**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' RESPONSE BRIEF TO AMICUS BRIEF OF AMERICAN ASSOCIATION FOR JUSTICE AND NEW MEXICO TRIAL LAWYERS ASSOCIATION

HINKLE SHANOR LLP
William P. Slattery
Dana S. Hardy
Post Office Box 2068
Santa Fe, NM 87504-2068
(505) 982-4554
wslattery@hinklelawfirm.com
dhardy@hinklelawfirm.com

Attorneys for
Defendants-Appellants

STEPTOE & JOHNSON LLP
Bennett Evan Cooper
201 E. Washington St., Suite 1600
Phoenix, AZ 85004-2382
(602) 257-5217
bcooper@steptoe.com

LORENZ LAW
Alice T. Lorenz
2501 Rio Grande Blvd. NW, Suite A
Albuquerque, NM 87104-3233
(505) 247-2456
alice@alorenzlaw.com

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## STATEMENT OF COMPLIANCE

Pursuant to Rule 12-318(a)(1)(c) NMRA, defendants-appellants Rebecca C. Okun, M.D., and Women's Specialists of New Mexico, Ltd., state that this Appellants' Response Brief to Amicus Brief of American Association for Justice and New Mexico Trial Lawyers Association complies with the length limitations of Rule 12-318(F)(3) NMRA. The brief uses a proportionately spaced font, has a typeface of 14 points, and contains 7,184 words, excluding the parts of the brief exempted by Rule 12-318(F)(1). The word count is obtained using Microsoft Word 2010.

/s/ Dana S. Hardy

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## INTRODUCTION

Amici curiae American Association for Justice and New Mexico Trial Lawyers Association (together, "Plaintiff's Amici") argue that the New Mexico Medical Malpractice Act's damages cap violates the right to a jury trial and equal protection under the New Mexico Constitution, but their analysis is neither rooted in the prevailing case law nor reflective of the evidentiary record created in the district court. As to the jury right, the vast majority of courts that have addressed the constitutionality of statutory damages caps—including all of the federal courts applying the Seventh Amendment—have concluded that caps do not infringe the jury right. Plaintiff's Amici cite a handful of primarily older cases from other states that either do not rely on the jury right, or have been overruled or eroded in their own jurisdictions, or are poorly reasoned split decisions with powerful dissents. Plaintiff's Amici also place reliance on language from U.S. Supreme Court decisions that other federal and courts have deemed misplaced.

As to equal protection, Plaintiff's Amici argue that there is no rational basis for the MMA cap, but they make no effort to address the evidentiary record sustaining the cap that was laid out in the district court's three days of evidentiary hearing. They do not address the testimony of the expert witnesses, including Harvard-trained economist and Vanderbilt University Professor W. Kip Viscusi, or the studies and meta-analyses that he discussed and that were entered into evidence.

Nor do they address the specific concerns and experiences of New Mexico that drove the enactment of the MMA and continue to show its value. This Court has recognized that it will not engage in battles of studies under the equal protection clause. Regardless of what new material Plaintiff's Amici offer on appeal, the evidence properly in the record establishes that the New Mexico Legislature had a rational basis for the MMA, including its damages cap. The district court did not hold the MMA constitutionally infirm on the basis of equal protection, and neither should this Court.

## ARGUMENT

### I. The MMA damages cap does not violate the New Mexico Constitution's jury right.

#### A. Extolling the historical importance and inviolate nature of jury right does not answer what the right encompasses.

Plaintiff's Amici invoke the historical importance of the right to a jury trial and its "inviolate" nature under Article II, section 12 of the New Mexico Constitution, but they give short shrift to the important question: Where the jury right applies, what exactly does the right encompass? [Amicus Br. 1-9.] The federal and New Mexico cases on which Plaintiff's Amici rely do not attempt to address the relevant question here, namely, whether the right to have a jury decide contested issues of fact translates to a right to recover a legal remedy in the amount of whatever the jury

found to be damages.[1] And none of the cases they cite from a small number of other states attempts to answer that question based on a historical analysis of the jury right.

In 2016, however, the Oregon Supreme Court undertook precisely such a historical inquiry because, as the court aptly noted, "[t]o say ... that the right was viewed as an essential attribute of liberty does not say what the right encompasses." *Horton v. Oregon Health & Sci. Univ.*, 376 P.3d 998, 1036 (Or. 2016) [cited at BIC 22]. The court's in-depth analysis began with Magna Carta and *Blackstone's Commentaries on the Laws of England* and continued through the American Founding and the drafting of the Seventh Amendment and state constitutional provisions. Based on that analysis, the court upheld the statutory damages cap, concluding that the jury right does not limit "the legislature's authority to define, as

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[1] *See, e.g.*, *Dimick v. Schiedt*, 293 U.S. 474 (1934) (holding that additur was unconstitutional as reexamination of jury verdict); *Bailey v. Cent. Vt. Ry.*, 319 U.S. 350, 354 (1943) (jury right applies to railroad employee's claim for work-related injury under Federal Employers' Liability Act); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506 (1959) (jury right generally preserved as to issue raised on both legal and equitable claims); *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 573-74 (1990) (jury right applies to NLRA claim for back pay for union's breach of duty of fair representation); *State ex rel. Bliss v. Greenwood*, 1957-NMSC-071, ¶¶15, 22, 63 N.M. 156, 315 P. 223 (jury right did not apply to court's fine of more than $50 for contempt of court because legislature could not limit courts' power to fine for direct contempt).

a matter of law, the substantive elements of a cause of action or the extent to which damages will be available in that action." *Id.* at 1040.

For example, the court explained, "In focusing on the procedural benefits of civil jury trials, Blackstone did not suggest that the right to a civil jury imposed a substantive limit on the ability of either the common-law courts or parliament to define the legal principles that create and limit a person's liability." *Id.* at 1037. Nor did Blackstone "state that the jury trial right checked the lawmaking authority of either the common-law courts or parliament. Rather, he explained that courts retain the authority to define the applicable legal principles." *Id.*

Similarly, academic analysis of "the American experience … did not identify any substantive limitation among the original states that the right to a civil jury placed on a state legislature's ability to define civil causes of action or damages." *Id.* at 1038. And the *Horton* court noted that, in Federalist No. 83, Alexander Hamilton "explained that the right to a civil jury placed no limit on the legislature's power to define the substantive law." *Id.* at 1039. The *Horton* court concluded, "Neither the text nor the history of the jury trial right suggests that it was intended to place a substantive limitation on the legislature's authority to alter or adjust a party's rights and remedies." *Id.* at 1044. The court therefore overruled its prior decision in *Lakin v. Senco Products, Inc.*, 987 P.2d 463, *modified*, 987 P.2d 476 (Or. 1999), and upheld the damages cap. *Id.*

The Oregon court's ruling accords with the Virginia Supreme Court's earlier conclusion that "the jury trial guarantee secures no rights other than those that existed at common law and the common law has never recognized a right to full recovery in tort." *Pulliam v. Coastal Emergency Servs. of Richmond, Inc.*, 509 S.E.2d 307, 314-15 (Va. 1999) (quotation omitted) (citing *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 88-89 n.32 (1978) (recognizing that "statutes limiting liability are relatively commonplace and have consistently been enforced by the courts")). The court reasoned that "it is not the role of the jury but of the legislature to determine the legal consequences of the jury's factual findings." *Id.* at 314. Moreover, the court noted, "If it is permissible for a legislature to enact a statute of limitations completely barring recovery in a particular cause of action without impinging upon the right of trial by jury, it should be permissible for the legislature to impose a limitation upon the amount of recovery as well." *Id.* at 314. This Court should follow these courts' analyses.

### B. This Court should follow the federal courts' universal conclusion that statutory damages caps do not violate the jury right under the Seventh Amendment.

While Plaintiff's Amici cite language from a smattering of U.S. Supreme Court decisions, they do not cite any of the overwhelming number of federal cases that have upheld statutory damages caps under the Seventh Amendment to the U.S. Constitution. In construing the

scope of the New Mexico Constitution's jury right, New Mexico courts have looked to "federal precedents" under the Seventh Amendment. *N.M. Law Grp., P.C. v. Byers*, 2018-NMCA-023, ¶ 4, 413 P.3d 875 (summary-judgment rules "do not violate the right to have a jury decide a case" but instead "prescribe[] the means of making an issue") (quotation omitted), *cert. denied* (Mar. 9, 2018); *see Bd. of Educ. v. Harrell*, 1994-NMSC-096, ¶ 34, 118 N.M. 470, 882 P.2d 511 ( "[W]e find Supreme Court decisions interpreting the Seventh Amendment relevant to our discussion of [the] right to a jury trial under the New Mexico Constitution."); *Blea v. Fields*, 2005-NMSC-029, ¶ 1, 138 N.M. 348, 120 P.3d 430 (overruling prior decision to the extent it was "diverging from" the rule of *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), on right to a jury on fact issues material to equitable and legal claims).

New Mexico courts' reference to Seventh Amendment principles is particularly appropriate because, whether or not the Seventh Amendment applies to New Mexico's state courts or even its prestatehood territorial courts, it provides a basis for understanding the scope of "the rights of trial by jury as they existed at common law" before New Mexico's statehood. *Walker v. N.M. & S.P.R. Co.*, 165 U.S. 593, 595 (1897) (finding it "unnecessary" to decide whether Seventh Amendment applied to New Mexico territorial courts); *see Pankey v. Ortiz*, 1921-NMSC-007, ¶ 27, 26 N.M. 575, 195 P. 906 (explaining that the jury right "was given by the Seventh Amendment to the Constitution of the United States[,] extended

to the territory of New Mexico by section 17 of the Organic Act and secured ... by the language of section 12, art. 2 of the state Constitution").

Plaintiff's Amici could not cite any federal cases striking down damages caps under the Seventh Amendment because, as Defendants pointed out in the Brief in Chief, federal courts have long upheld statutory caps as against jury-right challenges. [BIC 20-21 & n.5.] As one court summarized, "[t]he federal courts regularly uphold ... jury verdict caps" because the caps do not "impose their own factual determinations." *In re W.R. Grace & Co.*, 475 B.R. 34, 169 (D. Del. 2012). Plaintiff's Amici do not even acknowledge that body of federal case law. Nor do Plaintiff's Amici cite any state cases that strike down damages caps under the state constitutional provisions that, like New Mexico's jury right, are applied in light of Seventh Amendment jurisprudence.

Instead, Plaintiff's Amici misplace reliance on Seventh Amendment decisions by the U.S. Supreme Court that do not support their position. For example, they cite the Court's statement in *Dimick v. Schiedt*, 293 U.S. 474 (1935), regarding a plaintiff's right "to have a jury properly determine the question of liability and the extent of liability by an assessment of damages," as these are "questions of fact." [Amicus Br. 8 (quoting *Dimick*, 293 U.S. at 483).] But *Dimick* rejected the notion that the jury right included a right to recover everything the jury awarded. The Supreme Court invalidated the procedure of additur (conditioning the denial of a new trial on an *increase* in the jury award), even as it

recognized the validity of remittitur (conditioning the denial on a *decrease* in the jury award). The Court recognized that remittitur did not violate the Seventh Amendment because "what remains is included in the verdict along with the unlawful excess—in that sense that it has been found by the jury—and that the remittitur has the effect of merely lopping off an excrescence." *Id.* at 486. In contrast, additur reflects the court's "bald addition of something which in no sense can be said to be included in the verdict." *Id.* By the reasoning of *Dimick*, the legislature's limiting of damage awards by statute does not offend the jury right because what remains was within the jury verdict.

Thus, it is curious that Plaintiff's Amici miscite language from *Henderson v. Dreyfus*, 1919-NMSC-023, 26 N.M. 541, 191 P. 442, claiming that "[t]his Court has also referred to the New Mexico litigant's 'constitutional right to have the question of damages tried by a jury.'" [Amicus Br. 8 (quoting *Henderson*, 1919-NMSC-023, ¶ 9).] This Court was actually quoting the U.S. Supreme Court's statement in *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69 (1889), that "[t]he point was much pressed at the bar" that remittitur "deprived the defendant of his constitutional right to have the question of damages tried by a jury, without interference upon the part of the court." *Id.* at 72. Yet the Supreme Court in *Arkansas Valley*, as quoted by this Court in *Henderson*, rejected that "pressed" position, holding that the reduction of the verdict by means of remittitur "'does not in any just sense impair the

constitutional right of trial by jury.'" *Henderson*, 1919-NMSC-023, ¶ 9 (quoting *Arkansas Valley*, 130 U.S. at 74). This Court agreed and followed "the almost universal rule in this country" allowing such reductions in jury verdicts. *Id.* ¶ 11.

As federal and state courts have recognized, Plaintiff's Amici also err in relying [Amicus Br. 8] on the U.S. Supreme Court's statement in the *Feltner* case that "[t]he right to a jury trial includes the right to have a jury determine the *amount* of statutory damages, if any, awarded to the copyright owner." *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998). *Feltner* did not involve the constitutionality of a damages cap, and federal and state appellate courts have recognized in *upholding* such caps that *Feltner* is irrelevant. *See Schmidt v. Ramsey*, 860 F.3d 1038, 1045 (8th Cir. 2017) (upholding Nebraska malpractice cap and stating that "[w]e are not persuaded" by citation to *Feltner*); *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1201-02 (9th Cir. 2002) (upholding Title VII cap and noting that *Feltner* did not "address[] the fact that the Copyright Act limits damages to amounts between $500 and $20,000"); *Pulliam*, 509 S.E.2d at 312 (upholding Virginia malpractice cap and noting that the "[p]laintiff's reliance on *Feltner* is also misplaced").

As the Eighth Circuit recently explained, "[t]he statute in *Feltner* allowed a judge to determine damages in the first instance. Because that role had historically belonged to juries, the statute collided with the Seventh Amendment." *Schmidt*, 860 F.3d at 1045 (citing *Feltner*, 523

U.S. at 345-46, 355). In contrast, under the statutory cap, "[t]he jury ... performed its historical role by finding liability and assessing damages," and the "cap imposed an upper legal limit on that jury determination" that the trial court applied "as a matter of law." *Id.*

Similarly, the Ninth Circuit recognized that *Feltner* held only that "the Seventh Amendment includes a right to a jury determination of statutory damages under ... the Copyright Act," without addressing the Act's cap on damages. *Hemmings*, 285 F.3d at 1202. The Ninth Circuit upheld the Title VII damages cap because "[t]he Seventh Amendment does not provide unlimited protection to jury determinations." *Id.* The cap reflected that "Congress has merely definitely explained what constitutes excessive damages. Congress may 'prescribe' a 'rule of decision' in such a context." *Id.* (quoting *Robertson v. Seattle Audobon Soc'y*, 503 U.S. 429, 440 (1990)). The court recognized that its reasoning agreed with the Eighth Circuit's prior decision upholding the Title VII cap: "'The statute does not violate the Seventh Amendment because it does not impinge upon a jury's fact finding function. In applying a provision, a court ... implements the legislative policy decision by reducing the amount recoverable to that deemed to be a reasonable maximum by Congress.'" *Id.* (quoting *Madison v. IBP, Inc.*, 257 F.3d 780, 804 (8th Cir. 2001)). Indeed, the Ninth Circuit found the plaintiff's challenge "paradoxical" because, if the court cannot impose a statutory cap on recoverable damages, "how can a judge impose statutorily

mandated double or treble damages without also imposing on the jury's province as sole factfinder?" *Id.* Such statutory enhancements to jury awards "'date back to the 13th century ... and the doctrine was expressly recognized in cases as early as 1763.'" *Id.* (quoting *Browning-Ferris Indus. of Vt. v. Kelco Disposal Inc.*, 492 U.S. 257, 274 (1989)).

Finally, the Virginia Supreme Court recognized that *Feltner* "did not address the validity of a cap on the recovery of damages," as opposed to whether the party "was entitled to a jury trial even though it elected to seek statutory damages." *Pulliam*, 509 S.E.2d at 313. Rather, the year after *Feltner*, the U.S. Supreme Court cited the Third Circuit's *Davis* decision and the Fourth Circuit's *Boyd* decision (both cited in the Brief in Chief) "as instances where courts of appeals have held that district court application of state statutory caps in diversity cases, post verdict, does not violate the Seventh Amendment." *Id.* (citing *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 429 n.9 (1996) (citing *Davis v. Omitowoju*, 883 F.2d 1155, 1161-65 (3d Cir. 1989), and *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989))). All of this precedent supports the conclusion that the Seventh Amendment does not bar statutory damages caps, and neither should New Mexico's jury-right provision.

### C. The overwhelming majority of jurisdictions have rejected the position of Plaintiff's Amici.

When it comes to the the jury right, Plaintiff's Amici are swimming against a strong tide. As the Oregon Supreme Court tallied in 2016, 23

jurisdictions (including Oregon) have considered whether damages caps violate the jury right, and 18 of the 23 "have held that a damages cap does not violate either the state or federal constitutional right to a jury trial." *Horton*, 376 P.3d at 1043.[2] The court counted only five states that had held that caps on noneconomic damages violate the jury right—almost all the ones cited by Plaintiff's Amici. *Id.* at 1043-44 & n.50. [*See* Amicus Br. 4-5.]

That majority has continued to grow in recent years: as noted in the Brief in Chief [BIC 20-22], the Eighth Circuit, North Dakota, and Pennsylvania have similarly rejected jury-right challenges to damages caps because the caps simply establish the legal remedy for the facts found by the jury. *Schmidt v. Ramsey*, 860 F.3d 1038, 1045-46 (8th Cir. 2017); *Larimore Pub. Sch. Dist. No. 44 v. Aamodt*, 908 N.W.2d 442, 454 (N.D. 2018); *Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1132-33 (Pa. 2014).

Plaintiff's Amici attempt to distinguish the North Dakota Supreme Court's decision in *Larimore*, as well as the New Mexico Court of Appeals' decision in *Wachocki v. Bernalillo County Sheriff's Department*, 2010-

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[2] In light of this subsequent case law, little weight should be given to Plaintiff's Amici's citation to the unsubstantiated suggestion in a thirty-year-old law-student comment that statutory damage caps are somehow novel constitutionally. [Amicus Br. 9 (citing Paul B. Weiss, *Reforming Tort Reform: Is There Substance to the Seventh Amendment?*, 38 Cath. U.L. Rev. 737, 748-49 (1989)).]

NMCA-021, ¶¶ 45-49, 147 N.M. 720, 228 P.3d 504, on the ground that they involved claims against a government entity. [Amicus Br. 7-8.] But nothing in either court's rationale limited it to public bodies. The premise of these cases was *not* that the jury right did not apply to the cause of action before the court, but instead that, even if it did, the right was not violated because the cap did not interfere with the jury's fact finding. In *Larimore*, the court assumed that the jury right existed against public bodies at the time of adoption of the state constitution, and then reasoned that "'the full-blown jury trial appellant demanded and received was not impeded by the damages cap. What was affected was the ultimate recovery post-verdict, which was not a function of the trial here being by jury.'" *Id.* at 454-55 (quoting *Zauflik*, 104 A.3d at 1133). The court explained that the "'effect of the cap exists in all such cases—whether resolved by motion, jury trial, bench trial, or negotiated settlement—but the cap did not alter the availability, or contours of, a jury trial, any more than a jury trial against a judgment–proof defendant could be said to impair the jury trial *right*." *Id.* at 455 (quoting *Zauflik*, 104 A.3d at 1133). Indeed, in its latest decision, the North Dakota Supreme Court upheld the malpractice-damages cap in a suit against private parties, citing *Larimore* in rejecting an equal-protection challenge, without any need to address further the jury right. *Condon v. St. Alexius Med. Ctr.*, — N.W.2d —, 2019 ND 113, ¶ 13 (N.D. Apr. 22, 2019).

### D. The handful of cases cited by Plaintiff's Amici is not persuasive.

In their discussion of the jury right, Plaintiff's Amici cite only seven state-court decisions—and *no* federal cases under the Seventh Amendment—that have invalidated statutory damages caps. [Amicus Br. 4-5 (citing *Smith v. Dep't of Ins.*, 507 So. 2d 1080 (Fla. 1987); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988); *Kan. Malpractice Victims Coal. v. Bell*, 757 P.2d 251 (Kan. 1988); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989); *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 (Ala.1991); *Atl. Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010); *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633 (Mo. 2012)).] These decisions represent, at best, a small minority of jurisdictions that have addressed the pertinent issues. Beyond that, none should be considered persuasive for one or more of several reasons: (1) the cases were not decided based on the jury right; (2) the cases were decided early on, before the wave of contrary opinions, and they have been overruled or eroded by subsequent decisions in their own jurisdictions; (3) the specific state damages caps—unlike the MMA—did not provide a *quid pro quo* that compensated for the legislature's limitation of the legal remedy; and (4) those states' jury rights—unlike New Mexico's, do not generally track Seventh Amendment case law, which has universally upheld caps.

### 1. Some of the cases were not decided based on the jury right.

At least two of Plaintiff's Amici's cases (from Texas and Florida) were not decided based on the jury right. [Amicus Br. 4-5.] *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988), held only that the malpractice cap violated the state constitution's "open courts" provision. *Id.* at 687; *see* Tex. Const. art. 1, § 13 ("All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."). The majority opinion *did not even cite* the Texas Constitution's separate guarantee of the jury right. *See* Tex. Const. art. 1, § 15. New Mexico's Constitution does not have a similar "open courts" provision, and neither Siebert nor the district court below advanced that theory.

In *Lucas*, the Chief Justice's dissent did address the jury-right argument but rejected it, explaining that even under the "much broader … guarantee" of the Texas jury right vis-à-vis the Seventh Amendment, the state provision "cannot be read so expansively as to preclude any modification of the remedies available under those common law rights." *Id.* at 710 (Phillips, C.J., dissenting). He continued, "Although our courts have zealously guarded the right to trial by jury, that right is satisfied if access to some determination of disputed issues of fact by a jury is preserved. Since the caps do not destroy a plaintiff's right to a jury

resolution of a justiciable controversy, they do not violate the right to trial by jury." *Id.*

The *Lucas* majority found that its decision as to the "open courts" provision was "supported" by the Florida court's reasoning in *Smith v. Department of Insurance*, 507 So. 2d 1080, which Plaintiff's Amici also cite here, as well as by the district court's ruling invalidating the Virginia cap in *Boyd v. Bulala*, 672 F. Supp. 915 (W.D. Va. 1987). Like *Lucas*, *Smith* also did not involve any jury-right challenge to the damages cap; it was based on access to the courts. While the Virginia district court's decision in *Boyd* was based on the jury right, it was reversed by the Fourth Circuit in that case and then rejected by the Virginia Supreme Court; both courts upheld caps against jury-right challenges. *See Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989); *Pulliam*, 509 S.E.2d at 314-15. Indeed, *Pulliam* recognized that *Smith* had declared the statutory cap violative of "a constitutional provision guaranteeing a right of access to the courts"—not the jury right. 509 S.E.3d at 314.

**2. Some of the cases have been overruled or eroded by later decisions in their own jurisdiction.**

Two other decisions cited by Plaintiff's Amici—those from Kansas and Alabama—have been overruled or eroded in those jurisdictions. In *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251 (Kan. 1998), the Kansas Supreme Court struck down the malpractice cap based on the jury right, but recognized that the legislature could modify the common

law so long as it provided an adequate substitute remedy. *Id.* at 259. Two years later, the same court upheld a noneconomic-damages cap for all personal-injury actions that had been passed before *Bell* was decided. *Samsell v. Wheeler Transp. Servs., Inc.*, 798 P.2d 541 (Kan. 1990). Then, in *Miller v. Johnson*, 289 P.3d 1098 (Kan. 2012), the Kansas Supreme Court *upheld* another version of the malpractice cap against a challenge under an "inviolate" jury-right provision because the cap was "limited in scope" and part of an overall scheme that provided a *quid pro quo* for any encroachment of the jury right. *Id.* at 1116-17. Indeed, Defendants' Brief in Chief discusses *Miller* at length because Kansas's *quid pro quo* for malpractice victims is similar to, but not even as generous as, New Mexico's MMA. [BIC 33-34.]

*Moore v. Mobile Infirmary Association*, 592 So. 2d 156 (Ala. 1991), also cited by Plaintiff's Amici, is of questionable vitality. The majority held, without citation to authority, that "a party has a constitutionally protected right to receive the amount of damages fixed by a jury." *Id.* at 162. When it was decided, a majority of courts (including *Smith* and the Washington decision in *Sofie* discussed below) had invalidated caps; that is no longer the case. Later, in *Mobile Infirmary Medical Center v. Hodgen*, 884 So. 2d 801 (Ala. 2003), the Alabama Supreme Court recognized that *Moore* was no longer reliable authority and explicitly acknowledged "the erosion of [*Moore*'s] holdings." *Id.* at 814. It declined an invitation to reinstate the statute invalidated in *Moore* or to revisit its

prior ruling because the legislature had since adopted a different statute (imposing caps on punitive damages). *Id.*

Even in *Moore*, one justice concurred in the result solely because the statute barred instructing the jury about the cap, not because the cap itself violated the statute; he concluded that, based on a historical analysis similar to that in *Horton*, the only legislation that would violate the jury right would be a law that changed the number, impartiality, or unanimity of jurors. *Id.* at 172 (Houston, J., concurring in the result). Two other justices dissented from the opinion on the jury right. *Id.* at 181-82 (Maddox, J., dissenting). *Moore* was weak precedent even before *Hodgen* recognized its "erosion."

### 3. Some of the cases do not apply because the MMA provides a *quid pro quo* for the damages cap.

The same *quid pro quo* analysis applied by the Kansas Supreme Court in *Miller* undermines Plaintiff's Amici's reliance on the Florida Supreme Court's "open courts" ruling in *Smith*. That decision was based on a principle of Florida law that "where a right of access to the courts for redress for a particular injury" had become part of the common law, "the Legislature is without power to abolish such a right" unless either (1) the Legislature "provid[es] a reasonable alternative to protect the rights of the people of the State to redress for injuries," or (2) "the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such

public necessity can be shown." *Smith*, 507 So. 2d at 1088 (quotation omitted). This Court has previously read *Smith* as recognizing that these two bases would justify a damages cap, because Florida and some other "jurisdictions consider the constitutionality of legislative modifications of common-law rights in terms of whether the legislature has provided a quid pro quo to plaintiffs in the form of an adequate substitute remedy or corresponding benefit." *Trujillo v. City of Albuquerque*, 1990-NMSC-083, ¶¶ 10 n.4, 19, 110 N.M. 621, 798 P.2d 571, *overruled in later appeal*, 1998-NMSC-031, ¶ 18, 125 N.M. 721, 965 P.2d 305 (upholding cap). Similarly, in *Pulliam*, the Virginia Supreme Court recognized that *Smith* did not recognize any absolute bar to damages caps, but merely struck down the stand-alone cap because "the legislature had 'provided nothing in the way of an alternative remedy or commensurate benefit.'" *Pulliam*, 509 S.E.3d at 314 (quotation omitted). *Pulliam* noted that "Virginia law does not impose such a quid-pro-quo requirement," *id.*, and neither does New Mexico law.

In any event, *Smith* tellingly distinguished the damages cap before it from damages limitations in the Florida vehicular no-fault statute, under which "the legislature had provided such plaintiffs with an alternative remedy and a commensurate benefit," including that the "statute required that all motor vehicle owners obtain insurance or other security to provide injured persons with minimum benefits." *Smith*, 507 So. 2d at 1088. As the court explained, that statute "provided a

reasonable trade off," while "the benefits of a $450,000 cap on noneconomic damages run in only one direction" with "no compensatory benefit" for the plaintiff. *Id.* As this Court and the New Mexico Court of Appeals has explained in numerous cases—including *Salopek v. Friedman*, 2013-NMCA-087, 308 P.3d 139, which rejected a jury-right challenge to the MMA cap—the MMA provides powerful counterbalancing benefits where the qualified health care provider is subject to the cap, including the protection of minimum malpractice-insurance requirements not found outside the MMA. [*See* BIC 30-34.]

#### 4. The remaining cases are poorly reasoned and lack any historical analysis of the jury right.

What remains of Plaintiff's Amici's cited cases lacks solid support, including in any historical analysis of the kind undertaken by the Oregon Supreme Court in *Horton. Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989), invalidated by a 4-3 vote a noneconomic-damages cap that varied the permissible damages based on the plaintiff's age. In its cursory and unsupported analysis, the majority relied in large part on *Kansas Malpractice Victims Coalition v. Bell*, which, as noted above, was based on a *quid pro quo* analysis and later overruled as to the malpractice cap in *Miller v. Johnson*. Yet the *Sofie* majority engaged in no similar *quid pro quo* analysis. The three dissenting opinions in *Sofie* took what has become the majority position in favor of upholding caps against jury-right challenges. First, the "constitutional provision should be interpreted to

require only that a jury determine such facts as the legislature may choose to incorporate into a cause of action." *Id.* at 729 (Callow, C.J., dissenting). The majority's analysis eroded "[t]he distinction between the fact-finding power of the jury and remedy granted by the court," which is "well-illustrated" by U.S. Supreme Court decisions. *Id.* at 733 (Dolliver, J., dissenting). Second, "if consistently applied, the majority's analysis renders ... treble damages provisions unconstitutional." *Id.* at 731 (Callow, C.J., dissenting); *see id.* at 738 (Durham, J., dissenting).

*Atlanta Oculoplastic Surgery P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010), which concluded that a damages cap "nullifies" the jury's findings of fact as to damages, similarly relies on the older cases of questionable validity and relevance, including *Moore*, *Smith*, and *Sofie*. And *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633, 640 (Mo. 2012), Plaintiff's Amici's most-recent case, is yet another 4-3 decision that overturned the Missouri court's prior upholding of the cap, and it relied on *Moore*, *Smith*, *Sofie*, *Atlanta Oculoplastic*, and the earlier Oregon decision in *Lakin* that was overruled in *Horton*. *See supra* p. 11. The powerful three-justice dissent concluded that the majority "overrules this Court's well-reasoned, longstanding precedent ... without persuasive justification," and the dissent examined all of the contrary cases that have rejected jury-right challenges to damages caps. *Id.* at 649-52 (Russell, J., dissenting). This Court should follow the majority position, not this handful of outliers.

### E. Plaintiff's Amici fail to rebut the alternative analysis of the jury right in *Salopek v. Friedman*.

Plaintiff's Amici challenge the New Mexico Court of Appeals' alternative conclusion in *Salopek v. Friedman* that the *constitutional* jury right does not apply to the MMA claim, but they do not even mention the Court of Appeals' opinion or address its analysis. [Amicus Br. 5-6.] Contrary to Plaintiff's Amici, *Salopek*'s reasoning is not that the constitutional jury right (as opposed to the MMA's statutory jury right) does not apply because the MMA "is a statutory cause of action enacted after 1911" [Amicus Br. 5], but that the statutory claim is so different from the common-law claim for medical negligence in so many ways that it is no longer "analogous to common-law causes of action." [Amicus Br. 6 (quoting *Feltner*, 523 U.S. at 348).] Yet Plaintiff's Amici merely claim the MMA claim is sufficiently analogous for purposes of New Mexico law without analyzing why that is so.

This Court has never held that the existence of a common-law predecessor or analog to the statutory claim is sufficient to extend the jury right, no matter how much the claims differ. *State ex rel. Human Servs. Dep't v. Aguirre*, 1990-NMCA-083, ¶¶ 1, 12, 14, 17, 110 N.M. 528, 797 P.2d 317, cited by Plaintiff's Amici [Amicus Br. 6], *rejected* the jury right as to a paternity proceeding under the Uniform Parentage Act because "a paternity suit most resembles an action that invokes the equitable powers of a court" and, alternatively, there was no paternity

statute or common-law claim before the adoption of the constitution. *Salopek* was closely reasoned based on the MMA's specific provisions, and the cursory conclusion of Plaintiff's Amici gives this Court no reason to doubt the court of appeals' result.

## II. The MMA cap does not violate equal protection.

Plaintiff's Amici argue that the MMA violates equal protection because the New Mexico Legislature could not have had a rational basis for believing the MMA cap would enhance the availability of malpractice insurance in the state. [Amicus Br. 10-40.] It is therefore surprising that Plaintiff's Amici do not address at all the evidentiary record developed below in this case, which supports the efficacy of damages caps in achieving the Legislature's purpose. That record is summarized at length in Defendants' Brief in Chief [BIC 46-55], with copious citations to the testimony of Harvard-trained economist and Vanderbilt University Professor W. Kip Viscusi; the admissions of Siebert's insurance-market expert witness, J. Robert Hunter; and the published studies and meta-analyses by Viscusi, his colleagues, and other researchers on the effect of damages caps at every step:

- reducing losses from malpractice claims [BIC 48-49]
- reducing the frequency of malpractice claims [BIC 49]
- improving insurers' profitability and willingness to enter and remain in insurance markets [BIC 50]
- making it easier to write coverage by reducing insurance-market uncertainty and volatility—particularly in New Mexico under the MMA [BIC 50-52]

- restraining the growth in insurance premiums [BIC 52]
- improving physician supply, particularly in rural areas and medical specialties—the practice categories that most challenge New Mexico [BIC 52-55].

This evidentiary record was no fluke. The district court ordered *sua sponte*, and over Defendants' repeated objections, an evidentiary hearing at which both sides would have an opportunity to present expert and factual evidence on Siebert's constitutional challenges. That hearing ultimately consumed two and a half days. The evidentiary record heavily supported the efficacy of the MMA cap, and the district court ultimately relied on the fact-free ground of the jury right, with only an inconclusive reference to Siebert's equal-protection challenge, even though that issue had motivated the court to set an evidentiary hearing in the first place.

Instead of responding to the expert testimony and studies that the district court *accepted into evidence* from Defendants during the hearing, Plaintiff's Amici respond to additional materials offered by other amici on appeal before this Court. [Amicus Br. 26-40.] Plaintiff's Amici quibble about the persuasiveness of the materials—for example, speculating that the MMA cap is *too generous* to have the desired effects [Amicus Br. 27-28]—and cite to hearsay about other studies that are available on the Internet or cited in other courts' decisions *but that were not in evidence in this case* or subjected to the analysis of the expert witnesses who testified below. This is too little, too late.

Moreover, Plaintiff's Amici's argument about the inadequacy of the evidence supporting the efficacy of damages caps is itself inadequate. They complain that "[t]he studies proffered to show that caps can accomplish these goals are not *compellingly persuasive*" [Amicus Br. 26 (emphasis added)], as if that were the legal standard under the applicable rational-basis test. They complain that "[m]any of the proffered studies also suffer from poor methodology" [Amicus Br. 28], without identifying the studies they mean. They offer the brief writers' personal observations on the meaning of evidence, unsupported by expert testimony. They certainly do not respond to Dr. Viscusi's testimony regarding the state of research on these points. Nor do they respond to Mello & Kechalia's 2016 meta-analysis analyzing and synthesizing all of the available research, even though both Dr. Viscusi and Hunter endorsed use of meta-analyses, and Plaintiff's Amici themselves cite Mello's earlier paper. [Amicus Br. 28-29; *see* BIC 47-48.]

Plaintiff's Amici ultimately conclude that the studies "have come to hopelessly inconsistent and even contradictory conclusions." [Amicus Br. 30.] They ignore this Court's admonition, cited in the Brief in Chief [BIC 47], that, "when employing the rational-basis test, courts will not consider the controversies surrounding the academic examination of legislative policy." *Cummings v. X-Ray Assocs. of N.M., P.C.*, 1996-NMSC-035, ¶ 40, 121 N.M. 821, 918 P.2d 1321, 1996-NMSC-035, ¶ 40. As Defendants pointed out, the Court upheld the MMA's statute of repose

even though 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.* Yet Plaintiff's Amici needlessly replow much of this same ground. [Amicus Br. 14-16.] 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 v. Brand W. Dairy*, 2016-NMSC-029, ¶ 10, 378 P.3d 13 (quotation omitted; emphasis added). Plaintiff's Amici do not suggest that any of their eleventh-hour argumentation removes "all reasonable doubt"—particularly in light of their failure to address the trial evidence below.

In any event, Plaintiff's Amici ultimately offer no convincing support for the proposition that, at the time the Legislature enacted the MMA, it had no basis to believe that the legislation would in fact make malpractice insurance more available. Instead, the facts show that, for New Mexico, this was not an academic issue. The state's only insurer, Travelers, was leaving the market, and no other insurer wanted to come in. Unless New Mexico wanted whatever physicians it could attract and retain to practice without insurance, it had to find a way to ensure the availability of insurance. The state's physicians, joined by its plaintiff *and* defense bars, crafted a solution that did exactly what the Legislature

intended: a mutual insurer was created that provided coverage under the MMA, and its successor-in-interest continues to do so.

Plaintiff's Amici are silent as to the testimony offered by Siebert's own expert witness, J. Robert Hunter, on the *actual efficacy* of the MMA in insulating New Mexico from what Plaintiff's Amici admit are "major 'crises' in recent years affecting the medical malpractice insurance market." [Amicus Br. 14.] As Defendants have discussed [BIC 51-52], Hunter conceded that, since the "hard" market in the mid-1970s led the New Mexico 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."*[3] Hunter agreed that the MMA "has, in fact, insulated New Mexico from the national economic cycles." (1 Tr. 150:1-5.) He testified that the country will "probably" experience a hard market again, but when it does, *New Mexico will not experience it*. (1 Tr. 152:20-23, 152:1-9.) He explained that New Mexico's market stability results from the effect of the MMA cap in limiting private insurers' exposure to $200,000, and the responsibility of the PCF, a government-run program, 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

[3] (1 Tr. 150:1-19, 151:2-6 (emphasis added); Hr'g Ex. 10, Hunter Report 24.)

premium increases." (1 Tr. 151:10-17.) *That was the evidence from Siebert's own expert on the actual and anticipated effectiveness of the MMA.* Yet Plaintiff's Amici ignore this evidentiary record.[4]

Plaintiff's Amici seem to suggest that a legislative solution cannot survive rational-basis scrutiny under the equal-protection clause unless the legislature knew to a virtual certainty at the time of enactment that its handiwork would succeed. Fortunately, that is not the law, because it would doom almost every innovative solution ever crafted, particularly in response to imminent crises of the kind New Mexico faced once Travelers announced its withdrawal. In this case, even Siebert's expert witness acknowledged that the MMA *did* work. That is enough.

* * *

In April 2019, the North Dakota Supreme Court firmly rejected an equal-protection challenge to that state's malpractice-damages cap. *Condon v. St. Alexius Med. Ctr.*, — N.W.2d —, 2019 ND 113 (N.D. Apr.

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[4] Plaintiff's Amici also rely on assertions of fact for which there is no record. For example, they argue that "most" New Mexico physicians have chosen not to be insured under the MMA [Amicus Br. 29], even though the evidence at the hearing showed that the Office of Superintendent of Insurance does not have any such data, but that the percentage of physicians insured under the MMA is growing. [BIC 35 n.14.] In fact, the most-recent publicly available statistics, provided in the New Mexico Medical Review Commission's 2017 Annual Report to the Chief Justice, show that in the 2016-2017 period, 1,179 physicians were added to the approximately 1,300 previously covered by the MMA. N.M. Medical Review Commission, *2017 Annual Report* 4 (Nov. 12, 2018).

22, 2019). Indeed, the court upheld the cap even though, unlike this Court, it had long applied to such caps an "intermediate level of scrutiny" rather than rational-basis scrutiny. *Id.* ¶¶ 11, 13. The court concluded, based on far less evidence than Defendants presented in this case, that "there is a close correspondence between the damage cap at issue in this case and legitimate legislative goals." *Id.* ¶ 16. Among them was "the goal … to stabilize the risk for insurance providers which would potentially have a beneficial effect on premiums." *Id.* ¶ 14. Here, the MMA cap has performed as intended for over 40 years and has achieved the Legislature's purposes. Like the New Mexico Court of Appeals in *Salopek*, this Court should uphold the MMA cap's constitutionality.

## 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.

DATED this 6th day of May, 2019.

Respectfully submitted,

STEPTOE & JOHNSON LLP
Bennett Evan Cooper
201 E. Washington St., Suite 1600
Phoenix, Arizona 85004-2382
(602) 257-5217
bcooper@steptoe.com

LORENZ LAW
Alice T. Lorenz
2501 Rio Grande Blvd. NW, Suite A
Albuquerque, New Mexico 87104-3233
(505) 247-2456
alice@alorenzlaw.com

HINKLE SHANOR LLP

/s/ Dana S. Hardy
William P. Slattery
Dana S. Hardy
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554
wslattery@hinklelawfirm.com
dhardy@hinklelawfirm.com

Attorneys for
Defendants-Appellants

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Appellants' Response Brief to Amicus Brief of American Association for Justice and New Mexico Trial Lawyers Association was electronically filed in the Court's Odyssey filing system, which in turn caused all counsel of record to be electronically served, on this 6th day of May, 2019.

/s/ Dana S. Hardy