IN THE UTAH SUPREME COURT

UNIVERSITY OF UTAH, *Defendant/Appellant*, v. AMELIA TULLIS and JOHN TULLIS, *Plaintiffs/Appellees*.	**Supreme Court No. 20230672** **Appeal from** **Third District Court No. 190907183** **Honorable Adam T. Mow**

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INTRODUCTION

This appeal presents a single question: whether the Tullises discharged their burden in opposing summary judgment to establish that the Utah Governmental Immunity Act ("**UGIA**") damages cap cannot apply here, despite failing to mount any constitutional challenge, and instead relying exclusively on a 1989 decision, *Condemarin v. University Hospital*, 775 P.2d 348 (Utah 1989), narrowly holding a prior version of the damages cap was "unconstitutional as applied to University Hospital." The Tullises did *not* discharge their burden, and denial of the University's Motion for Summary Judgment (the "**Motion**") was error for the following reasons:

- *Condemarin*'s limited holding was generated by an aspect of this Court's open courts jurisprudence that is no longer the law: specifically, that the statute must be reviewed under heightened scrutiny because it implicated the open courts clause under the Court's *Berry* test;[1]
- in the decades since *Condemarin*, the legislature replaced the damages cap analyzed in *Condemarin* with a meaningfully different statute, along with having repealed and reenacted the entire UGIA;
- as a result, the *Tullises* were obligated to discharge their "heavy burden" to show relevant provisions of the current statute are unconstitutional under the appropriate level of scrutiny—rational basis; and
- this necessarily could not have been accomplished by relying on *Condemarin*, which no longer reflects the Court's approach to these questions.

The Tullises' response to the foregoing amounts a series of criticisms of the University's briefing and identification of the issues, none of which have merit.

[1] *Berry ex rel. Berry v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985).

First, the Tullises seek to avoid the consequences of their decision below not to mount a constitutional attack on the UGIA damages cap by reversing the parties' respective burdens. The University moved for summary judgment on the ground that the UGIA damages cap applies, anticipating the Tullises' reliance on *Condemarin*. The Tullises agreed the UGIA applies and argued in response that *Condemarin* renders the current cap unconstitutional. The Tullises made no constitutional argument independent of *Condemarin*. The University's burden as movant was thus met; the Tullises' burden—as the party challenging the statute—was not. The Tullises chose to oppose summary judgment without having obtained the discovery they claim would have supported a challenge to the statute—meaning not only did they fail to preserve any constitutional challenge to the UGIA cap, there is also no ground in the record ("apparent" or otherwise) that would allow them to carry their "heavy burden" for the Court to strike the damages cap provisions as unconstitutional. *Salt Lake Cnty. v. Utah State Tax Comm'n*, 2024 UT 11, ¶ 27, 548 P.3d 865 (a party challenging legislation must "affirmatively demonstrat[e]" unconstitutionality).

Second, the Tullises argue the district court properly denied summary judgment because *Condemarin* is "good law" in all respects, and contains a three-part, "majority rationale" that renders the present UGIA damages cap unconstitutional: "(1) the damage cap infringes upon a remedy protected by the Open Courts Clause; (2) this infringement triggers heightened scrutiny; and (3) the damages cap cannot withstand heightened scrutiny." (Tullis Br. 16.) But heightened scrutiny in this context was "disavowed" by this Court in *Judd v. Drezga*, 2004 UT 91, 103 P.3d 135, and in *Waite v. Utah Labor*

Commission, 2017 UT 86, 416 P.3d 635. A majority rationale that a prior version of the UGIA damages cap did not withstand *heightened* scrutiny says nothing about whether the current statute would survive *rational basis* review—even if the present statute were not materially different from that reviewed in *Condemarin*, which it is.

Third, the Tullises contend that in order for the University to avoid the effect of *Condemarin*'s limited holding, it was obligated to meet the standard for overturning precedent under *stare decisis*. There is no need to "overturn" *Condemarin*, because the majority rationale on which the Tullises rely is not the law today. And even if *stare decisis* applied, *Berry* and its progeny have been sharply criticized and identified by members of this Court as precedent particularly susceptible to reexamination.

Finally, under the guise of "reaffirming" *Condemarin* as a "sound rule" under *stare decisis*, the Tullises argue the UGIA damages cap fails under open courts and uniform operation of laws. The Tullises did not preserve these challenges below, no record evidence exists nor is validly advanced to support them, and the *Condemarin*-sourced arguments the Tullises urge in support of them fail. The Court should decline to consider the Tullises' new constitutional arguments, and should reverse and remand with instructions to grant the Motion.

ARGUMENT

A. Seeking to Remedy Their Decision Not to Mount Any Constitutional Challenge to the Damages Cap, the Tullises Incorrectly Frame the Applicable Burdens.

The Tullises failed to discharge their "heavy burden" to invalidate the UGIA damages cap. *Salt Lake Cnty.*, 2024 UT 11, ¶ 27. Because they failed to mount *any*

proper constitutional challenge below—electing instead to rely solely on *Condemarin*—the Tullises are barred from raising their constitutional arguments now. Seeking to avoid the consequences of this decision, the Tullises argue the *University* failed to carry *its* burdens on summary judgment and appeal. (*See* Tullis Br. 12–14.) These arguments fail.

1. The University Discharged Its Burdens on Summary Judgment and Appeal.

Summary judgment shall be granted "if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(a). The burden of proof under Rule 56 "shifts between the party moving for summary judgment and the nonmoving party." *Jones & Trevor Mktg., Inc. v. Lowry*, 2012 UT 39, ¶ 29, 284 P.3d 630. When a moving party bears the burden of proof on an issue, the movant's burden is to establish that he is entitled to judgment as a matter of law on that issue. *Id*. ¶ 30 n.8. Once the movant makes that "initial showing," the burden "shifts to the nonmoving party to identify contested material facts or legal flaws that would preclude entry of summary judgment." *Id*. (cleaned up).

In moving for summary judgment, the University made an "initial showing" that the UGIA damages cap limits the amount of recoverable damages. Specifically, the University established that the UGIA, including the damages cap, applied to it as a "governmental entity." (R.2685–88.) The Tullises did not dispute that their claims against the University are "generally governed by the [UGIA]." (R.3499). The burden thus shifted to the Tullises to identify contested material facts or "legal flaws" precluding the

district court from applying the UGIA damages cap. The Tullises did not identify contested material facts, and, as set forth in the University's principal brief, in citing *Condemarin* only, failed to identify a legal flaw. The University therefore showed its entitlement to judgment as a matter of law as to the UGIA damages cap.

The Tullises also contend the University failed to meet its burden on appeal in two ways, each of which is without basis. First, they argue the University "failed to adequately develop" its contentions regarding *Condemarin*. (Tullis Br. 13.) But "[a]n issue is preserved for appeal when it has been presented to the district court in such a way that the court has an opportunity to rule on it." *State v. Johnson*, 2017 UT 76, ¶ 15, 416 P.3d 443 (cleaned up). Once the Tullises relied on *Condemarin* as their sole authority for opposing the University's motion, (R.3499–504), the University in its reply argued the numerous reasons why *Condemarin* does not control.[2] (R.4246–50 (including R.4248–49 (addressing plurality opinion) and R.4523 (addressing UGIA amendments).) Given these arguments, and that the district court expressly (if erroneously) ruled that *Condemarin* is "binding authority," there is no credible claim the University failed to preserve its arguments concerning *Condemarin*.

Second, the Tullises assume the University was required to argue on appeal "why it should prevail under first constitutional principles if its attack on *Condemarin* succeeds." (Tullis Br. 13.) This too is incorrect. As the parties challenging the UGIA, the

[2] The Tullises suggest the University's analysis of *Condemarin* was limited to "a single paragraph with two unelaborated assertions." (Tullis Br. 13.) In fact, the University's analysis spanned nearly four full pages of argument, which the University further developed at oral argument. (R.4246–50; R.4521–26.)

Tullises bear the heavy burden of demonstrating unconstitutionality. *Amundsen v. Univ. of Utah*, 2019 UT 49, ¶ 47, 448 P.3d 1224 ("When asserting a constitutional violation, a party must identify the provision allegedly infringed and develop an argument as to how that provision has been violated."). The Tullises elected not to independently challenge the UGIA's constitutionality, other than pointing to *Condemarin*. As the proponent of a statute that undisputedly applies, the University had no obligation to *identify* and then *defend* against all conceivable challenges thereto. And the University fully dispatched the solitary argument the Tullises did make, that *Condemarin* held any UGIA damages cap unconstitutional as applied to the University. "Legislative enactments are endowed with a strong presumption of validity; and they should not be declared unconstitutional if there is any reasonable basis upon which they can be found to come within the constitutional framework." *In re Estate of S.T.T.*, 2006 UT 46, ¶ 26, 144 P.3d 1083 (cleaned up) (citation omitted). This principle does not permit the district court's ruling, which disregarded this strong presumption and failed to take proper account of *Condemarin*, this Court's relevant caselaw since, or the current UGIA damages cap. (R.4441, 4450–52.)

The University satisfied its burdens on summary judgment and appeal.

2. The Tullises Failed to Satisfy Their Heavy Burden of Establishing the Invalidity of the UGIA Damages Cap.

In contrast, the Tullises did not establish the invalidity of the UGIA damages cap below. The "strong presumption of validity" requires courts to resolve "any reasonable doubts in favor of constitutionality." *Matter of Childers-Gray*, 2021 UT 13, ¶ 14, 487

P.3d 96 (citation omitted). "A statute violates the constitution only when it '*clearly* violates a constitutional provision.'" *Id.* ¶ 68 (quoting *Vega v. Jordan Valley Med. Ctr., LP*, 2019 UT 35, ¶ 12, 449 P.3d 31).

"Accordingly, 'a party seeking to challenge the constitutionality of a law' faces a heavy burden and must 'provide a sufficient basis' for such challenge, and not merely 'a murky basis for setting it aside.'" *Id.* (Lee, A.C.J., concurring) (quoting another source). This Court has declined to consider challenges to the UGIA's validity where the party failed to develop specific constitutional arguments below. *Tindley v. Salt Lake City School Dist.*, 2005 UT 30, ¶ 10 n.2, 116 P.3d 295 ("Because Tindley failed to raise [additional arguments that the UGIA damages cap violated constitutional provisions] below, we decline to address them."); *Amundsen*, 2019 UT 49, ¶ 47 (declining to consider constitutional arguments regarding UGIA provisions which were not adequately raised).

While there is no fixed formula "for adequate framing and briefing of state constitutional issues before district courts," *State v. Tiedemann*, 2007 UT 49, ¶ 37, 162 P.3d 1106, "[m]ere mention of a constitutional right, phrase, or principle does not raise a constitutional claim," *Salt Lake City v. Kidd*, 2019 UT 4, ¶ 35, 435 P.3d 248. And "a party must identify the [constitutional] provision allegedly infringed and develop an argument as to how that provision has been violated." *Amundsen*, 2019 UT 49, ¶ 47; *see Graves v. Utah Cnty. Gov't*, 2024 UT App 80, ¶ 24, -- P.3d -- (declining to address open courts challenge to UGIA because challenging party "did not raise a specific constitutional challenge to the immunity of governmental entities to a degree that the district court had an opportunity to consider it").

The Tullises' constitutional arguments here were not sufficiently raised below. In response to the University's Motion seeking application of the UGIA damages cap, the Tullises relied solely on *Condemarin*. (R.3493–510.) They did not develop any argument that the damages cap violated a specific constitutional provision. (*Id*.) The same is true of the Tullises' oral arguments before the district court. (R.4546–50.)

3. The Tullises Have Not Shown "Alternate Grounds" Apparent on the Record.

The Tullises argue for affirmance of the district court's order on alternate grounds, "even though such a ground or theory … was not raised in the lower court, and was not considered or passed on by the lower court." (Tullis Br. 13 (quoting *Limb v. Federated Milk Producers Ass'n*, 461 P.2d 290, 293 n.2 (Utah 1969).) But alternate grounds for affirmance still must be "apparent on the record." *Limb*, 461 P.2d at 293 n.2; *accord Francis v. State, Utah Div. of Wildlife Res.*, 2010 UT 62, ¶ 10, 248 P.3d 44. "To be apparent on the record requires more than mere assumption or absence of evidence contrary to the alternate ground or theory. The record must contain *sufficient and uncontroverted evidence* supporting the ground or theory to place a person of ordinary intelligence on notice that the prevailing party may rely thereon on appeal." *Francis*, 2010 UT 62, ¶ 19 (emphasis added; cleaned up). "It falls to the party seeking the benefit of the rule to explain why it is eligible to have alternative arguments considered." *Id*. ¶ 21. Even if the proponent meets that burden, the Court is never "obligated" to affirm on alternate grounds. *O'Connor v. Burningham*, 2007 UT 58, ¶ 23, 165 P.3d 1214.

Because the Tullises chose to rely on *Condemarin* rather than develop a specific constitutional challenge, the district court had no constitutional challenge to resolve, and instead issued a ruling solely focused on *Condemarin*. Thus, the Tullises' two constitutional challenges are *not* "apparent on the record," but *absent* from the record entirely. The Court should decline to consider the Tullises' unpreserved constitutional challenges to the UGIA damages cap.

B. The District Court's Denial of Summary Judgment Was Error Because *Condemarin* No Longer Reflects the Law.

Regardless of its precedential value when issued, the *Condemarin* "majority rationale" on which the Tullises rely is no longer the law.[3]

If obliquely, the Tullises acknowledge only two justices (Durham and Zimmerman) found the 1978 damages cap unconstitutional under open courts clause and due process analyses, and only two justices (Durham and Stewart) found it unconstitutional under uniform operation of laws. (Tullis Br. 5). The Tullises also concede "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (*Id.*; *see* Am. Jur. 2d *Courts* § 134 (2024) ("[A]t least a majority … of the Court must agree on a ground for decision in order to make that a binding precedent for future cases; if there is merely a majority for a particular result, then the parties to the case are bound by the judgment but

[3] The Tullises portray the University as arguing there is no holding of the Court in *Condemarin* because it is a plurality opinion. (*See, e.g.*, Tullis Br. 15.) In fact, thehe University uniformly acknowledged the three-justice holding of *Condemarin* that the statutes at issue in that case were unconstitutional as applied to the University. (*See, e.g.*, Univ. Br. 1–2, 6, 9–10, 12–13, 21.)

the case is not an authority beyond the immediate parties." 20 Am. Jur. 2d *Courts* § 134 (2024).) Here, there is no need to *discern* the "narrowest grounds" constituting the holding in *Condemarin*, because the lead opinion *expressly* did so: "the holding of the Court is limited to the following: the recovery limits statutes are unconstitutional as applied to University Hospital." 775 P.2d at 366. If there were subparts to that limited holding, presumably, the lead opinion in *Condemarin* would so state. It does not. Instead, each justice took pains to distinguish their separate analyses, resulting in a "limited" holding. *See McCorvey v. UDOT*, 868 P.2d 41, 47 n.25 (Utah 1993) ("The three justices comprising the majority [in *Condemarin*] disagreed as to the correct state constitutional analysis to apply to the damage recovery statute.").

Nonetheless, the Tullises rely on a "majority rationale" in *Condemarin*: "(1) the damages cap infringes upon a remedy protected by the Open Courts Clause; (2) this infringement triggers heightened scrutiny; and (3) the damages cap cannot withstand this heightened scrutiny." (Tullis Br. 16.) To the extent *Condemarin* should be so read,[4] that rationale does not control here because it is no longer the law.

1. Open Courts Challenges Are No Longer Subject to Heightened Scrutiny.

Despite its tightly circumscribed holding, heightened scrutiny based on open courts was foundational to Justices Durham, Zimmerman, and Stewart's opinions in

[4] *See Condemarin*, 775 P.2d at 369 (Stewart, J.) (criticizing the opinions of Justices Durham and Zimmerman because they "[t]elescop[e] the due process, equal protection, and open courts analyses" and "blur[] important analytical concepts intended to give different substance and effect to each constitutional provision and to the policies each is designed to serve").

Condemarin. 75 P.3d at 363, 368–70. With scant evidence, the Tullises contend *Condemarin*'s application of heightened scrutiny is the law today. (Tullis Br. 23 (equating use of the phrase "narrow tailoring" in *Judd* and *Waite* with the application of "heightened scrutiny").) That position—and the Tullises' subsequent application of heightened scrutiny in their own unpreserved constitutional analysis, (*see id*. at 32–37)—is incorrect.

In *Judd*, this Court rejected heightened scrutiny for open courts challenges. Since *Judd*, "article I, section 11 rights are not properly characterized as 'fundamental,'" and thus courts now "apply the rational basis test." *Judd*, 2004 UT 91, ¶ 11; *see also id*. ¶ 42 (Durham, J., dissenting) (acknowledging the *Judd* majority "specifically rejects heightened scrutiny in favor of a 'rational basis' standard'" in a *Berry* review); *Waite*, 2017 UT 86, ¶ 96 n.109 (Pearce, J., concurring) ("[I]n *Judd*, this court abandoned heightened scrutiny for article 1, section 11 challenges.").

The shift from heightened scrutiny to rational basis review guts any precedential value the *Condemarin* "majority rationale" may have once held. *See id.* (noting the Court's "modifications to *Berry*"—including "[m]ost significantly," the Court's decision to "abandon[] heightened scrutiny for article I, section 11 challenges"—"undercut the persuasiveness of *Berry*'s original reasoning"). Moreover, *Condemarin* itself acknowledged the dispositive nature of such a shift: "[c]haracterizing plaintiffs' rights … as 'nonfundamental' would virtually insure that the legislative action will be found constitutional under the rational basis standard." 775 P.2d at 357 (Durham, J.).

The Tullises selectively quote instances when the Court made observations concerning "narrow tailoring" in *Judd* and *Waite*, suggesting this shows that heightened scrutiny still applies. (Tullis Br. 23–24.) But while the Court used those words (before going on to uphold legislation in those cases), the standard applied was whether the legislation was "arbitrary" and "unreasonable." *Judd*, 2004 UT 91, ¶ 16; *Waite*, 2017 UT 86, ¶ 30 (statute is "reasonable" and "non-arbitrary" because it cuts off only a "narrow class of claims" and is thus "targeted to control costs in one area where costs might be controllable"). That a reasonable, nonarbitrary statute may *also* be narrowly tailored does not mean the Court continues to apply heightened scrutiny to evaluate challenged legislation—especially since the Court has announced unequivocally that it will apply rational basis. *See, e.g.*, *Judd,* 2004 UT 91, ¶¶ 11, 16, 29 (upholding damages cap as not "arbitrary or unreasonable" and noting "one nonarbitrary manner of controlling [malpractice insurance] costs is to limit the amounts paid out").

The "majority rationale" on which the Tullises rely in *Condemarin* has been since rejected by this Court, and is not the law. Neither *Condemarin*'s holding nor any majority rationale could properly control the outcome of the Motion here.

2. *Condemarin* Also Does Not Control Because the Court Disavowed Its Presumption of Unconstitutionality.

The Tullises concede that since *Condemarin*, this Court "changed the level of deference" afforded the legislature in the *Berry* test. (Tullis Br. 22–23.) They nevertheless insist that presuming the constitutionality of a statute, rather than its unconstitutionality, has no effect on *Condemarin*'s continued viability. As support, they

cite the three *Condemarin* justices' (decidedly non-deferential) criticisms of the damages cap. (*E.g.*, Tullis Br. 24.)

Waite states this disavowal and reversal of the presumption as follows:

> [W]e have clarified that the view of the presumption of constitutionality we expressed in these [prior] cases is no longer good law. In [*Judd*], we recognized an obligation of deference to legislative judgments in a *Berry* review, and to the extent this differed from our prior application of *Berry*, those prior applications were disavowed.

2017 UT 86, ¶¶ 21–22. Under this presumption of constitutionality, "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." *Id*. (quotation omitted). The Court's role is "to determine whether the legislature overstepped the bounds of its constitutional authority in enacting [a statute], not whether it made wise policy in doing so." *Judd*, 2004 UT 91, ¶ 15. This shift in analysis begets different results. *Compare Condemarin*, 775 P.2d at 374 (Stewart, J.) (criticizing damages cap as "operat[ing] *only* on those most seriously and severely injured"), *with Judd*, 2004 UT 91, ¶ 16 ("While we recognize that such a cap heavily punishes those most severely injured, it is not unconstitutionally arbitrary merely because it does so.").

The Tullises' insistence that the Court's change in approach since *Condemarin* is ineffectual—which change followed years of criticism, debate, and calls for *Berry* to be overruled[5]—is without basis.

[5] *Waite*, 2017 UT 86, ¶ 33 ("This court has engaged over the last three decades in a sometimes contentious debate over the correct interpretation of the Open Courts Clause."); *see also id*. ¶ 58, n.81 (Lee, A.C.J., concurring) ("*Berry* has never become

3. The District Court Erred In Not Construing All Relevant Provisions of the Current UGIA.

The Tullises contend neither they nor the district court were obligated to construe the UGIA's provisions, because *Condemarin*'s analysis of the 1978 damages cap should endure. This is not the law.

This Court "presume[s] that legislative enactments are constitutional." *Vega*, 2019 UT 35, ¶ 12. As such, "where possible [the Court] will construe [legislation] as complying with our state and federal constitutions." *Id*. The Court thus "will not declare a legislative enactment invalid unless it *clearly violates* a constitutional provision." *Id*. (emphasis added). As for the UGIA, this Court has consistently required "strict compliance" with various aspects of its regime. *E.g.*, *Amundsen*, 2019 UT 49, ¶ 1 ("[T]he UGIA is a deliberately stingy piece of legislation that outlines strict requirements a plaintiff must satisfy to file suit against a State entity."). The Tullises' insistence that the statutes at issue in *Condemarin* and here are effectively the same fails to comply with requirements that courts construe statutes as constitutional if possible, resolve reasonable doubts in favor of constitutionality, and decline to invalidate legislation absent a clear violation of a constitutional provision. *Vega*, 2019 UT 35, ¶ 12.

The current UGIA damages cap differs from that considered in *Condemarin.* The cap itself has gone from $100,000, *Condemarin*, 775 P.2d at 348 n.1, to $745,200 for claims arising after July 1, 2018. Utah Code §§ 63G-7-604, -605(4); Utah Admin. R37-4-

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'firmly' established. Quite the contrary, as noted, this decision has spawned extensive debate and ongoing revisionism (which continues in the majority opinion today).").

3(12). And in the 30+ years since *Condemarin*, the legislature enacted numerous other amendments to the UGIA including a "comprehensive overhaul" of the entire statute in 2004. *Mallory v. Brigham Young Univ.*, 2012 UT App 242, ¶ 34, 285 P.3d 1230, *rev'd on other grounds*, 2014 UT 27, 332 P.3d 922.

Significantly, and unacknowledged by the Tullises, the UGIA now provides individuals whose damages have been capped with the ability to present an "excess claim"—*i.e.*, the amount exceeding the cap—to a board of examiners. Utah Code § 63G-7-701(3) ("If a judgment against the state is reduced by the operation of Section 63G-7-604, the claimant may submit the excess claim to the board of examiners."). A claimant may "submit[] a written statement of claim" within 180 days of "a final, nonappealable judgment in favor of the individual on a personal injury claim in an amount that would have exceeded the damages cap " or "a damages cap settlement." *Id*. § 63G-9-302.5(2).

None of this was reviewed below or in *Condemarin*. "Where the law on a particular subject is radically changed or superseded by statute, decisions under the old law become of little value as authority." *Maxwell Hardware Co. v. C.I.R.*, 343 F.2d 713, 716 n.1 (9th Cir. 1965) (quoting 21 C.J.S. Courts § 191); *DeKalb Cnty. Bd. of Tax Assessors v. Barrett*, 865 S.E.2d 192, 197 (Ga. Ct. App. 2021) (noting when presented a question concerning a "a post-decision statutory amendment," a court is "compel[led]" to "reevaluat[e] … the statute out of deference to the Legislature's supremacy on statutory issues" (cleaned up)). Since *Condemarin*, the legislature has repealed and replaced the UGIA, enacting a damages cap different in amount and operation, including a procedure

for the presentation of claims above the cap for payment. This also defeats *Condemarin*'s ability to control here.

C. ***Stare Decisis* Considerations Are Inapplicable.**

Having mounted no challenge to the constitutionality of the UGIA, apart from *Condemarin*, the Tullises reframe the issue as whether the *University* has "carried the heavy burden of overcoming *stare decisis* to justify changing a long-standing precedent." (Tullis Br. 24–25.) Inside this Trojan horse, the Tullises introduce arguments, not made below, urging the Court to declare the UGIA damages cap unconstitutional because *Condemarin* contains a "sound rule." (*Id*. at 32 (urging the Court to "adopt that holding as a matter of underlying constitutional principles considered afresh").) But *stare decisis* has no place here—it neither excuses the failure to preserve constitutional challenges, nor creates a record for review where there is none.

First, there is *Condemarin*'s plurality status. "For an opinion to have stare decisis effect, at least a majority … of the Court must agree on a ground for decision in order to make that a binding precedent for future cases; if there is merely a majority for a particular result, then the parties to the case are bound by the judgment but the case is not an authority beyond the immediate parties." 20 Am. Jur. 2d *Courts* § 134; *see id*. ("If … less than a majority could agree on the reasoning for [a] decision, the decision has no stare decisis effect.").

Next, there is *Condemarin*'s disavowed application of heightened scrutiny and failure to presume constitutionality, placing the burden under *Berry* on the statute's proponent. *Waite*, 2017 UT 86, ¶¶ 21–22. Whether explicitly or implicitly, *Condemarin*'s

"majority rationale" has been rejected by later, conflicting cases. *See* 20 Am. Jur. 2d *Courts* § 145 ("A court may implicitly overrule a judicial precedent; accordingly, a later decision overrules prior decisions which conflict with it regardless of whether such prior decisions are mentioned or commented on." (footnotes omitted)). Moreover, the "majority rationale" is an application of the *Berry* test, (Tullis Br. 16), which members of this Court have observed "is not entitled to much stare decisis weight." *Waite*, 2017 UT 86, ¶¶ 89, 93–97 (Pearce, J., concurring) (reviewing *stare decisis* "persuasiveness" and "firmly established" factors and concluding "[o]ur test for assessing precedential weight confirms that our Open Courts Clause jurisprudence is particularly susceptible to reexamination").

Lastly, "[w]hile stare decisis applies to the rulings rendered in regard to specific statutes, it is limited to circumstances where the facts of a subsequent case are substantially the same as a former case." 20 Am. Jur. 2d *Courts* § 125. Here, the facts are different than in *Condemarin*, the Court's analytical approach is different, and the UGIA has been repealed and replaced and includes a procedure for recovery of damages above the cap.

Thus, the question is not whether *Condemarin*'s narrow holding must be overturned; the question is whether the Tullises met their burden below to establish the unconstitutionality of the current UGIA under current law. They did not.

D. The Tullises Did Not Preserve Their Constitutional Arguments.

The Tullises argue that even if the Court determines *Condemarin* does not control, it should nevertheless adopt the "rule of *Condemarin*" as a matter of "underlying

constitutional principles considered afresh." (Tullis Br. 25, 32.) In reality, this is a request for the Court to entertain constitutional challenges to the present-day UGIA damages cap not made below. But "the judicial function of the lower courts is not optional; it is the duty of the courts to reason through each case and issue decisions based on sound and thorough legal analysis, including constitutional analysis. We are meant to be the final review—not the only review—of such issues." *Vega*, 2019 UT 35, ¶ 8 n.5. The Court should decline to consider the Tullises' unpreserved open courts and uniform operation of law challenges.

1. Even If It Were Preserved, the Tullises' Open Courts Challenge Fails.

Open courts analysis under article I, section 11 first requires the determination of "whether the legislature has abrogated a cause of action." *Waite*, 2017 UT 86, ¶ 19. If it has, the court "then determine[s] whether the 'law provides an injured person an effective and reasonable alternative remedy.'" *Id*. (quoting *Berry*, 717 P.2d at 642). "If there is no substitute or alternative remedy provided, abrogation of the remedy or cause of action may be justified only if there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective." *Id*. (quoting *Berry*, 717 P.2d at 680). And as detailed above, this Court recognizes "an obligation of deference to legislative judgments in a *Berry* review." *Id.* ¶ 22 (citation omitted).

Concerning open courts challenges to the UGIA damages cap, abrogation has involved finding that the activity in question is neither uniquely governmental nor

"essential to the core of governmental activity." *Scott v. Univ. Sales, Inc.*, 2015 UT 64, ¶ 60, 356 P.3d 1172. This inquiry is fact-intensive and considers "the extent to which the activity is funded by the State, competes in the marketplace with private entities, generates annual profits, and would be 'qualitatively different' if engaged in by a private entity." *Id.* ¶ 61. The analysis "must be applied with a degree of flexibility" and "evaluate whether the effect of tort liability would promote public safety or defeat essential or core governmental activities and programs that are critical to the protection of public safety and welfare." *Tindley*, 2005 UT 30, ¶ 23 (quotations omitted).

Having determined not to mount a constitutional challenge below, the Tullises can only address these factors in conclusory terms. For example, the Tullises assert that "2.9% of [the University's] funding" comes through legislative appropriations. (Tullis Br. 33.) The Tullises' only support for this proposition is their own brief below, which proffered that statistic without citation to any source—instead offering it "on information and belief." (*Id.* at 33 (citing R.3498).) And the Tullises' cite to the University's summary judgment reply reflects the University's objection that the "fact" was speculation, not evidence. (*Id.* (citing R.4243–44).) Without such record, the Tullises have not shown that the UGIA abrogates a remedy, and thus their challenge fails at that stage.[6]

[6] The Tullises chose to oppose summary judgment without having obtained discovery they claim would have allowed them to show abrogation. If that issue had been developed below, the University would have established that abrogation does not apply for multiple reasons, factual and legal, including that University monies are "public funds" subject to state oversight under the State Money Management Act, Utah Code §§ 51-7-1 *et seq.*, as well as additional reasons under the Utah Constitution, the Act and other authorities.

Nor can the Tullises show absence of an alternative remedy. The open courts clause is satisfied if the injured person has an "effective and reasonable alternative remedy." *Berry*, 717 P.2d at 680 (requiring the "alternative remedy" to be "substantially equal in value or other benefit"). The Tullises claim it is "self-evident" the UGIA damages cap is an inadequate alternative remedy. (Tullis Br. 34.) This fails to acknowledge the UGIA has changed materially since 1978—including the legislature's decision to include a procedure by which an "excess claim"—specifically, the amount exceeding the UGIA damages cap—can be presented to a board of examiners for payment. If this process for seeking additional compensation from the state above the damages cap does not constitute an alternative remedy, the Tullises must explain why, and they have not.

Finally, the Tullises cannot show the UGIA damages cap is an "arbitrary or unreasonable means" for eliminating a "clear social or economic evil." *Waite*, 2017 UT 86, ¶ 19. Consistent with their focus on *Condemarin*, the Tullises advance conclusory criticisms of the legislature. For example, they proclaim that "the Legislature did not articulate any crisis of claims against the Hospital," and the damages cap is "an arbitrary round number settled upon decades ago" reflecting "no logic at all." (Tullis Br. 34, 37.)[7] That non-deferential analysis is inconsistent with the Court's disavowal of heightened

[7] In arguing the cap "reflects no logic at all," the Tullises argue the cap amount is "a fraction of the Hospital's self-insurance, even before it reaches excess coverage." (Tullis Br. 37.) As the UGIA allows, Utah Code § 63G-7-801, the University is self-insured up to $5 million per claim and secures excess coverage per year—not per claim. The Tullises alone seek over $22 million, (R.3498), enough to nearly exhaust the University's total yearly coverage.

scrutiny since *Condemarin*. For example, the plaintiff in *Judd* urged the Court to find that one of the justifications for limiting non-economic damages—a crisis in the health care industry stemming from unlimited awards—"d[id] not actually exist." 2004 UT 91, ¶ 14. The Court rejected that argument, because accepting it would "permit imposition of [the Court's] views on such policy disputes." *Id*. *See also id*. ¶ 14 n.1 (rejecting dissent's argument that "there is more, better, or more intelligent support for alternative views" because that approach would elevate "the views of a majority of members of this court … over those of the majority of the legislature"); *Waite*, 2017 UT 86, ¶¶ 23, 24–26 (rejecting argument that the Court defer to the legislature only if it made "specific findings of purpose").

The Tullises purport to distinguish the Court's decisions upholding limiting statutes under the modern-day open courts analysis: a $250,000 cap on noneconomic medical malpractice damages in *Judd*, and statutes of repose in *Craftsman* and in *Waite*. But the Tullises do not address *Judd*'s reasoning, which applies equally here: "While we recognize that such a cap heavily punishes those most severely injured, it is not unconstitutionally arbitrary merely because it does so. Rather, it is targeted to control costs in one area where costs might be controllable." *Judd*, 2004 UT 91, ¶ 16.[8] An open courts challenge would fail here even if it had been sufficiently preserved or developed.

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[8] The Tullises emphasize that *Judd* considered a cap on noneconomic damages, arguing that distinction makes *Judd*'s reasoning inapplicable to the cap here. (Tullis Br. 23–24.) If so, that should have been argued below. Moreover, the UGIA cap (on both economic and non-economic damages) has been upheld several times by this Court, and the Tullises do

2. Even If It Were Preserved, the Tullises' Uniform Operation of Laws Challenge Fails.

The Tullises likewise failed to preserve a challenge to the constitutionality of the UGIA damages cap under article 1, section 24, which provides that "[a]ll laws of a general nature shall have uniform operation." Even if it had been preserved, their arguments do not satisfy their heavy burden to invalidate the statute.

The uniform operation of laws clause "guards against discrimination within the same class and helps ensure that statutes establishing or recognizing rights for certain classes do so reasonably given the statutory objectives." *Judd*, 2004 UT 91, ¶ 19. Under uniform operations, when considering legislation which "implicates" rights under the open courts provision, the Court analyzes whether the legislation is "reasonably necessary to achieve [legitimate legislative] goals" and "actually and substantially further[s] them." *Id*. ¶¶ 19, 21.[9] While the level of scrutiny may be more demanding than rational basis, deference is still shown: as in an open courts analysis, the Court "do[es] not proceed [here] as if … called upon to answer these questions in the first instance," but "giv[es] appropriate deference to the policy choices of the citizens' elected representatives." *Id*. ¶ 22.

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not meaningfully distinguish those cases other than to note that they "did not apply heightened scrutiny." (Tullis Br. 43–44 (citing *Tindley*, 2005 UT 30, ¶ 26; *Parks v. Utah Transit Auth.*, 2002 UT 55, ¶ 18, 53 P.3d 473; and *McCorvey*, 868 P.2d at 48).)

[9] *But see Tindley*, 2005 UT 30, ¶ 30 ("Because the Act implicates neither a fundamental right nor a right protected by the open courts clause, the lower, or rational basis, level of scrutiny governs our analysis of plaintiffs' equal protection and due process claims.").

The legislature's decision to enact a cap on damages for claims against state entities furthers legitimate goals. The UGIA damages cap is "intended to preserve the treasuries of the state and its political subdivisions." *Tindley*, 2005 UT 30, ¶ 32. "By limiting the damages payable by governmental entities, the [UGIA] protects an entity's operating budget from the possibility of substantial damage awards and the financial havoc they may wreak." *Id*. This is "a legitimate governmental purpose." *Id*.; *see also Judd*, 2004 UT 91 ¶ 19 (finding damage cap on noneconomic damages "reasonably necessary to the legislative goal of decreasing health care costs and ensuring the continued availability of health care").[10]

Nor have the Tullises established that the UGIA damages cap is "unconstitutionally discriminatory." *Id*. ¶ 20. The Tullises argue the damages cap "arbitrarily" classifies between (1) persons with medical malpractice claims against the University and those with claims against private hospitals, and (2) persons with "the most severe injuries and those with milder injuries." (Tullis Br. 39–40.) But such classifications are not arbitrary. The first is inherent in the UGIA, which as a general matter distinguishes between those with claims against state entities and those against private actors. That classification is definitional, not arbitrary, and it furthers the state's legitimate purpose of protecting the state treasury while still allowing those with claims

[10] *Lee v. Gaufin*, 867 P.2d 572 (Utah 1993), which invalidated statutes of repose and limitation precluding minors' claims, is distinguishable. That decision, issued years before *Judd*, scrutinized the legislature's goals, findings, and legislative history at length, and measured its sufficiency against its own evidence. *Gallivan v. Walker*, 2002 UT 89, 549 P.3d 1069, concerned the constitutionality of voter initiative legislation, and said nothing about the UGIA, damages caps, nor "classifications" like those here.

against the state to recover in full or in part. As to the second, it is inherent in the nature of a damages cap; whatever the amount, any damages cap will necessarily discriminate against those whose claims exceed the cap. *See Judd*, 2004 UT 91, ¶¶ 27, 29 (noting the legislature "necessarily discriminated" and was "inevitably forced to draw lines" in choosing to enact a cap on noneconomic damages). While such classifications may "deny some victims a full recovery while allowing such a recovery to others," that does not make them unconstitutional. *Id*. ¶ 28. Just as in *Judd*—and although the issue is undeveloped in the record—the cap here furthers the legislature's legitimate goals of "control[ing] costs," "provid[ing] for the continuing availability of health care resources," and "protect[ing] an entity's operating budget from the possibility of substantial damages awards and the financial havoc they may wreak." *Id*. ¶ 27; *see also Tindley*, 2005 UT 30, ¶ 32.

Lastly, the Tullises present no record here on which the Court could conclude the UGIA damages cap is not "reasonably necessary to achieve the [legislature's] goals, and … actually and substantially further[s] them." *Judd*, 2004 UT 91, ¶ 21. The Tullises are left to repeat their unsupported allegation that the University "receives only about 3% of its funding from the State." (Tullis Br. 41.) Speculation is no substitute for a record.

If a record existed, it would demonstrate what the Court concluded in *Tindley*: the "classifications inherent in [the UGIA aggregate damages cap] are both reasonable and reasonably related to accomplishing the Act's objective of protecting the fiscal resources of governmental entities." 2005 UT 30, ¶ 33. And while the cap "may impose significant financial and emotional burdens on those injured by a governmental entity, it is not [the

courts'] province to rule on the wisdom of the [UGIA] or to determine whether the [UGIA] is the optimal method for achieving the desired result." *Id*. ¶ 32.

In short, the Tullises failed to mount any constitutional challenge below, and their belated effort to do so on appeal fails.

CONCLUSION

Much has changed since *Condemarin* issued in 1989. The Court abandoned heightened scrutiny for open courts challenges and reaffirmed the presumption of constitutionality. The legislature overhauled the UGIA; it now contains a different, higher damages cap and a procedure for recovery of excess damages claims above the cap. Yet the Tullises did not develop any factual record or sufficient legal analysis to support a constitutional challenge. By relying on *Condemarin* exclusively, the Tullises failed to meet their burden to overcome the presumption of constitutionality afforded every statute.

Whatever its persuasive power at issuance, *Condemarin* is an artifact of a former era of open courts jurisprudence, and the rationale which animates its narrow holding is no longer the law. The district court erred in denying the University's Motion seeking to apply the cap, the constitutionality of which went unchallenged below.

The Court should remand with instructions to grant the Motion.

DATED: June 21, 2024.

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CERTIFICATE OF COMPLIANCE

1. The undersigned certifies that this brief complies with the type-volume limitation of Utah R. App. P. 24(g) because it contains 6,954 words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).

2. The undersigned certifies that this brief complies with Utah R. App. P. 21(h) governing public and private records because it does not contain any non-public information.

DATED: July 21, 2024.

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CERTIFICATE OF SERVICE

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