IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

JODI MCCLAY,	)	
	)	
Petitioner-Plaintiff,	)	
	)	
v.	)	**Appeal No.**
	)	**M2019-00511-SC-R23-CV**
AIRPORT MANAGEMENT SERVICES, LLC,	)	
	)	
Respondent-Defendant.	)	

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF OF THE STATE OF TENNESSEE

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ISSUES PRESENTED FOR REVIEW

I

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?

II

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?

III

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

STATEMENT OF THE CASE AND THE FACTS

The State of Tennessee submits this brief under Tenn. R. App. P. 32(c) in support of the constitutionality of Tenn. Code Ann. § 29-39-102, which imposes a statutory cap on noneconomic damages in civil actions. Under the statute, "[a]ll noneconomic damages awarded to each injured plaintiff, including damages for pain and suffering, as well as any claims of a spouse or children for loss of consortium or any derivative claim for noneconomic damages, shall not exceed in the aggregate a total of seven hundred fifty thousand dollars ($750,000)." Tenn. Code Ann. § 29-39-102(e).

In a personal-injury action in federal district court, *Jodi McClay v. Airport Management Services, LLC*, No. 3:17-cv-00705 (M.D. Tenn.), a jury found that Plaintiff, Jodi McClay, had sustained noneconomic damages in an amount in excess of Tennessee's statutory cap. (D.E. 61, Verdict Form, 2.)[1] Defendant, Airport Management Services, LLC, moved the district court to reduce the jury's damage award in accordance with the statutory cap, as required by Tenn. Code Ann. § 29-39-102(g). (D.E. 63, Defendant's Motion to Apply Damage Cap, 1.)

In response to Defendant's motion, Plaintiff asserted that the statutory cap should not be applied because it violates the Tennessee Constitution. She argued that the cap violates (1) the right to trial by jury under Tenn. Const. art. I, § 6, (2) the separation-of-powers doctrine embodied in Tenn. Const. art. II, §§ 1 and 2, and (3) the right to equal

[1] "D.E." references are to the docket entries in the district-court action.

protection under Tenn. Const. art. I, § 8, and art. XI, § 8. (D.E. 64, Plaintiff's Response to Defendant's Motion to Apply Damage Cap, 2-8.)

Because Plaintiff's challenge to the constitutionality of the statutory damage cap raises a question of Tennessee law that has not been decided by this Court, the district court certified the three dispositive issues of state constitutional law, as identified above, to this Court pursuant to Tenn. Sup. Ct. R. 23.[2] (D.E. 81, Certification Order, 2-3.) The district court determined that the constitutional questions are ripe for review, as the jury awarded damages in excess of the statutory limit. (*Id.* at 1-2.) The district court's Certification Order was filed in this Court on March 20, 2019, and this Court issued a notice on that same date establishing a briefing schedule.[3]

STANDARD OF REVIEW

Tennessee Supreme Court Rule 23 vests this Court with discretion to answer certified questions of state law. The three questions certified to this Court present facial challenges to the constitutionality of a Tennessee statute under Tennessee constitutional law, and all are questions of first impression.

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[2] The State of Tennessee was notified of Plaintiff's constitutional challenge after the district court issued the certification order. (D.E. 82, Order Notifying Attorney General of Constitutional Challenge, 1.)

[3] Plaintiff has requested oral argument. Under Tenn. Sup. Ct. R. 23, § 7(B), oral argument "will not be permitted unless ordered by the Court, on its own motion or upon application of a party." Should this Court order oral argument, the State of Tennessee will exercise its right to participate under Tenn. R. App. P. 32(c).

If this Court exercises its discretion to answer the certified questions, its charge will be "to uphold the constitutionality of a statute wherever possible." *Waters v. Farr*, 291 S.W.3d 873, 882 (Tenn. 2009) (citing *State v. Pickett*, 211 S.W.3d 696, 700 (Tenn. 2007)). In light of that charge, the Court must "start with a strong presumption" that the state law is constitutional. *Lynch v. City of Jellico*, 205 S.W.3d 384, 390 (Tenn. 2006) (citing to *Osborn v. Marr*, 127 S.W.3d 737, 740–41 (Tenn. 2004)). "The presumption of constitutionality applies with even greater force when a party brings a facial challenge to the validity of a statute," *id.*, as Plaintiff does in this case. This Court "'must indulge every presumption and resolve every doubt in favor of constitutionality.'" *Id.* (quoting *Vogel v. Wells Fargo Guard Servs.*, 937 S.W.2d 856, 858 (Tenn. 1996)).

ARGUMENT

The cap on noneconomic damages in Tenn. Code Ann. § 29-39-102 was enacted as part of the Tennessee Civil Justice Act of 2011, *see* 2011 Tenn. Pub. Acts, ch. 510, §§ 1, 10, which is designed to improve the State's business climate and its economy by offering businesses a way to quantify risk with some degree of predictability, which, in turn, encourages businesses to create jobs in Tennessee by locating and expanding here. (Exhibit 1: Governor's Press Release, May 20, 2011; Exhibit 2: Governor's Press Release, June 16, 2011.)[4] In 2011, Tennessee was one of the few

[4] References to Exhibits 1-5 in this brief are to documents filed simultaneously with this brief under a separate Notice of Filing. Since the State did not participate in this case in the district court, *see* note 2,

States in the region that did not have caps on damages. Because the surrounding States that did have damage caps enjoyed an advantage in attracting business, Tennessee's statutory damage caps were specifically intended to level the playing field for Tennessee, giving Tennessee the same advantage. (*Id.*)

Under the statute, noneconomic damages in civil liability actions are generally limited to $750,000, Tenn. Code Ann. § 29-39-102(a)(2); however, the damage cap is increased to $1,000,000 for certain "catastrophic loss or injury," Tenn. Code Ann. §§ 29-39-102(c)-(d). The statute also exempts certain kinds of cases from the damage cap, such as cases in which "the defendant had a specific intent to inflict serious physical injury" or the defendant committed a felony in causing the injury. Tenn. Code Ann. § 29-39-102(h).

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supra, the State has filed the following supporting documentation in this Court:

Exhibit 1: Governor's Press Release, May 20, 2011;

Exhibit 2: Governor's Press Release, June 16, 2011;

Exhibit 3: *The Potential Impact of the Proposed Comprehensive Tort Reform Legislation on Business Activity in Tennessee*, The Perryman Group, March 2011;

Exhibit 4: *Tort Liability Costs for Small Businesses*, U.S. Chamber Institute for Legal Reform, July 2010;

Exhibit 5: Daniel P. Kessler, *Evaluating the Medical Malpractice System and Options for Reform*, Journal of Economic Perspectives, Vol. 25, No. 2, pp. 98-100, 2011.

I. The Statutory Cap on Noneconomic Damages Does Not Violate Plaintiff's Right to Trial by Jury.

Article I, § 6, of the Tennessee Constitution provides "[t]hat the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors." This constitutional provision preserves "the trial by jury as it then existed in force and use at the time of the adoption of the [Tennessee] constitution." *Garner v. State*, 13 Tenn. 160, 176 (Tenn. 1833). The constitutional question, therefore, is whether the cap on noneconomic damages violates the right to trial by jury as the right was understood when Tennessee's Constitution was adopted.

The right to trial by jury guarantees "that all contested factual issues [shall] be determined by an unbiased, impartial jury." *Ricketts v. Carter*, 918 S.W.2d 419, 421-22 (Tenn. 1996). Plaintiff argues that the damage cap precludes the jury from determining the issue of the amount of noneconomic damages. (Br. Plaintiff-Petitioner, 6-8.) This argument is misplaced, however, because nothing in the statute prevents the jury from making a factual finding regarding the extent of noneconomic damages. The cap is applied—as a matter of law—only when the jury makes a finding that exceeds the statutory limit. *See* Tenn. Code Ann. § 29-39-102(g).

Plaintiff is mistaken about the scope of the right to trial by jury. The right does not mean that juries may dictate what remedies are recoverable under the law, nor does it preclude a jury's finding on damages from being reduced according to policy-based legislation. Thus, what Plaintiff is actually challenging is the legislature's power to define

a substantive legal remedy. She is claiming entitlement to the amount of damages found by the jury, even if that amount exceeds what is permitted by law. (Br. Plaintiff-Petitioner, 3.) That claim, however, is untenable.

A. The legislature has the power to limit the amount of damages that can be recovered in personal-injury claims.

The legislature's power to modify legal remedies for personal injury is well established and fundamental to its policy-making role. The right to trial by jury does not alter this legislative power; it does not dictate what remedies are available under the law, nor does it permit a plaintiff to receive damages greater than what the law authorizes.[5]

Imposing a damage cap is within the legislature's power to define legal remedies for personal injury. "The extent of recoverable damages is limited by this State's law and policy." *Smith v. Gore*, 728 S.W.2d 738, 752 (Tenn. 1987). "[T]he Tennessee General Assembly has the sovereign power prospectively to limit and even to abrogate common law rights of action in tort as long as the legislation bears a rational relationship to some legitimate governmental purpose." *Mills v. Wong*, 155 S.W.3d 916,

[5] It is worth noting that Plaintiff has not shown that the specific remedy of noneconomic damages would have even been available to personal-injury litigants when the Tennessee Constitution was adopted. Awards for pain and suffering were not widely recognized until the 19th century. *See* Jeffrey O'Connell & Keith Carpenter, *Payment for Pain and Suffering Through History*, 50 Ins. Couns. J. 411, 412 (1983) (copy attached to brief); *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 520 (1957); Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. Rev. 163, 170 (2004).

922 (Tenn. 2005); *see Wos v. E.M.A. ex rel. Johnson*, 133 S. Ct. 1391, 1400 (2013) ("[T]here is no question that States possess the 'traditional authority to provide tort remedies to their citizens' as they see fit.").

The legislature may alter, change, or abolish common law without violating the Constitution. *See Nance v. O. K. Houck Piano Co.*, 155 S.W. 1172, 1174 (Tenn. 1913). "The state has complete control over the remedies which it offers to suitors in its courts, even to the point of making them applicable to rights or equities already in existence. It may change the common law and the statutes so as to create duties and liabilities which never existed before." *Alamo Dev. Corp. v. Thomas*, 212 S.W.2d 606, 610 (Tenn. 1948) (quoting *Cavender v. Hewitt*, 239 S.W. 767, 769-70 (Tenn. 1922)).

In defining legal remedies, the legislature is not held captive by pre-existing remedies under the common law. "The legislature may abolish remedies recognized at common law and create new ones to attain a permissible legislative object." *Nichols v. Benco Plastics, Inc.*, 469 S.W.2d 135, 137 (Tenn. 1971). Even when a plaintiff had a common-law remedy before the passage of a statute, the legislature has the power to "take away" that remedy by statute.[6] *Scott v. Nashville Bridge Co.*, 223 S.W. 844, 852 (Tenn. 1920). An example is Tenn. Code Ann. § 36-3-701, which provides that "[t]he common law tort action of alienation of

[6] The legislature can take away a remedy without violating the constitutional rights of prospective plaintiffs because plaintiffs do not have a vested right to a particular remedy under the law. *See Morris v. Gross*, 572 S.W.2d 902, 905 (Tenn. 1978); *Dowlen v. Fitch*, 264 S.W.2d 824, 825 (Tenn. 1954).

affections is hereby abolished." Since the legislature is empowered to eliminate causes of action that were available at common law, logic dictates that the legislature can likewise limit the relief available for an existing cause of action.

The cap on noneconomic damages in Tenn. Code Ann. § 29-39-102 is not unique; the Tennessee legislature has previously placed limits on the amount of damages that can be recovered for personal injury. Through Tenn. Code Ann. § 37-10-102, for instance, the legislature has capped the amount of damages that can be recovered from parents for the conduct of their children. The parental-liability cap superseded the common-law remedy, which provided for unlimited damages. *See Lavin v. Jordon*, 16 S.W.3d 362 (Tenn. 2000). In addressing the parental-liability cap, this Court recognized that "the General Assembly has plenary power within constitutional limits to change the common law by statute." *Id.* at 368.

It is important to remember that defendants share the right to trial by jury with plaintiffs. Defendants are afforded the same constitutional protection as plaintiffs under the Tennessee Constitution, art. I, § 6. *See Morgan v. Tennessee Cent. Ry. Co.*, 216 S.W.2d 32, 37 (Tenn. Ct. App. 1948) ("Defendant had the constitutional right to have all issues of fact decided by a jury if the evidence was in conflict on the issues."). Yet, that constitutional protection does not preclude the legislature from abolishing defenses that were available to defendants at common law. *See Scott*, 223 S.W. at 848 ("[W]e do not think that the power of the Legislature to abolish these common-law defenses can be seriously

questioned.").[7] The right to trial by jury also does not prohibit the legislature from imposing remedies that are more onerous on defendants than those available under common law or past statutes. The authority of the legislature to impose more onerous liability on defendants is the same authority that allows the legislature to limit damages in personal-injury actions. And there are countless instances in which the legislature has modified legal rights and remedies under the common law to the detriment of defendants.[8]

B. The right to trial by jury does not preclude a damage award from being reduced as a matter of law.

The right to trial by jury is the right of a party to present all of his or her evidence to the jury and to have the jury find the facts, based on that evidence. *Ricketts*, 918 S.W.2d at 421-22. The statutory cap on noneconomic damages does not impinge on this right. The jury has fulfilled its constitutional function once it has made its findings of fact.

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[7] The legislature can abolish common-law defenses for the same reason that it can alter legal remedies: just as plaintiffs do not have a vested right to a remedy, defendants do not have a vested right to a common-law defense. *See Scott*, 223 S.W. at 848 (citing *New York Cent. R. Co. v. White*, 243 U.S. 188, 198 (1917)); *see also Hawkins v. Bleakly*, 243 U.S. 210, 213 (1917) ("[I]t is clear . . . that the employer has no vested right to have these so-called common-law defenses perpetuated for his benefit.").

[8] The most obvious example is the enactment of wrongful-death statutes. "A wrongful death cause of action did not exist at common law." *Jordan v. Baptist Three Rivers Hosp.*, 984 S.W.2d 593, 596 (Tenn. 1999) (citing *Modern Status of Rule Denying a Common–Law Recovery for Wrongful Death*, 61 A.L.R.3d 906 (1975)). The availability of compensation for wrongful death is due entirely to the legislature. *Id.* at 597.

The legal consequences of the jury's finding on damages is a matter entrusted to Tennessee's legislature. "The decision to place a cap on damages awarded is a policy choice and not a re-examination of the factual question of damages determined by the jury." *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1051 (Alaska 2002).[9] The trial court is applying the legislature's policy imperative—and is not making any factual determination—when it reduces the jury's assessment of noneconomic damages to comport with the law.

The trial-court practice of applying the law to a jury's findings to reduce or augment the amount of damages is deeply embedded in the law. Statutes establishing multiple damages have existed since the 13th century. *See Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 274 (1989). For example, Tenn. Code Ann. § 47-50-109, in a departure from common law, provides for treble damages for inducing a breach of contract. *See Buddy Lee Attractions, Inc. v. William Morris Agency, Inc.*, 13 S.W.3d 343, 354 (Tenn. Ct. App. 1999). Under that statute, the jury makes a finding as to the actual damages that the plaintiff sustained, and the trial court then trebles the jury's finding so that the plaintiff is awarded the remedy authorized by law. *See id.* at 359-60 (discussing process for trebling damages under Tenn. Code Ann. § 47-50-109).

[9] *See also Horton v. Oregon Health & Sci. Univ.*, 376 P.3d 998, 1041 (Or. 2016) ("[A] damages cap does not reflect a legislative attempt to determine a fact in an individual case or to reweigh the jury's factual findings. Rather, a statutory cap is a legal limit on damages that applies generally in a class of cases.").

Like damage caps, statutory damage multipliers result in a judgment that is different from a jury's assessment of the level of damages. And like statutory caps on noneconomic damages, statutory damage multipliers reflect a legislative policy determination. *See Buddy Lee Attractions, Inc.*, 13 S.W.3d at 354 (explaining policy for trebling damages for inducing a breach of contract).

In the case of damage multipliers, the policy determination works to the detriment of defendants: the legislature has determined that enhanced damages are necessary to deter and punish particular conduct. *See id.* Civil defendants would certainly prefer to pay just the actual damages found by the jury, just as the Plaintiff here certainly prefers to receive the damages awarded by the jury. But neither option is secured by the Tennessee Constitution. As the Ninth Circuit Court of Appeals, among other courts, has observed, "[i]f a judge cannot limit damages found by a jury in accordance with a statute, how can a judge impose statutorily mandated double or treble damages without also imposing on the jury's province as sole factfinder?" *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1201-02 (9th Cir. 2002); *see Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 432 (Ohio 2007); *Kirkland v. Blaine Cnty. Med. Ctr.*, 4 P.3d 1115, 1119 (Idaho 2000).

For their part, plaintiffs often try to exclude at trial any mention of multiple damages for fear that juries will lower the damage amount to prevent a windfall to the plaintiff. *See HBE Leasing Corp. v. Frank*, 22 F.3d 41, 45 (2d Cir. 1994) (noting that federal courts have uniformly agreed that juries should not be informed of treble-damage provisions under RICO or the Clayton Act); *accord Pollock & Riley, Inc. v. Pearl*

Brewing Co., 498 F.2d 1240, 1242-43 (5th Cir. 1974). The rationale of such plaintiffs is that jurors have no need to be informed of multiple-damage provisions because it is not the jury's function to determine the amount of a judgment. *See id.* The jury's function is simply to compute the amount of damages. For example, the legislative authorization of treble damages in an antitrust case "is a matter of law to be applied by the [trial] court without interference from the jury. The fact that the awarded amount will be tripled has no relevance in determining the amount a plaintiff was injured by the anti-trust violation." *Pollock & Riley, Inc.*, 498 F.2d at 1243; *see also HBE Leasing Corp.*, 22 F.3d at 45 ("Reference to treble damages . . . is irrelevant to the jury questions of liability and damages."); *Semke v. Enid Auto. Dealers Ass'n*, 456 F.2d 1361, 1370 (10th Cir. 1972).

The same reasoning applies in the context of capping noneconomic damages. The jury's function is to assess the amount of noneconomic damages, and it is then the trial court's function to apply the law—in this case the law established by the legislature that caps noneconomic damages—and to enter a judgment in accordance with the law.[10]

[10] The mechanism of applying the law to a jury's findings is not limited to multiple- or reduced-damage provisions. This same mechanism is what allows courts to apply the laws regarding the allocation of fault in personal-injury cases. For example, Tenn. Code Ann. § 29-11-107(d) permits juries to allocate fault to nonparties, including nonparties that are immune from liability. The trial court then reduces the jury's finding on damages by the percentage of fault attributed to the nonparty.

Using this analysis, numerous state courts outside Tennessee have held that damage caps do not violate the right to trial by jury.[11] And federal courts have uniformly held that statutory damage caps do not violate the federal right to trial by jury under the Seventh Amendment, which, like the Tennessee Constitution, "assigns the decisions of disputed questions of fact to the jury." *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 537 (1958); *see Estate of Sisk v. Manzanares*, 270 F. Supp.

[11] *See Horton v. Oregon Health & Sci. Univ.*, 376 P.3d 998, 1002 (Or. 2016); *Tam v. Eighth Jud. Dist. Ct.,* 358 P.3d 234, 238 (Nev. 2015); *Chastain v. AnMed Health Found.*, 694 S.E.2d 541, 544 (S.C. 2010) (incorporating analysis in *Wright v. Colleton Cnty. Sch. Dist.*, 391 S.E.2d 564, 569 (S.C. 1990)); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 432 (Ohio 2007); *Judd v. Drezga*, 103 P.3d 135, 145 (Utah 2004); *Phillips v. Mirac, Inc.*, 685 N.W.2d 174, 183 (Mich. 2004); *Gourley ex rel. Gourley v. Nebraska Methodist Health Sys., Inc.*, 663 N.W.2d 43, 75 (Neb. 2003); *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1050-51 (Alaska 2002); *Kirkland v. Blaine County Med. Ctr.*, 4 P.3d 1115, 1119–20 (Idaho 2000); *Murphy v. Edmonds*, 601 A.2d 102, 118 (Md. 1992); *Peters v. Saft*, 597 A.2d 50, 53-54 (Me. 1991); *Robinson v. Charleston Area Med. Ctr., Inc.*, 414 S.E.2d 877, 888 (W. Va. 1991); *English v. New England Med. Ctr., Inc.*, 541 N.E.2d 329, 332 (Mass. 1989); *Etheridge v. Med. Ctr. Hospitals*, 376 S.E.2d 525, 529 (Va. 1989); *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585, 602 (Ind. 1980), *overruled on other grounds by In re Stephens*, 867 N.E.2d 148 (Ind. 2007); *see also Learmonth v. Sears, Roebuck & Co.*, 710 F.3d 249, 261 (5th Cir. 2013) (federal court upholding cap under state constitution); *Fein v. Permanente Med. Grp.*, 695 P.2d 665, 682 (Cal. 1985) (not addressing trial by jury challenge, but stating, "[W]e know of no principle of California—or federal—constitutional law which prohibits the Legislature from limiting the recovery of damages in a particular setting in order to further a legitimate state interest."); *Zdrojewski v. Murphy*, 657 N.W.2d 721, 737 (Mich. Ct. App. 2002).

2d 1265, 1277-78 (D. Kan. 2003).[12] The United States Supreme Court has yet to address the constitutionality of caps on damages under the Seventh Amendment right to trial by jury. *See Hemmings*, 285 F.3d at 1201. But at least in regard to civil penalties, the Supreme Court has indicated that the right to trial by jury does not extend to the remedy phase of a civil trial. *See Tull v. United States*, 481 U.S. 412, 426 n.9 (1987) ("We have been presented with no evidence that the Framers meant to extend the right to a jury to the remedy phase of a civil trial.").[13]

In sum, for the reasons set forth in this section, the statutory cap on noneconomic damages does not violate Plaintiff's right to trial by jury under Tenn. Const. art. I, § 6.

II. The Statutory Cap on Noneconomic Damages Does Not Violate Tennessee's Separation-of-Powers Doctrine.

Plaintiff challenges the cap on noneconomic damages under Tennessee's separation-of-powers doctrine (Br. Plaintiff-Petitioner, 11.), which is embodied in art. II, §§ 1 and 2, of the Tennessee Constitution.

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[12] *See Smith v. Botsford Gen. Hosp.*, 419 F.3d 513, 519 (6th Cir. 2005); *Hemmings v. Tidyman's, Inc.*, 285 F.3d 1174, 1202 (9th Cir. 2002); *Madison v. IBP, Inc.*, 257 F.3d 780, 804-05 (8th Cir. 2001), *judgment vacated on other grounds*, 536 U.S. 919 (2002); *Davis v. Omitowoju*, 883 F.2d 1155, 1159–65 (3d Cir. 1989); *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir.1989); *see also Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325, 1330–35 (D. Md. 1989).

[13] In *Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989), the Third Circuit conducted an exhaustive review on the origins of the Seventh Amendment before concluding that the Amendment precludes judges, but not the legislature, from reexamining facts tried by a jury. 883 F.2d at 1163.

Taken together, those sections provide that "[n]o person or persons belonging to one of the [three] departments [of Government, namely the Legislative, Executive, and Judicial] shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." Tenn. Const. art. II, §§ 1, 2.

Generally speaking, the "legislative power" is the authority to make, order, and repeal the laws. *Richardson v. Young*, 125 S.W. 664, 668 (Tenn. 1910); *see also State v. Mallard*, 40 S.W.3d 473, 481 (Tenn. 2001) (acknowledging that the legislature has the "ability to enact substantive law"). More specifically, "legislative power" includes the authority to alter, enlarge, modify, or confer a remedy for existing legal rights. *Alamo Dev. Corp. v. Thomas*, 212 S.W.2d 606, 610 (Tenn. 1948). It also includes the authority to balance competing public and private interests to arrive at policy choices and to implement those choices by enactment of laws. *See Mills*, 155 S.W.3d at 923.

Generally speaking, the power of the judiciary is to interpret and apply the law. *Richardson,* 125 S.W. at 668. As specifically relevant in this context, the power of the judiciary is the power to apply, as a matter of law, the legal remedies provided by the legislature. *See Mary C. Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303, 312 (Tenn. 2014). This Court has repeatedly recognized that the role of the judiciary does not extend to altering substantive rights and remedies enacted by the legislature.[14]

[14] *See, e.g., Owens v. Truckstops of Am.*, 915 S.W.2d 420, 432 (Tenn. 1996) ("When the legislature grants a remedy, it cannot be abolished by judicial decision.") (citing *Bervoets v. Harde Ralls Pontiac-Olds, Inc.*, 891 S.W.2d 905, 907 (Tenn. 1994)); *Abney v. Abney*, 433 S.W.2d 847, 849

Through the damage cap, the legislature established or modified a substantive legal remedy. As the Court of Appeals explained in *Caudill v. Foley*, 21 S.W.3d 203 (Tenn. Ct. App. 1999), "[i]t is within the province of the General Assembly, not the judiciary, to establish and control the remedies that are available to persons seeking judicial relief." *Id.* at 210. By limiting noneconomic damages, the legislature acted within its authority "to establish and control the remedies that are available to persons seeking judicial relief." *Id.* And by enacting the damage cap, the legislature was also acting within the scope of its authority to balance competing public and private interests to arrive at policy choices. Thus, the legislature is not intruding on the province of the judiciary.

Plaintiff argues that the damage cap encroaches on judicial power by interfering with the role of the jury.[15] (Br. Plaintiff-Petitioner, 11-15.) The problem is, of course, that the separation-of-powers doctrine applies only to the three "departments" or branches of government, and the jury is not a branch of government. The separation-of-powers doctrine is, therefore, inapplicable.

To surmount this hurdle, Plaintiff asks this Court to make the jury an honorary part of the judicial branch of government, referring to jurors as "judicial officers." (*Id.* at 12.) But the jury does not become part of the judicial department within the meaning of the Tennessee Constitution

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(Tenn. 1968) (explaining that the trial court's duty is to give effect to statute specifying grounds for divorce, regardless of whether courts agree or disagree with wisdom of legislature's choice).

[15] This is nothing but Plaintiff's right-to-jury-trial challenge in another constitutional guise.

just because it is part of the trial process. In that process, jury and judge perform different functions. The prime function—the only function—of the jury is to find facts when the facts are in dispute. *See Wilson v. Nashville, C. & S. L. Ry.*, 65 S.W.2d 637, 643 (Tenn. Ct. App. 1933) (stating that it is the function the jury to draw conclusions as warranted by the testimony presented by witnesses at trial). The prime function of a judge is to apply "the relevant law to the facts of the case." *Mary C. Smith, Inc.*, 439 S.W.3d at 312.

Thus, the separation-of-powers doctrine does not even come into play; the fact remains that the jury is not a "judge" and is not part of the judicial branch. To allow the jury to function as judge—i.e., to allow the jury to apply the law to the facts or interpret the law—would be a usurpation of judicial power and authority.

In sum, because the cap on noneconomic damages does not encroach on the judiciary's authority to interpret and apply the laws, it does not violate the separation-of-powers doctrine.[16]

III. The Statutory Cap on Noneconomic Damages Does Not Violate Plaintiff's Right to Equal Protection.

Plaintiff argues that the cap on noneconomic damages disproportionately affects women in violation of the right to equal

[16] Numerous state supreme courts have rejected separation-of-powers challenges to damage caps. An example is *Gourley ex rel. Gourley v. Nebraska Methodist Health Sys., Inc.*, 663 N.W.2d 43, 76-77 (Neb. 2003).

protection under Tenn. Const. art. I, § 8, and Tenn. Const. art. XI, § 8.[17] (Br. Plaintiff-Petitioner, 18-22.)

The right to equal protection is guaranteed by Article I, section 8, and Article XI, section 8, of the Tennessee Constitution. Equal protection seeks to assure that "'all persons similarly circumstanced shall be treated alike.'" *Newton v. Cox*, 878 S.W.2d 105, 109 (Tenn. 1994) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

A. The cap on noneconomic damages is a facially neutral law.

Plaintiff's argument about gender discrimination is without merit. A similar argument was rejected by the Supreme Court of Ohio in *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 436 (Ohio 2007). It determined that Ohio's cap on noneconomic damages was "facially neutral," meaning that the express terms of the statute do not distinguish based on classifications such as gender, race, or income. *Id.* The court explained that equal protection guarantees "'equal laws, not equal results.'" *Id.* (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979)). Thus, the fact that the damage cap might impact certain classes differently does not mean that the statute violates equal protection. *Id.*

Tennessee's damage cap is also facially neutral, as Plaintiff acknowledges. (Br. Petitioner-Plaintiff, 19.) The United States Supreme

[17] Plaintiff also argues that the damage cap discriminates against the elderly and children. (Br. Plaintiff-Petitioner, 18-19.) However, the question whether the cap discriminates based on age was not certified to this Court. Nevertheless, the argument would fail for the same reasons Plaintiff's gender-discrimination argument fails.

Court has applied the following legal standard for assessing facially neutral laws, which should be applied in this case.

> When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionably adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert [or] overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. In this second inquiry, impact provides an "important starting point," but purposeful discrimination is "the condition that offends the Constitution."

Feeney, 442 U.S. at 274 (internal citations omitted).

Here, the two-fold test set forth in *Feeney* is not satisfied. There is no question that Tennessee's cap is not gender-based, as it does not limit the amount of recovery based on gender. Nor does the cap constitute "invidious gender-based discrimination." *Id.* Therefore, even accepting Plaintiff's assertion that the cap has a disproportionate impact, the cap does not violate equal protection because it does not purposefully discriminate against women. *Id.* Accordingly, Plaintiff's equal-protection claim must fail.

Plaintiff argues instead that the damage cap should be subject to strict scrutiny or immediate scrutiny. (Br. Petitioner-Plaintiff, 20.) But neither is appropriate because the damage cap is a facially neutral law that fails the two-part test under *Feeney*. The cap should be subject only to rational-basis review. *See Tigrett v. Cooper*, 855 F. Supp. 2d 733, 750, 752 (W.D. Tenn. 2012) (applying rational-basis review after determining that facially neutral law was not motivated by racial purpose).

B. There is a rational basis for capping noneconomic damages.

Even if this Court were to decline to apply the *Feeney* test to the damage-cap statute, Plaintiff's equal-protection argument would still fail. The statute would be reviewed under the rational basis test, and there is a rational basis for capping noneconomic damages.

Courts are to apply rational-basis review unless "the challenged legislation affects a fundamental right, or operates upon a suspect class." *Sutphin v. Platt*, 720 S.W.2d 455, 457 (Tenn. 1986). The cap does not affect a fundamental right, because plaintiffs do not have a vested right to a particular remedy under the law. *See Dowlen*, 264 S.W.2d at 825. Moreover, even if plaintiffs *had* a vested right, it would not demand heightened protection. "Although common law rights of action in tort receive constitutional protection, they are not fundamental rights which demand heightened due process protection under the federal and Tennessee constitutions." *Mills v. Wong*, 155 S.W.3d 916, 921-22 (Tenn. 2005).

The damage cap also does not disadvantage a suspect class. "Suspect classifications are race, alienage, national origin, and sex." *King-Bradwell P'ship v. Johnson Controls, Inc.*, 865 S.W.2d 18, 21 (Tenn. Ct. App. 1993). "A suspect class is one that has been 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian process.'" *Gallaher v. Elam*, 104 S.W.3d 455, 461 (Tenn. 2003) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)). But here, the

damage cap does not discriminate based upon suspect criteria. Any disparate treatment caused by the cap is based on the recovery of damages, which is a purely economic interest. Economic classifications are not suspect classifications. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) ("When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude."). This Court has previously recognized that "medical malpractice litigants are not members of a suspect class." *See Newton*, 878 S.W.2d at 109 (citing *Sutphin*, 720 S.W.2d at 457). This should apply in equal measure to all personal-injury litigants. The damage cap does not interfere with the exercise of a fundamental right or disadvantage a suspect class; therefore, it should be subject only to rational-basis review.

Courts in other jurisdictions, by an overwhelming majority, have applied rational-basis review or a similar standard in addressing caps on damages.[18] The State is not aware of any appellate decision in America

[18] *See Estate of McCall v. United States*, 134 So. 3d 894, 901 (Fla. 2014); *Miller v. Johnson*, 289 P.3d 1098, 1120 (Kan. 2012); *Oliver v. Magnolia Clinic*, 85 So. 3d 39, 44 (La. 2012); *Chastain v. AnMed Health Found.*, 694 S.E.2d 541, 544 (S.C. 2010) (reaffirming decision in *Doe v. Am. Red Cross Blood Servs., S.C. Region*, 377 S.E.2d 323, 328 (S.C. 1989) (applying rational-basis test)); *DRD Pool Serv., Inc. v. Freed*, 5 A.3d 45, 66 (Md. 2010); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 433 (Ohio 2007); *Ferdon ex rel. Petrucelli v. Wisconsin Patients Comp. Fund*, 701 N.W.2d 440, 457 (Wisc. 2005); *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1, 15 (N.C. 2004) (addressing cap on punitive damages); *Phillips v. Mirac, Inc.*, 685 N.W.2d 174, 185-86 (Mich. 2004); *Judd v. Drezga*, 103 P.3d 135, 143 (Utah 2004); *Gourley ex rel. Gourley v. Nebraska Methodist Health Sys., Inc.*, 663 N.W.2d 43, 71 (Neb. 2003); *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1052-53 (Alaska 2002); *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901, 906 (Colo. 1993); *Murphy v. Edmonds*, 601 A.2d 102, 111-12

that has used strict-scrutiny review in addressing damage caps.[19]

A statute has a rational basis if it "is reasonably related to a legitimate legislative purpose" and is 'neither arbitrary nor discriminatory.'" *Riggs v. Burson*, 941 S.W.2d 44, 51 (Tenn. 1997) (quoting *Newton*, 878 S.W.2d at 110). "[S]pecific evidence is not necessary to show the relationship between the statute and its purpose."

(Md. 1992); *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So. 2d 517, 519 (La. 1992); *Peters v. Saft*, 597 A.2d 50, 53 (Me. 1991); *Robinson v. Charleston Area Med. Ctr., Inc.*, 414 S.E.2d 877, 886 (W. Va. 1991); *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 734 (Minn. 1990) (applying analysis "reminiscent of the minimal judicial scrutiny of an equal protection or substantive due process review."); *English v. New England Med. Ctr., Inc.*, 541 N.E.2d 329, 332-33 (Mass. 1989); *Etheridge v. Med. Ctr. Hospitals*, 376 S.E.2d 525, 531 (Va. 1989); *Meech v. Hillhaven W., Inc.*, 776 P.2d 488, 502 (Mont. 1989); *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585, 599 (Ind. 1980), *overruled on other grounds by In re Stephens*, 867 N.E.2d 148 (Ind. 2007); *Fein v. Permanente Med. Grp.*, 695 P.2d 665, 680 (Cal. 1985); *see also Smith v. Botsford Gen. Hosp.*, 419 F.3d 513, 520 (6th Cir. 2005); *Madison v. IBP, Inc.*, 257 F.3d 780, 805 (8th Cir. 2001), *judgment vacated on other grounds*, 536 U.S. 919 (2002); *Davis v. Omitowoju*, 883 F.2d 1155, 1158-59 (3d Cir. 1989); *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989); *Lucas v. United States*, 807 F.2d 414, 422 (5th Cir. 1986); *Watson v. Hortman*, 844 F. Supp. 2d 795, 801 (E.D. Tex. 2012); *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325, 1330–35 (D. Md. 1989).

[19] Two state supreme courts used a standard distinct from rational-basis review, but neither court reviewed the damage cap under strict scrutiny. *See Brannigan v. Usitalo*, 587 A.2d 1232, 1234 (N.H. 1991) (recognizing that cap does not implicate fundamental right, but applying a standard that was "more rigorous judicial scrutiny than allowed under the rational basis test"); *Arneson v. Olson*, 270 N.W.2d 125, 135 (N.D. 1978) (looking to whether "there is a sufficiently close correspondence between statutory classification and legislative goals").

Riggs, 941 S.W.2d at 52 (citing *Newton*, 878 S.W.2d at 110). The reviewing court need only be "able to conceive of a rational basis for the statute that is reasonably related to a legitimate state purpose." *Sutphin*, 720 S.W.2d at 457 (citing *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 456 U.S. 950 (1982)); *Fritts v. Wallace*, 723 S.W.2d 948, 949 (Tenn. 1987). The statute must be upheld even if a rational basis is "fairly debatable." *Sutphin*, 720 S.W.2d at 457. Rational-basis review is not a forum for debating and second-guessing the wisdom of a statute. *See Mills*, 155 S.W.3d at 925 (citing *Harrison v. Schrader*, 569 S.W.2d 822, 828 (Tenn. 1978).

1. The legislature is entrusted with addressing matters of public policy that affect the welfare of Tennessee's citizens.

"[I]t is the prerogative of the General Assembly to declare the policy of the State touching the general welfare." *Baptist Mem'l Hosp. v. Couillens*, 140 S.W.2d 1088, 1093 (Tenn. 1940). This Court has recognized that the imposition of legal duty is itself an expression of public policy. "The imposition of a legal duty reflects society's contemporary policies and social requirements, the concept of duty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." *Biscan v. Brown*, 160 S.W.3d 462, 479 (Tenn. 2005) (internal quotation marks omitted).

So too with legal remedies, which reflect societal determinations as to the appropriate repercussions for violating legal duties. Declaring the public policy of the State includes determining the legal remedies that

are recoverable for personal injury. *See Smith v. Gore*, 728 S.W.2d 738, 749 (Tenn. 1987) ("[T]he determination of the extent of liability and of legal causation inescapably involves notions of public policy.").

2. The cap on noneconomic damages is reasonably related to the legitimate legislative purpose of improving Tennessee's economy.

One can readily conceive of a rational basis for limiting the amount of noneconomic damages as provided in Tenn. Code Ann. § 29-39-102(a)(2). Legislation that attempts to improve the State's economy serves a legitimate legislative purpose. *See Harbison v. Knoxville Iron Co.*, 53 S.W. 955, 960 (Tenn. 1899). The cap is part of Tennessee's Civil Justice Act, which seeks to protect the welfare of Tennessee's citizens by improving the State's economy. (Exhibit 2: Governor's Press Release, June 16, 2011.) The Act constitutes economic legislation because it regulates the burdens and benefits of economic life. *See Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 83 (1978); *see also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) ("It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality.").

The cap on noneconomic damages is reasonably related to the purpose of improving the State's economy. The cap is a rational means for improving Tennessee's chances for recruiting and retaining businesses. The economic vitality of Tennessee is dependent on businesses operating in the State. To recruit and retain businesses in Tennessee, the legislature made comprehensive changes to the remedies available in personal-injury cases. Businesses certainly are affected by

their liability for personal-injury claims. And businesses unquestionably benefit from a statute that limits the extent of their liability. The cap also provides businesses with greater predictability as to their potential exposure for tort claims. Indeed, predictability is a bedrock principle of the rule of law and of tort law in particular. *See Hooker v. Haslam*, 393 S.W.3d 156, 165 (Tenn. 2012) (stating that predictability is a major objective of the legal system). Further, businesses benefit from lower rates for tort-liability insurance, a benefit that would logically result from capping noneconomic damages. *See Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 734 (Minn. 1990) (stating that "[l]owering insurance rates and providing predictable damage awards are legitimate legislative objectives").

Even if the caps ultimately prove ineffective in recruiting and retaining businesses, the constitutional question does not require an assessment of the effectiveness of the statute. *See Sutphin*, 720 S.W.2d at 457. "[S]pecific evidence is not necessary to show the relationship between the statute and its purpose." *Riggs*, 941 S.W.2d at 52 (citing *Newton*, 878 S.W.2d at 110). *See also Mills*, 155 S.W.3d at 925 (noting that while a rule extinguishing a medical malpractice right of action "may be harsh, it is fully within the constitutional power of the legislature so to provide, and thus it is not [the Court's] place to debate its wisdom"). Nevertheless, evidence does support the relationship between limiting damages and economic development. A report from the Perryman Group addresses the potential impact of limiting damages in Tennessee. (Exhibit 3: *The Potential Impact of the Proposed Comprehensive Tort Reform Legislation on Business Activity in Tennessee*, The Perryman

Group, March 2011.) The Report explains how similar legislation in Texas was effective in improving that state's economy. (*Id.* at 13.) The Report concludes that limiting damages, as provided in Tennessee's Civil Justice Act, would improve the economy of Tennessee. (*Id.* at 18.)

It is self-evident that businesses are concerned about their tort liability costs, and these concerns are confirmed by a report from the U.S. Chamber Institute. (Exhibit 4: *Tort Liability Costs for Small Businesses*, U.S. Chamber Institute for Legal Reform, July 2010.) The report refers to polls and surveys which found that businesses are concerned about their tort liability costs, as well as how the effect of those costs adversely affect their business operations. (*Id.* at 6-7, 11-12.) The report notes that small businesses disproportionately bear the brunt of tort liability costs.[20] (*Id.* at 1.) The report also states that medical groups, in particular, are concerned about tort liability costs, which has led to a number of adverse effects. (*Id.* at 11-13.) These adverse effects include the increase of health care costs due to the practice of defensive medicine, which is when health care providers engage in unnecessary tests, diagnostic procedures, or referrals for consultation in an effort to defend against possible health care liability claims. (*Id.* at 12.) The threat of tort liability has also resulted in a shift away from physician-owned practices to larger hospital and health systems. (*Id.* at 13.)

[20] It logically follows that reducing tort litigation costs will provide the greatest benefit to small businesses. This fact is important because the report also states that small businesses have generated a greater percentage of new jobs than their corporate counterparts. (*Id.* at 1, 3.) Thus, the damage cap is a targeted means for addressing the goal of the Civil Justice Act, which is to reduce unemployment.

Although this is not a healthcare-liability action, caps on damages have also been shown to reduce health care costs and to increase the availability of medical treatment. Legal scholar Daniel P. Kessler reviewed a number of empirical studies regarding the effects of tort-reform measures on the medical malpractice system. (Exhibit 5: Daniel P. Kessler, *Evaluating the Medical Malpractice System and Options for Reform*, Journal of Economic Perspectives, Vol. 25, No. 2, pp. 98-100, 2011.) He refers to several studies indicating that damage caps have resulted in reduced hospital expenditures (*id.*), including a study which found that "states adopting caps on noneconomic damages have 3-4 percent lower overall health spending than states that do not" (*id.* at 99). Kessler also refers to a study which found that tort-reform measures led to an increase in physician supply (*id.* at 100), which would have the beneficial effect of improving the availability of medical treatment. By reducing health care costs, the cap on noneconomic damages is reasonably related to the legitimate state purpose of recruiting and retaining health care providers in Tennessee.

Plainly, the legislative damage cap is reasonably related to the legitimate legislative purpose of improving Tennessee's economy.

3. The cap is also a rational means of addressing problems inherent in noneconomic damages.

It was rational for the legislature to place limits on the recovery of noneconomic damages for reasons other than fostering business development and reducing the cost of medical care in Tennessee.

Noneconomic damages have been the subject of heavy criticism.[21] This criticism predominately stems from the observation that noneconomic damages are difficult to measure with any consistency.

> [T]here seem to be no rational, predictable criteria for measuring these damages. For that reason, there are also no criteria for reviewing pain and suffering awards by the presiding judge or by an appellate court. Without rational criteria for measuring damages for pain and suffering, awarding such damages undermines the tort law's rationality and predictability—two essential values of the rule of law.

Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 Va. L. Rev. 1401 (2004).

Legal scholars have also argued that noneconomic damages are inconsistent with the goals of tort law.[22] Some legal scholars have

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[21] *See, e.g.,* Richard Abel, *General Damages Are Incoherent, Incalculable, Incommensurable, and Inegalitarian (but Otherwise A Great Idea)*, 55 DePaul L. Rev. 253 (2006); Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective View of the Problem and the Legal Academy's First Responses*, 34 Cap. U. L. Rev. 545 (2006); Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. Rev. 163 (2004); Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 Va. L. Rev. 1401 (2004); Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 Hofstra L. Rev. 763 (1995); Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 Cal. L. Rev. 772, 783-785 (1985); Clarence Morris, *Liability for Pain and Suffering*, 59 Colum. L. Rev. 476 (1959).

[22] *See* Richard Abel, *General Damages Are Incoherent, Incalculable, Incommensurable, and Inegalitarian (but Otherwise A Great Idea)*, 55 DePaul L. Rev. 253, 258 (2006); King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. Rev. at 164.

advocated for the elimination of noneconomic damages entirely,[23] while others have urged state legislatures to enact measures that "introduce rationality into the awards of pain and suffering."[24] Thus, considering the problems inherent to noneconomic damages, it was a rational policy choice for the legislature to limit their recovery.

In sum, the cap on noneconomic damages satisfies the rational-basis test. The statute is reasonably related to the legitimate legislative purposes of improving Tennessee's economy and controlling healthcare costs. Also, the cap is a rational means of mitigating the problems inherent in noneconomic damages.[25]

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[23] Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. Rev. 163, 164 (2004); *see also* Richard Abel, *General Damages Are Incoherent, Incalculable, Incommensurable, and Inegalitarian (but Otherwise A Great Idea)*, 55 DePaul L. Rev. 253, 325 (2006); Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 Cal. L. Rev. 772, 783-785 (1985) (advocating that noneconomic damages no longer be awarded in certain circumstances).

[24] Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 Va. L. Rev. 1401, 1420 (2004); *see* Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 Hofstra L. Rev. 763, 777 (1995) (proposing that jurors "be informed of the range of awards made by other juries in the same state for such damages during a contemporaneous time period").

[25] Numerous state supreme courts have held that caps on noneconomic damages, which apply to all personal-injury claims, do not violate the equal protection clause. *See Miller v. Johnson*, 289 P.3d 1098, 1121 (Kan. 2012); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 436-37 (Ohio 2007); *Kutch v. State*, 56 P.3d 1046, 1051-55 (Alaska 2002); *Murphy v. Edmonds*, 601 A.2d 102, 107-13 (Md. 1992). State supreme courts have

CONCLUSION

For the reasons stated, the Court should uphold the constitutionality of Tenn. Code Ann. § 29-39-102 by answering the three certified questions in the negative.

Respectfully submitted,

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also rejected equal protection challenges to caps that only apply in medical-malpractice actions. *See, e.g., Gourley ex rel. Gourley v. Nebraska Methodist Health Sys., Inc.*, 663 N.W.2d 43, 73 (Neb. 2003); *Etheridge v. Med. Ctr. Hospitals*, 376 S.E.2d 525, 34 (Va. 1989).

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 1.01(b) of Tenn. Sup. Ct. R. 46, the undersigned certifies that this brief complies with the requirements set forth in Rule 3.02 of Tenn. Sup. Ct. R. 46.

Number of words contained in this brief: 8,427.

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 2019, a true and exact copy of the foregoing was served via the court's electronic filing system and forwarded via first class, postage prepaid mail to:

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