, political characteristics, and other differences in malpractice law.[35] Mello & Kachalia (2016) concludes more strongly that the weight of a fairly large evidence base suggests noneconomic-damages caps effect statistically significant increases in the supply of physicians, with the increases clustered around 2% to 5%.[36] Hunter agreed that the empirical research supports these conclusions. (1 Tr. 148:18-149:4.) Hunter further testified that the *absence* of a damages cap may influence a physician's decision regarding where to live. (1 Tr. 149:5-17.)

These effects on physician supply are particularly important to New Mexico. First, they are most significant as to the supply of physicians in rural areas and medical specialties,[37] which are the very

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[35] (Hr'g Ex. I, D. Kessler et al., *Impact of Malpractice Reforms on the Supply of Physician Services*, JAMA, Vol. 293, No. 21, at 2618(2005); Viscusi, 2 Tr. 130:22-131:7.) Mello characterized Kessler's 2005 study as the "strongest study using caps on damages as the measure of the liability climate." (Hr'g Ex. 96, M. Mello, *Medical Malpractice: Impact of the crisis and effect of state tort reforms* 4, Robert Wood Johnson Foundation Research Synthesis Report No. 10 (May 2006).)

[36] (Hr'g Ex. H, Mello & Kachalia (2016) at 36; Viscusi, 2 Tr. 131:20-132:23.)

[37] (Hr'g Ex. 96, M. Mello, *Medical Malpractice: Impact of the crisis and effect of state tort reforms* 4, Robert Wood Johnson Foundation Research Synthesis Report No. 10 (May 2006) (noting a small effect that was somewhat higher for rural areas and specialists); Hr'g Ex. L,

categories of practice in which New Mexico continues to face significant shortages.[38] For example, Mello & Kachalia (2016) suggest that the effect may be concentrated among rural areas, high-risk specialist physicians, and caps at the most stringent level.[39] Second, Kessler found that damages caps have "a larger effect on [physician] supply through retirements,"[40] and studies show that New Mexico has the highest percentage of physicians age 60 or older—39% compared to 28% nationally—which indicates that provider shortages will continue to be a problem.[41] Without the MMA and its damages cap, New Mexico would

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W. Encinosa & F. Hellinger, *Have State Caps on Malpractice Awards Increased the Supply of Physicians?*, Health Affairs, at W5-250 (May 31, 2005); Hr'g Ex. M, J. Klick & T. Stratmann, *Medical Malpractice Reform and Physicians in High-Risk Specialties*, Penn Law: Legal Scholarship Repository, Paper 1117, at S132 (2007).)

[38] (Hr'g Ex. Q, N.M. Health Care Workforce Committee, *2016 Annual Report* 2, 6 (Oct. 1, 2016); Viscusi, 2 Tr. 134:1-10; Marshall, 2 Tr. 174:9-175:15, 175:24-177:22, 178:2-4, 178:17-179:3, 191:19-25, 192:1-6, 262:17-25, 263:18-264:4; Hunter, 1 Tr. 134:-10; *see generally* 10 RP 2300-02 ¶¶ 27-37.) *See Montano v. Frezza*, 2017-NMSC-015, ¶ 31, 393 P.3d 700 ("Numerous amici have informed this Court about the relative shortage of doctors, particularly specialists, in certain rural areas of New Mexico and the important role that state-operated health care facilities in Texas play in filling those gaps in care ….").

[39] (Hr'g Ex. H, Mello & Kachalia (2016) at 36; Viscusi, 2 Tr. 131:20-132:23.)

[40] (Hr'g Ex. I, D. Kessler et al., *Impact of Malpractice Reforms on the Supply of Physician Services*, JAMA, Vol. 293, No. 21, at 2618 (2005).)

[41] (Hr'g Ex. Q, N.M. Health Care Workforce Committee, *2016 Annual Report* 34 (Oct. 1, 2016); Marshall, 2 Tr. 180:24-181:21.)

have fewer provider benefits to offset the less attractive aspects of practicing in the state. (Marshall, 2 Tr. 253:17-22.)

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The evidence establishes a secure foundation for the Legislature's conclusion that the MMA cap works and will continue to work, to the benefit of doctors and patients in New Mexico. In the face of that evidence, no equal-protection or substantive-due-process claim can succeed.

CONCLUSION

This Court should reverse the district court, uphold the constitutionality of the MMA cap, and remand the case to the district court to conform the judgment to the MMA cap.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 12-214(B)(1) NMRA, Defendants request oral argument in this appeal. Oral argument is appropriate because the appeal concerns an issue of the constitutionality of the MMA statutory cap that is of statewide importance and affects MMA claimants and QHCPs throughout New Mexico.

DATED this 20th day of February, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Appellants' Brief in Chief was electronically filed in the Court's Odyssey filing system, which in turn caused all counsel of record to be electronically served, on this 20th day of February, 2019.

/s/ Dana S. Hardy