IN THE TENNESSEE SUPREME COURT

JODI McCLAY — PLAINTIFF/PETITIONER

v.

AIRPORT MANAGEMENT SERVICES, LLC — DEFENDANT/ RESPONDENT

No. M2019-00511-SC-R23-CV

On Certified Questions from the United States District Court
for the Middle District of Tennessee at Nashville
District Court No. 3:17-cv-00705

# PLAINTIFF'S/PETITIONER'S BRIEF

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## JURSIDICTIONAL STATEMENT

This Court has jurisdiction to answer questions certified by a federal court pursuant to Article VI, section 1 of the Constitution. *Haley v. Univ. of Tennessee-Knoxville*, 188 S.W.3d 518, 521–23 (Tenn. 2006). *See* Tenn. R.S.Ct. 23.

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The United States Court of the Middle District of Tennessee, in its case 3:17-cv-00705, has certified to this Court these three questions of state law:

(1) Does the non-economic damages cap in civil cases imposed by Tenn. Code Ann. § 29-39-102 violate a plaintiff's right to a trial by jury, as guaranteed in Article I, section 6, of the Tennessee Constitution?

(2) Does the non-economic damages cap in civil cases imposed by Tenn. Code Ann. § 29- 39-102 violate Tennessee's constitutional doctrine of separation of powers between the legislative branch and the judicial branch?

(3) Does the non-economic damages cap in civil cases imposed by Tenn. Code Ann. § 29-39-102 violate the Tennessee Constitution by discriminating disproportionately against women?

## STATEMENT OF THE CASE

This case is a personal injury action filed in the federal court on April 11, 2017, by Plaintiff Jodi McClay against Defendant Airport Management Services, LLC. Ms. McClay sought damages for injuries she sustained in the Hudson News store at Nashville International Airport in August 2016. The case was tried to a jury on January 8-11, 2019. The jury returned a verdict for Plaintiff in the amount of $444,500 for future medical expenses and $930,000 for pain, suffering, and loss of enjoyment of life, (Doc. No. 61)[1], and judgment was entered in accordance with the verdict. (Doc. No. 62)

Defendant made an oral motion following the verdict and, as directed by the Court, thereafter filed a written motion to apply the Tennessee statutory cap on noneconomic damages, found at Tenn. Code Ann. § 29-39-102, to the jury award. (Doc. No. 63) Plaintiff responded, challenging the constitutionality of the statutory cap (Doc. No. 64). Defendant filed a Reply (Doc. No. 77), and Plaintiff filed a Sur-Reply. (Doc. No. 80)

Noting that the jury awarded non-economic damages $180,000 in excess of the $750,000 statutory cap, the District Court found that application of the cap would reduce the judgment by $180,000 and that, therefore, under this Court's precedents, the constitutionality of the cap was ripe for determination. (Doc. 81). It certified the questions to this Court. *Id.*

[1] Citations are to docket entries in the federal court file, available to registered users through www.pacer.gov.

## STATEMENT OF THE FACTS

According to the Complaint[2], Ms. McClay, a citizen and resident of California, was injured when a large, heavy wooden panel, a known hazard inadequately maintained, fell from a commercial cooler at Defendant's facility at the Nashville Airport. Her right foot was lacerated and bruised. She received treatment in Nashville and then returned to California, where she received continuing medical care and physical therapy. Her pain did not abate and she was diagnosed with Complex Regional Pain Syndrome. According to the National Institutes of Health, "Complex regional pain syndrome (CRPS) is a chronic (lasting greater than six months) pain condition that most often affects one limb (arm, leg, hand, or foot) usually after an injury. CRPS is believed to be caused by damage to, or malfunction of, the peripheral and central nervous systems. ... CRPS is characterized by prolonged or excessive pain and changes in skin color, temperature, and/or swelling in the affected area." Complex Regional Pain Syndrome Fact Sheet, https://www.ninds.nih.gov/Disorders/Patient-Caregiver-Education/Fact-Sheets/Complex-Regional-Pain-Syndrome-Fact-Sheet%20 (last visited 02 April 2019).

The jury awarded Ms. McClay $444,500 for future medical expenses and $930,000 for pain, suffering, and loss of enjoyment of life. (Doc. No. 61).

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[2] The record of the federal court contains no summary of the alleged facts. The statement here is taken primarily from the allegations of the Complaint, Doc. 1.

## SUMMARY OF THE ARGUMENT

The answer to each of the three certified questions is yes. The cap is unconstitutional and is void *ab initio*. *Edwards v. Allen*, 216 S.W.3d 278, 290 (Tenn. 2007).

The drafters of the Tennessee Constitution were serious about the effects to be given to the rights, like trial by jury, they enumerated, providing that these rights "shall never be violated on any pretense whatever." Article XI, § 16. This Court has given that language full effect, finding, "the General Assembly has no constitutional power to enact rules that infringe upon the protections of the Declaration of Rights," *State v. Mallard*, 40 S.W.3d 473, 483 (Tenn. 2001).

The first two issues presented are interrelated, as legislative interference with the right to jury trial is also legislative interference with the power of the judiciary. The right to jury trial and the separation of powers sensibly are considered together because the right to jury trial is "'no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.'" *Walsh v. State*, 166 S.W.3d 641, 649 (Tenn. 2005), *quoting Blakely v. Washington*, 542 U.S. 296, 306 (2004). Thus, the Constitution assigns to the jury a political function. As de Tocqueville famously noted,

> The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged and with the notion of right. If these two elements be removed, the love of independence becomes a mere destructive passion. It teaches men to practice equity; every man learns to judge his neighbor as he would himself be judged. And this is especially true of the jury in civil causes, for while the number

> of persons who have reason to apprehend a criminal prosecution is small, everyone is liable to have a lawsuit. The jury teaches every man not to recoil before the responsibility of his own actions and impresses him with that manly confidence without which no political virtue can exist. It invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society and the part which they take in its government. By obliging men to turn their attention to other affairs than their own, it rubs off that private selfishness which is the rust of society.

Alexis de Tocqueville, DEMOCRACY IN AMERICA, Ch. XVI (1835), available at http://xroads.virginia.edu/~hyper/DETOC/1_ch16.htm (last visited 02 April 2019); *see State v. Davis*, 266 S.W.3d 896, 911 n.1 (Tenn. 2008)(Wade, J, concurring). The Constitution makes the jury the primary decisionmaker in the state's discharge of what Chief Justice Marshall, in *Marbury v. Madison*, identified as a "first dut[y]" of any state: to provide a full remedy to persons who have been wronged. *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

In a thoughtful order a trial court in Chattanooga reasoned that the cap unconstitutionally interfered with the right to jury trial. *Clark v. Cain*, 2015 WL 1137546 (Tenn.Cir.Ct. 2005). This Court vacated that ruling on procedural grounds, *Clark v. Cain*, 479 S.W.3d 830, 831 (Tenn. 2015), but its reasoning remains persuasive. The Sixth Circuit thought so, applying similar reasoning in holding unconstitutional a related cap on punitive damages, Tenn. Code Ann. § 29-39-104. *Lindenberg v. Jackson Nat'l Life Ins. Co.*, 912 F.3d 348, 353 (6th Cir. 2018)(petition for rehearing denied March 28, 2019). Both courts affirmed that the amount of damages in a case at law is a fact to be determined by a jury and ruled that the legislature's attempt to determine that fact in a class of cases violates the fundamental right to jury trial.

The cap arrogates the jury's power to the legislature, violating the separation of powers. The Constitution assigns the jury, in a case at law, the role of decisionmaker regarding damages. Even judges, within the judicial branch, are granted very limited power to interfere with that role. Judges have no power to do what the legislature does with the cap, to reduce awards juries make; they have the power only to suggest reductions. The legislature would seize the jury's Constitutional role of decisionmaker and reduce it to that of adviser. At law juries decided, they did not advise; advisory juries were used only in equity. The decisionmaking function is enshrined in the Constitution as "inviolate." The legislature may not infringe on it.

The legislature candidly said it did not trust juries to perform their Constitutional function. It identified no change in the way juries had performed this function since the Constitution was adopted, reflected little on the constitutional magnitude of its action, and offered little rationale for why the body politic required a transfer of power from citizen-jurors to legislators.

The legislature invaded the political role of juries in part because of an unsupported belief that jury awards of pain and suffering damages are subjective and not predictable. Even if the premise were true, caps affect relatively few cases and therefore lend minimal predictability to awards. Caps do nothing to make awards less subjective. They merely substitute the subjective judgment of the legislature for that of a jury.

Caps rob claimants of that which has justly been found due to them, and caps disproportionately rob female claimants, like Ms. McClay, because they, not men,

disproportionately suffer the kinds of injury that are not measured in markets. *See* Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 Emory L.J. 1263, 1267 (2004). The cap affects only the cases that juries have found the most meritorious, *Lucas v. United States*, 757 S.W.2d 687, 690 (Tex. 1988), and any minimal societal benefit they yield is borne primarily by persons traditionally unable to wield the political power that might protect them from such legislative actions. Absent here is the required fit between the ends the legislature used and the means it employed to achieve them. The cap thus discriminates against women in violation of equal protection guarantees.

## ARGUMENT

## STANDARD OF REVIEW

Whether a statute is constitutional is considered *de novo* by this Court. *State v. Decosimo*, 555 S.W.3d 494, 506 (Tenn. 2018), *cert. denied*, 139 S. Ct. 817 (2019). This standard applies to each of the three issues presented.

### I. The non-economic damages cap in civil cases imposed by Tenn. Code Ann. § 29-39-102 violates a plaintiff's right to a trial by jury, as guaranteed in Article I, section 6, of the Tennessee Constitution.

The right to trial by jury is "inviolate," Tenn. Const. art. 1, § 6, "one of the most important personal rights found in the Tennessee Declaration of Rights." *Poole v. Union Planters Bank, N.A.*, 337 S.W.3d 771, 778 (Tenn. Ct. App. 2010).[3] This elevated Constitutional status reflects the role the jury plays in the structure of the body politic.

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[3] The jury trial is not merely a procedural feature of our civil justice system. A war was fought, and lives lost, to win this right. The jury was immensely popular among the American colonists. They admired the heroism of Edward Bushel and the other jurors who refused to convict Quaker William Penn in 1670, knowing they would be, and being, fined and jailed for their failure to do so. *See* John Guinther, THE JURY IN AMERICA ch. 1 (1988). A 1688 case, in which a jury acquitted seven Anglican bishops of seditious libel for signing a letter in opposition to James II, elevated the jury in public esteem "as a bulwark of liberty, as a means of preventing oppression by the Crown." Austin Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 Harv. L. Rev. 669, 676 (1918). "Treatises extolling the jury flooded the market and profoundly influenced eighteenth century American as well as English views about jury trial." *Id.*

"The struggle over jury rights was, in reality, an important aspect of the fight for American independence and served to help unite the colonies." Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 Hastings L.J. 579, 596 (1993). *See also* Roscoe Pound, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 69-72 (1957); Carl Ubbelohde, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION 209-11 (1960); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 654 (1973).

*Walsh v. State*, 166 S.W.3d at 649; *Wolf v. Sundquist*, 955 S.W.2d 626, 630 (Tenn. Ct. App. 1997) ("This right is of constitutional significance because providing all citizens with an opportunity to participate in the fair administration of justice is fundamental to our democratic system.")(citing cases). The right is preserved as it existed at common law when the Tennessee Constitution was adopted in 1796. *Patten v. State*, 426 S.W.2d 503, 506 (Tenn. 1968), *cert. denied*, 400 U.S. 844 (1970).

At common law, it was the exclusive function of the jury to ascertain damages in a tort action for personal injury. *See, e.g.*, 3 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND (1965) 398 ("[W]here damages are to be recovered, a jury must be called to assess them; unless the defendant to save charges will confess the whole damages laid in the declaration"); *Barry v. Edmunds*, 116 U.S. 550, 565, 6 S. Ct. 501, 509, 29 L. Ed. 729 (1886) ("[N]othing is better settled than [the principle] that, in...actions for torts, where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict."); *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 776 (Mo. 2010)(Wolff, J. concurring) (internal citation omitted), *cited with approval, Watts v. Lester E. Cox Med. Centers*, 376 S.W.3d 633, 638 (Mo. 2012), reh'g denied (Sept. 25, 2012)(holding caps unconstitutional in violation of right to jury trial) ("In a 1615 case, it was declared that 'jurors are chancellors' in the matter of assessing damages, and entitled to use an uncontrolled discretion. No one outside of the judicial system interfered."); *Id.* ("English common law [of 1607] recognized medical negligence as one of five types of 'private wrongs' that could be redressed in court.").

The right of jury trial applies to a claim "inherently legal in nature," *Smith Cty. Educ. Ass'n v. Anderson*, 676 S.W.2d 328, 336 (Tenn. 1984), that was "triable by jury at the time of the formation of the Constitution." *Newport Hous. Auth. v. Ballard*, 839 S.W.2d 86, 88 (Tenn. 1992). The Supreme Court explicated these statements in finding that a jury must ascertain damages even in statutory claims that effectively codify common law claims, emphasizing that a jury must determine the amount of damages:

> The 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. It has long been recognized that "by the law the jury are judges of the damages." *Lord Townshend v. Hughes*, 2 Mod. 150, 151, 86 Eng. Rep. 994, 994–995 (C.P. 1677). Thus in *Dimick v. Schiedt*, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603 (1935), the Court stated that "the common law rule as it existed at the time of the adoption of the Constitution" was that "in cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it." *Id.*, at 480, 55 S.Ct., at 298 (internal quotation marks and citations omitted). And there is overwhelming evidence that the consistent practice at common law was for juries to award damages.

*Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998)(emphasis in original).

Tennessee law similarly defines the decisionmaking authority the Constitution grants to the jury:

> Where a party invokes the right to a jury trial, our constitution requires "that the jury be allowed to determine all disputed issues of fact." *Spence v. Allstate Ins. Co.*, 883 S.W.2d 586, 594 (Tenn. 1994); [*Meals ex rel. Meals v. Ford Motor Co.*, 417 S.W.3d 414, 419 (Tenn. 2013)] (citing Tenn. Const. art. I, § 6). The questions of disputed fact to be resolved by the jury include the type and amount of any damages awarded to the plaintiff. *Meals*, 417 S.W.3d at 419-20."

*Borne v. Celadon Trucking Servs., Inc.*, 532 S.W.3d 274, 308 (Tenn. 2017). The determination of damages is "peculiarly within the province of the jury," *Thompson v. French*, 18 Tenn. 452, 459, 1837 WL 1022, at *4 (1837), and a "court has no more right to

weigh the evidence and to disturb the verdicts of juries on the question of the amount of damages, in [trials at law], than it has on any other question of fact." *Grace v. Curley*, 3 Tenn. App. 1, 10, 1926 WL 2018, at *6 (1926).

*Smith Cty. Educ. Ass'n v. Anderson, supra,* and *Newport Hous. Auth. v. Ballard, supra,* discuss the distinction between a jury in a legal case and a jury in a case in equity. In the former, the role of the jury is decisional; in the latter, merely advisory. The legislature would reduce the role of the jury in a case at law to the role of a jury in equity. The distinction between the roles was understood by the drafters of the Constitution, whose command that the role of the jury remain "inviolate" precludes this legislative effort to diminish the role of a jury in a legal case.

The Alabama Supreme court explained this in depth:

> It is not relevant, under a § 11[of the Alabama Constitution, making the right to jury trial inviolate, as it is in Tennessee] analysis, that the statute has not entirely abrogated the right to empanel a jury in this type of case. The relevant inquiry is whether the function of the jury has been impaired. Because the right to a jury trial "as it existed at the time the Constitution of 1901 was adopted must continue 'inviolate,' " the pertinent question "is not whether [the right] still exists under the statute, but whether it still remains inviolate."...
>
> Because the statute caps the jury's verdict automatically and absolutely, the jury's function, to the extent the verdict exceeds the damages ceiling, assumes less than an advisory status. This, as our cases illustrate, is insufficient to satisfy the mandates of § 11... A "constitution deals with substance, not shadows. Its inhibition [is] leveled at the thing, not the name."... Consequently, we hold that the portion of § 6-5-544(b), imposing a $400,000 limitation on damages for noneconomic loss represents an impermissible burden on the right to a trial by jury as guaranteed by § 11 of the Constitution of Alabama.

*Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 163-64 (Ala. 1991)(internal citations omitted); *Id.* at 164 ("practical effect of the damages limitation ... is to prevent the jury from applying the facts").

Missouri similarly found, "statutory caps on damage awards simply did not exist and were not contemplated by the common law when the people of Missouri adopted their constitution in 1820 guaranteeing that the right to trial by jury as heretofore enjoyed shall remain inviolate. The right to trial by jury 'heretofore enjoyed' was not subject to legislative limits on damages." *Watts v. Lester E. Cox Med. Centers*, 376 S.W.3d 633, 639 (Mo. 2012). Georgia, too, concurs: "By requiring the court to reduce a noneconomic damages award determined by a jury that exceeds the statutory limit, OCGA § 51-13-1 clearly nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function." *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731, 735, 691 S.E.2d 218, 223 (2010).[4] The state constitutions of Alabama (Article 1, Section 11), Missouri (Article 1, Section 22(a)), and Georgia (Art. 1,

[4] Of the eight states bordering Tennessee, three do not have statutes establishing caps on pain and suffering damages (AR, KY, NC). Three have had legislative enactments struck down as violating the right to trial by jury, *supra.* Mississippi has a cap on pain and suffering damages in medical malpractice actions which was struck down by one trial court, *Tanner v Eagle Oil & Gas Co.*, 2012 WL 7748580 (Miss. Cir., 2012), and has been challenged, without the issue being reached. *See Emergency Med. Assocs. of Jackson, PLLC v. Glover*, 189 So. 3d 1247 (Miss. Ct. App. 2016). A similar malpractice cap in Virginia was upheld by the Virginia Supreme Court, adopting a rationale similar to that advanced by the opposing parties here. *Etheridge v. Med. Ctr. Hosps.*, 237 Va. 87, 96, 376 S.E.2d 525, 529 (1989); *see also Pulliam v. Coastal Emergency Servs. of Richmond, Inc.*, 257 Va. 1, 7, 509 S.E.2d 307 (1999).

Sect. I, Par. XI(a)) each had provisions that declared "the right to trial by jury shall remain inviolate."[5]

Caps are, effectively, absolute remittitur by legislative fiat. *Lebron v. Gottlieb Mem'l Hosp.*, 237 Ill. 2d 217, 239, 930 N.E.2d 895, 908-09 (2010) ("legislative remittitur" violates separation of powers under the Illinois Constitution); *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 689 N.E.2d 1057 (1997). They are not like judicial remittitur, which was and is recognized at common law. Remittitur is not the power to cap damages. It is the power to "suggest" a reduction of the verdict; if the suggestion is not taken, the court may order a new trial, but may not order a reduction in the amount of damages found by the jury. *Meals*, 417 S.W.3d at 420-21. *See Sofie v. Fireboard Corp*, 112 Wash 2d 636, 654, 771 P.2d 711, 721 (1989) amended, 780 P.2d 260 (Wash. 1989) ("the legislative damages limit is fundamentally different from the doctrine of remittitur"). *See also Hetzel v. Prince William Cnty., Va.*, 523 U.S. 208 (1998) (relying on common law precedents to find that the Seventh Amendment bars an absolute reduction of compensatory damages). This Court in *Meals* admonished that there are limits even on what a court might suggest: the suggestion "should not be so substantial as to destroy the jury's verdict." *Meals*, 417 S.W.3d at 420, n.8. The highest courts of neighboring states have recognized this distinction between a legislative fiat and judicial remittitur in holding caps unconstitutional. *Watts v. Lester E. Cox Med. Ctr., supra*; (Mo. 2012); *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731, 738, 691 S.E.2d 218, 224 (2010)

[5] The state of Washington's Supreme Court found statutory damage caps in violation of Washington's state constitution that guaranteed the inviolate right to trial by jury. *Sofie v Fibreboard Cpr.*, 112 Wash 2d 636, 771 P.2nd 711 (1989) (Art. 1, Sect. 21)

("[T]he contention that the damages caps are analogous to the courts' remittitur power is unfounded.").

The cap's diminution of the role of the jury cannot be tolerated:

> The preservation of the trial by jury in all its purity is of the first importance; a strict adherence to its form, in all its parts, is not to be dispensed with, or to be considered as captious or trifling. It is to be watched with a jealous assiduity, and the slightest deviation from the established mode of proceeding regarded as affecting our dearest interests, and as such to be instantly put down--bearing constantly in our minds, that it is one of the best guards of our rights, of our property, of our liberty and our lives.

*Garner v. State*, 13 Tenn. 160, 179 (1833)(Whyte, J., concurring).

## II. The non-economic damages cap in civil cases imposed by Tenn. Code Ann. § 29-39-102 violates Tennessee's constitutional doctrine of separation of powers between the legislative branch and the judicial branch.

Article XI, Section 16 provides the following:

> The declaration of rights hereto prefixed is declared to be a part of the Constitution of this State, and shall never be violated on any pretense whatever. And to guard against transgression of the high powers we have delegated, we declare that everything in the bill of rights contained, is excepted out of the General powers of government, and shall forever remain inviolate.

The Tennessee legislature's passage of and the Governor's promulgation of Tenn. Code Ann. § 29-39-102 violates the unequivocal prohibition of Article XI, Section 16.

In addition, the Tennessee Constitution prohibits the exercise of judicial power by the legislature.[6] The cap violates this injunction in two ways: by diminishing the

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[6] Article II Section 1.

> The powers of the government shall be divided into three distinct departments: legislative, executive, and judicial.

role the Constitution assigns to judicial officers (judges and jurors) and by replacing a system of individualized adjudication with one of categorical adjudication.

Tennessee's courts wield the judicial power of the state. Tenn. Const. Art. VI, § 1[7]. Any attempt to exercise "powers properly belonging to the judicial branch by the legislative branch of government violates Article II, Section 2 and Article VI, Section 1 of the Constitution of Tennessee." *Belmont v. Bd. of Law Examiners*, 511 S.W.2d 461, 464 (Tenn. 1974). The power of individualized adjudication, with individualized determination of damages by a jury, is a peculiarly judicial function unconstitutionally trod upon by the caps.

"'Judicial power' is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for a decision." *Morrow v. Corbin*, 122 Tex. 553, 558, 62 S.W.2d 641, 644 (1933), *cited with approval, State v. Mallard*, 40 S.W.3d 473, 483 (Tenn. 2001). The right to ask a court to perform this function is itself fundamental. Tenn. Const., Art. I, §§ 17[8], 23[9]; *Borough of*

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Section 2.

> No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.

[7] Article VI, Section 1.

> The judicial power of this state shall be vested in one Supreme Court and in such Circuit, Chancery and other Inferior Courts as the Legislature shall from time to time, ordain and establish; in the judges thereof, and in justices of the peace. The Legislature may also vest such jurisdiction in Corporation Courts as may be deemed necessary. Courts to be holden by justices of the peace may also be established.

[8] Article I, Section 17.

> That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of

*Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 387 (2011)("the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes. '[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government.'"); *Lucas v. United States*, 757 S.W.2d at 690. This exercise of judicial power requires individualized adjudication of a particular claim. *See Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (constitutional right to be heard "in a meaningful manner" requires hearing on matters particular to the case before the court).

The cap violates these principles. The difference between the kind of adjudication to which plaintiffs are entitled and the kind of adjudication they get with caps is analogous to the difference between custom-tailored clothing and off the rack clothing, and in this case nothing is available off the rack in large or extra-large. "[A] 'court's constitutional function to independently decide controversies is impaired if it must depend on, or is limited by, another branch of government in determining and evaluating the *facts* of the controversies it must adjudicate.'" *State v. Mallard*, 40 S.W.3d

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> law, and right and justice administered without sale, denial, or delay. Suits may be brought against the state in such manner and in such courts as the Legislature may by law direct

[9] Article I, Section 23:

> That the citizens have a right, in a peaceable manner, to assemble together for their common good, to instruct their representatives, and to apply to those invested with the powers of government for redress of grievances, or other proper purposes, by address of remonstrance.

A remonstrance is a "petition to a court or deliberative or legislative body, in which those who have signed it request that something which is in contemplation to perform shall not be done." 3 BOVIER'S LAW DICTIONARY 2872 (8th ed. 1914).

473, 483 (Tenn. 2001)(quoting *Opinion of the Justices*, 141 N.H. 562, 688 A.2d 1006, 1016 (1997)); see discussion of jury's exclusive province to determine facts, *supra*, at 5-11. The caps do not survive a separation of powers challenge because they "frustrate or interfere with the adjudicative function of the courts." *Underwood v. State*, 529 S.W.2d 45, 47 (Tenn. 1975).

Little could interfere more with a court's function than to have it try a case to a jury; instruct the jury that it must determine the facts, including the amount of damages; have the jury render a verdict; and then have that verdict rendered meaningless by the caps. The impact on jurors, called to serve and then having their service rendered nugatory, is appalling. *See* Shari Seidman Diamond, *Truth, Justice, and the Jury*, 26 Harv. J.L. & Pub. Pol'y 143, 152 (2003) (describing the seriousness and earnestness of jurors in deliberating). The reactions of actual jurors are well-predicted by Professor Diamond's work. Michael Overton, a juror in another case involving the cap, *Yebuah v. Center for Urological Treatment*, Court of Appeals Case No. M2018-01652-COA-R3-CV (pending),[10] noted, upon learning that the cap would diminish the amount he jury awarded:

> We jurors worked hard during this case and paid close attention all the way. We each voted for what was fair and reasonable under the law the Judge gave us.
>
> Now, sadly, I have learned that the hard work we put in as jurors really did not matter because there is a law that places a limit on what Mr. and Mrs. Yebuah can recover. I understand that the limit is $750,000 for Mr. and Mrs. Yebuah combined. $750,000 does not even come close to compensating Mr. and Mrs. Yebuah for what they went through. How can

[10] Mr. Overton's affidavit, as well as that of *Yebuah* juror Amber Lasater, *infra*, were submitted in the *Yebuah* case and are reproduced in the Appendix. Plaintiff asks that this Court take judicial notice of them.

it be that the Tennessee Legislature has limited Mr. and Mrs. Yebuah to what they can recover? It is just wrong.

It also is wrong that we twelve jurors worked so hard during this case and we voted our conscience, and our votes do not count. What kind of system is this where Tennesseans are brought together into the courthouse to decide an important case involving important issues and our votes in the end do not matter?

Affidavit of Michael Overton, App. 1-2. His fellow juror, Amber Lasater, expressed similar feelings:

Eleven fellow jurors and I deliberated this case. We sat through this trial for five days. We paid attention. We took our job seriously. We carefully considered the evidence that was presented to us, every bit of it, and the law Judge Binkley gave us. When we went into the jury room to decide the case, we discussed all the evidence. We worked hard and deliberated with integrity over the value of the Yebuahs' case....

I am upset and disheartened to learn that the law in Tennessee limits Mr. and Mrs. Yebuah to $750,000 for what they have gone through. It isn't right. $750,000 is not fair compensation for what they suffered. It makes no sense to me that the Legislature essentially decides the value of a case, without knowing the facts and evidence of that particular situation. The Legislators cannot possibly know what we know about how badly the Yebuahs were harmed by this neglectful conduct. The Legislators did not even know about this case or the Yebuahs when they passed this senseless law years ago.

This law is an insult to the people of Tennessee who dutifully serve as jurors. It is just plain wrong to assemble jurors in a case, tell them what they need to do, they do it in good faith, believing they are doing the right thing, only to learn later their votes didn't matter and their votes do not count. We are not living in a Communist country. We are Americans and Tennesseans with constitutional rights. Something is very wrong when a Tennessean's vote does not even count in such an important matter like this jury trial.

Why doesn't the Legislature trust us to vote when fulfilling jury duty? Our vote counts when we step into the voting booth. Obviously our vote does not count when we step into the jury box.

Affidavit of juror Amber Lasater, App. 3-4.

The legislature purposefully and unconstitutionally arrogated unto itself powers constitutionally vested in the judiciary. The sponsors of the Civil Justice Reform Act[11] repeatedly made known their purpose in enacting caps on damages. In the words of Representative Dennis, "The purpose of this act is to create predictability and clarity for business owners, small and large throughout this state, in regards to risk management." May 9, App. 23:20-23; App. 28:5 ("much needed predictability and risk management"); May 12, App. 35:24-25 (Kelsey) ("This bill is to provide certainty and clarity."). Senator Norris noted that the bill was all about quantifying risk so that businesses can say "we can quantify what our risk might be there." April 19, App. 18:24-25. "[Y]ou can accurately assess your potential liabilities and potential insurance needs." May 9, App. 31:15-18 (Rep. Dennis).

The sponsors were aware of objections that caps would modify the constitutional function of the jury. "[W]e are not changing the right to a trial by jury; everyone will still have that right. We are simply modifying the terms of the - a jury award that can be granted." May 9, App. 26:7-11 (Dennis). They were motivated by the fact that the businesses in whose interest they were acting did not feel that juries were fair: business had "lost a lot of confidence and faith in the judicial system. They do not want to go to

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[11] The enrolled Act, 2011 Tennessee Laws Pub. Ch. 510 (H.B. 2008), with sponsors listed, is available at https://publications.tnsosfiles.com/acts/107/pub/pc0510.pdf (last visited January 29, 2019). Excerpts of certified transcriptions of the legislative hearings are reproduced in the Appendix. References in the brief are to the day of a hearing, Appendix page and line number for each day.

court because business doesn't feel that that they've got a fair playing field, and most importantly, it's unpredictable." April 19, App. 16:17-21 (Barfield).

The sponsors never explained what had happened, in the intervening two centuries, to make the jury less reliable and predictable than it had been when the 1796 Constitution made its function "inviolate," a feature that has been maintained continuously through the present. Tenn. Const., Art. I § 6. They did, however, justify their actions by analogy to two wholly non-analogous situations: the absence of jurors in governmental tort liability actions and in workers' compensation claims. May 9, App. 26:7-14 (Dennis).

When the Constitution was adopted the jury had no function in evaluating claims against the government as no claims existed; the sovereign was immune. *Cruse v. City of Columbia*, 922 S.W.2d 492, 495 (Tenn. 1996). When the legislature, as authorized first by the 1796 Constitution, and today by Article I, § 17, lifted the bar on sovereign immunity without providing for trial by jury, the right to jury trial remained inviolate because it never had existed with regard to claims against the sovereign.

This Court found the workers' compensation scheme did not violate the right to trial by jury because by accepting employment a worker voluntarily waived the right. *Scott v. Nashville Bridge Co.*, 143 Tenn. 86, 223 S.W. 844, 852 (1920) 114-115 (1919) ("A jury may be waived by parties falling within the provisions of the Workmen's Compensation Act by their voluntary acceptance of the terms of said act.") No such voluntary waiver is involved in this case or in tort cases in general.

## III. The non-economic damages cap in civil cases imposed by Tenn. Code Ann. § 29-39-102 violates the Tennessee Constitution by discriminating disproportionately against women.

The jury returned a verdict in favor of Jodi McClay of $444,500 for future medical expenses and $930,000 for pain, suffering and loss of enjoyment of life in damages. The cap deprives her of $180,000.00. Professor Lucinda Finley has established, empirically, that caps on noneconomic damages disproportionately affect claims like this asserted by women, the elderly, and children. *Finley, The Hidden Victims of Tort Reform, supra,* 53 Emory L. J. 1263. For example, analysis of California data revealed that before applying a noneconomic damages cap, women's average jury awards were 52 percent of men's mean awards and 94 percent of men's median awards; after applying the cap, the women's figures dropped to 45 percent and 59 percent, respectively, *id.* at 1285-86, a sad echo of the wage gap that affects women. *See, e.g* U.S. Department of Labor, *Breaking Down the Gender Wage Gap*, https://www.dol.gov/wb/media/gender_wage_gap.pdf.

Consistent discriminatory effects were found in data from Florida and Maryland. *Finley, supra,* at 1297-1307; 1307-12. In Florida, in torts in general (torts that have no special gender component), noneconomic damages comprised 58 percent of awards for women, versus 50 percent of awards for men. *Id.* at 1299, Tables 14, 15. But non-economic damages comprised 83 percent of amounts awarded for gynecological torts suffered only by women, 33 percentage points higher than awards to men in gender-neutral torts. *Id.* at 1302, Table 18. In Maryland:

> the average noneconomic award to women was $714,881, and the average noneconomic award to men was $495,457. Thus, the average noneconomic award to women was $219,424 more than that to men, or 44% more than men's noneconomic awards. The median noneconomic award for women

> was $450,000, while the men's median was $331,250. The median noneconomic award to women was 36% higher than for men and shows that more than half of women's cases were affected by the $350,000 cap, while less than half of men's cases were similarly affected.

*Id.* at 1307-08.

Analysis of the California data described above showed that persons over 65 years of age, men and women, suffered analogous disproportionate reductions in damages when their awards were compared to those of a younger cohort. *Id.* at 1284-89. Professor Finley concluded, "women and elderly accident victims will suffer a significant disparate impact from caps. They will lose greater percentages of their total compensatory awards than men who are of working age." *Id.* at 1313.

These differences are matters of constitutional concern,[12] as facially neutral statutes, like the cap, that "involve discrimination against suspect or quasi-suspect

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[12] Article I, Section 8, provides:

> That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land.

Article XI, Section 8, provides:

> § 8. General or special law
>
> The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunities, or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law. No corporation shall be created or its powers increased or diminished by special laws but the General Assembly shall provide by general laws for the organization of all

classes, like race, age, or gender" can violate the constitution. *Nat'l Gas Distributors v. Sevier Cnty. Util. Dist.*, 7 S.W.3d 41, 46 (Tenn. Ct. App. 1999). The Court of Appeals, in *Nat'l Gas*, was following *Mitchell v. Mitchell*, 594 S.W.2d 699, 701 (Tenn. 1980), in which this Court struck down facially gender-based discriminatory legislation, noting, "[t]he gender-based classification which these statutory sections created did not 'serve important governmental objectives' and was not 'substantially related to achievement of those objectives.'" (quoting *Orr v. Orr*, 440 U.S. 268, 279 (1979)). It also considered, however, the constitutionality of a statute "neutral on its face and *susceptible* of a constitutionally sound interpretation." *Mitchell*, 594 S.W.2d at 702 (emphasis added). This Court analyzed the statute under these principles, finding that the statute did not work any discrimination on the basis of gender, and therefore was constitutional. *Id.* Strict scrutiny is required when an enactment burdens fundamental rights, like the rights to jury trial and to petition affected here, or "'operates to the peculiar disadvantage of a 'suspect class' (e.g., age or race).'" *Nat'l Gas*, 7 S.W.3d at 45. Intermediate scrutiny is required with regard to enactments whose burdens are disproportionately allocated by gender. *Id.* at 46.

Finley explains why women, in particular, lose more compensation to noneconomic damages caps than men do:

> One major reason why women, on average, recover more in noneconomic damages—and why a greater proportion of their total damages are for noneconomic loss—is that certain injuries that happen primarily to women are compensated predominantly or almost exclusively through

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corporations, hereafter created, which laws may, at any time, be altered or repealed and no such alteration or repeal shall interfere with or divest rights which have become vested.

> noneconomic loss damages. These injuries include sexual or reproductive harm, pregnancy loss, and sexual assault injuries. The impact of these injuries—impaired fertility or sexual functioning, miscarriage, incontinence, trauma associated with sexual relationships, and scarring or disfigurement in sensitive, intimate areas of the body—is not primarily on the economic wage earning aspects of life. Rather, the impact is more in terms of emotional suffering and self-esteem—an impaired sense of self and ability to function as a whole person, or damaged relationships. These priceless aspects of life hold little economic worth in the market, so market-referenced economic loss damages are ill-suited and inadequate to compensate for them.

Finley, *supra*, at 1266.

The kinds of injuries women suffer are not measured in markets, in part because for policy reasons deeply rooted in law and culture we do not permit markets to exist in things like the buying and selling of limbs, or of children. Instead, we call these kinds of damages noneconomic, and we assign juries the function of measuring them, after hearing particular evidence about particular cases. Caps systematically disproportionately deprive women of value that juries award to them. The Constitution does not permit such gender-based deprivation unless the state demonstrates that discrimination serves "'important governmental objectives,'" and the discriminatory means employed are "'substantially related to the achievement of those objectives." *Mitchell v. Mitchell*, 594 S.W.2d 699, 701 (Tenn. 1980); *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 722, (2003) (same). Professor Finley demonstrates that, even assuming the governmental interest at issue is important, caps have very little relationship to achieving it. *Finley, supra*, at 1267-77; Affidavit of Lucinda M. Finley, submitted in *Klotz, v. St. Anthony's Medical Center*, 2008 WL 5707845, at IV (discussing evidence showing marginal, at best, linkage between caps and decreased insurance

premiums), App. 41-48. *See also id.* at V (discussing discriminatory effects of caps) App. 48-59; Affidavit of Robert Hunter submitted in *Siebert v. Okun,* No. D-202-CV-2013-05878 (NM Second Judiical District, 2018), App. 60-122.[13]

Asking whether the cap "serves" an important government objective, and it is "substantially related" to accomplishing that objective - whether the means are proportional to the ends - dooms the cap. A 40-year discussion about the adequacy of juries and the efficacy of caps on damages has been more propaganda campaign than search for truth. *See generally* Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric and Agenda-Building,* 52 Law & Contemp. Probs. 269 (1989); Jay M. Feinman, *Un-Making Law: The Conservative Campaign To Roll Back The Common Law* (2004). But recent competent scholarship summarizes the state of knowledge about the effects of caps.

Georgetown University scholars Kathryn Zeiler and Lorian E. Hardcastle reviewed extant empirical literature about caps, including sources cited by the State. They conclude that while the studies suggest that caps do not have a downward effect on insurance premiums, that conclusion is not reliable because of methodological flaws in the studies; they counsel further study. Kathryn Zeiler and Lorian E. Hardcastle, *Do Damages Caps Reduce Medical Malpractice Insurance Premiums?: A Systematic Review of Estimates and the Methods Used to Produce Them,* at 3-4, available at https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?referer=https://en.wikipedia.org/&httpsredir=1&article=2140&context=facpub (last visited June 23, 2018). A

[13] Plaintiff asks the Court to take judicial notice of these documents.

similar comprehensive analysis of locational preferences of obstetricians and gynecologists, one of the specialties of most concern in debates about physician location, concluded that their locational preferences "had no statistically significant association with premiums or tort reforms" and "that tort reforms such as caps on noneconomic damages do not help states attract and retain high risk specialists." Y. Tony Yang, David M. Studdert, S. V. Subramanian, and Michelle M. Mello, *A Longitudinal Analysis of the Impact of Liability Pressure on the Supply of Obstetrician□Gynecologists*, available at https://doi.org/10.1111/j.1740-1461.2007.00117.x (last visited March 26, 2019).

The most recent paper on the issue comes to similar conclusions. Charles M. Silver, David A. Hyman, and Bernard S. Black, *Fictions and Facts: Medical Malpractice Litigation, Physician Supply, and Health Care Spending in Texas Before and after HB 4* (January 3, 2019). U of Texas Law, Law and Econ Research Paper No. 284, 2019; Northwestern Law & Econ Research Paper No. 19-0, available at https://ssrn.com/abstract=3309785 (last visited March 26, 2019). The paper is the latest in a series of papers by these authors, published in peer-reviewed journals, using a richly detailed closed-claims dataset to review the effects of tort reforms, including a cap on damages, passed by Texas in 2003. *Id.* at 1-3. That cap was enacted after a constitutional amendment reversed a Texas Supreme Court decision finding a cap unconstitutional. *Lucas v. United States*, 757 S.W.2d 687, 690 (Tex. 1988) (caps "are unconstitutional as applied to catastrophically damaged malpractice victims seeking a

'remedy by due course of law.'")(abrogated by constitutional amendment, Tex. Const. art. III, § 66(c), (e) (amended 2003)).

Relevant here, the researchers found "no evidence that the 'smoke' of the insurance crisis that prompted the reforms was produced by an underlying 'fire' of rising liability"; that "[m]ore injured patients who deserved compensation received either inadequate payments or nothing at all"; and, critically, that more avoidable errors were made – there was more negligence – because of the reforms, a finding consistent with economic theory. *Id.* at 1-2. Limited liability undermines the deterrent effect of the tort system. A key finding regards jury verdicts, the "unpredictability" of which was a key concern of the legislature. *See* discussion, *supra*, at 16-17. The authors here explain that while mean jury verdicts can vary year to year, driven by a small number of larger awards, if those outliers are excluded means and medians are stable. *Fictions and Facts, supra*, at 8. And verdicts are one thing, but what people actually collect is another. Most cases settle, *id.* at 6, and "while very large awards can generate newspaper headlines, they are rarely paid in full. Regression analysis indicates that while smaller verdicts are paid in full, the plaintiff can expect to collect only about 60% of a $1 million verdict, and only 35% of a $10 million verdict." *Id.* at 7.

The cap does not meet the tests of constitutionality required of an enactment that impacts on a fundamental right or discriminates against a group traditionally unable to wield political power. The cap is not even rationally related to its purposes, a sufficient reason to strike it down. *N. Broward Hosp. Dist. v. Kalitan*, 219 So. 3d 49, 56-59 (Fla. 2017).

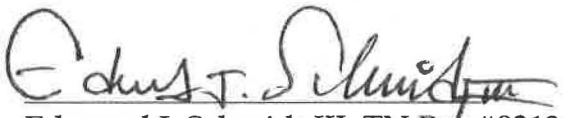
## CONCLUSION

The cap at issue here tramples fundamental constitutional rights and, by arrogating judicial power to the legislature, diminishes a governmental mechanism designed to protect those rights. The cap converts the Constitutional role of a jury in a legal case from that of decisionmaker to that of mere adviser. The cap has an impermissible disparate impact on women. The cap is void *ab initio* and can have no effect on the duty of a trial court to enter judgment on a judicially sound jury verdict.

The certified questions each should be answered, YES.

Respectfully submitted,

Law Office of Eddie Schmidt

By: 

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