IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

JODI MCCLAY, Plaintiff/Appellant, v. AIRPORT MANAGEMENT SERVICES, LLC, Defendant/Appellee, and STATE OF TENNESSEE, Intervening Defendant/ Appellee.	)	Supreme Court No. M2019-00511-SC-R23-CV On Tennessee Supreme Court Rule 23 Certification from the United States District Court for the Middle District of Tennessee No. 3:17-cv-00705

BRIEF OF *AMICI CURIAE* TENNESSEE CHAMBER OF COMMERCE AND INDUSTRY, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, TENNESSEE MEDICAL ASSOCIATION, AMERICAN MEDICAL ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AMERICAN TORT REFORM ASSOCIATION, AND COALITION FOR LITIGATION JUSTICE, INC.

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STATEMENT OF THE ISSUES

(1) Does the noneconomic damage 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 noneconomic damage 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 noneconomic damage 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 AND FACTS

Amici adopt the Statement of the Case and Facts of Defendant/Respondent Airport Management Services, LLC (AMS). *Amici* summarize the facts and procedural history relevant to this brief as follows. When visiting a Hudson News store at the Nashville International Airport, Plaintiff injured her foot when a panel from a beverage cooler fell as she closed its door. Plaintiff traveled to San Diego on her scheduled flight, but, after arriving in California, she was diagnosed with a "crush injury and associated soft tissue damage and bruising." Plaintiff filed a complaint in the U.S. District Court for the Middle District of Tennessee alleging AMS negligently caused her injury. A jury returned a verdict for Plaintiff, awarding her $444,500 for future medical expenses and $930,000 for noneconomic damages. AMS requested that the federal district court apply Tennessee's statutory limit on noneconomic damages, Tenn. Code Ann. § 29-39-102.

In response, Plaintiff challenged the constitutionality of the statute. The district court then certified the constitutional questions to this Court.

INTEREST OF *AMICI CURIAE*

Amici represent businesses, physicians, and insurers that are concerned with the predictability and fairness of Tennessee's civil justice system. *Amici* include the Tennessee Chamber of Commerce and Industry, Chamber of Commerce of the United States of America, Tennessee Medical Association, American Medical Association, National Federation of Independent Business Small Business Legal Center, American Tort Reform Association, and Coalition for Litigation Justice, Inc. *Amici* have a substantial interest in the constitutionality of Tenn. Code Ann. § 29-39-102, as their members are directly affected by the potential for unrestrained and excessive liability.

The General Assembly enacted Tenn. Code Ann. § 29-39-102 to provide a reasonable limit on the subjective and immeasurable portion of awards in personal injury cases—those awarded for noneconomic damages—by confining them to $750,000 or $1,000,000 in cases of catastrophic injury. *Amici* support this law, which contributes to a fair and predictable civil litigation environment and advances Tennessee's economic growth. This statutory limit is particularly critical for preserving access to affordable medical care.

SUMMARY OF ARGUMENT

Noneconomic damage awards are highly subjective and inherently unpredictable. There is "almost no standard for measuring pain and suffering damages, or even a conception of those damages or what they represent." Dan B. Dobbs, *Law of Remedies* § 8.1(4), at 383 (2d ed. 1993).[1] Juries are "left with nothing but their consciences to guide them." Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 Cal. L. Rev. 772, 778 (1985). Jurors struggle when attempting to assign a monetary value on pain and suffering:

> Some roughly split the difference between the defendant's and the plaintiff's suggested figures. One juror doubled what the defendant said was fair, and another said it should be three times medical[s]. . . . A number of jurors assessed pain and suffering on a per month basis. . . . Other jurors indicated that they just came up with a figure that they thought was fair.

Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 Duke L.J. 217, 253-54 (1993).

Historically, noneconomic awards were modest and noncontroversial. In the past half century, however, plaintiffs' lawyers have become skilled at inflating them to the point where, today, they outpace other types of liability. Legislatures, including the Tennessee General Assembly, have found that the increasing size of noneconomic

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[1] *See also* Restatement (Second) of Torts § 903 cmt. a (1965) ("There is no scale by which . . . suffering can be measured and hence there can only be only a very rough correspondence between the amount awarded as damages and the extent of the suffering.").

damages and the potential for runaway awards threaten the economic stability of businesses, the medical profession, and the affordability of liability insurance. In response, many states have placed reasonable upper limits on such awards. When the General Assembly enacted Tenn. Code Ann. § 29-39-102, it struck a careful balance. The General Assembly sought to maintain economic stability for all Tennesseans by choosing a substantial, but not unlimited, remedy for the few Tennesseans who may find themselves as plaintiffs seeking extraordinary noneconomic losses. The legislature left uncapped all economic recoveries, including for past and future medical expenses, rehabilitation expenses, lost wages, or other such out-of-pocket costs. Tennessee's law has brought needed stability and predictability to tort liability. This has proven to be particularly critical to ensuring broad access to affordable health care for Tennesseans.

Tenn. Code Ann. § 29-39-102 is in the legal mainstream and constitutional. About half of the states limit noneconomic damage awards. Most courts that have considered the constitutionality of these statutes have upheld them, including based on state constitutions comparable or identical to those in Tennessee. Courts have found that laws constraining liability awards are a proper legislative function and do not infringe on a plaintiff's constitutional rights. *Amici* respectfully request that this Court answer the three certified questions in the negative and find Tenn. Code Ann. § 29-39-102 constitutional.

ARGUMENT

I. LIMITS ON NONECONOMIC DAMAGES RESPOND TO A RISE IN PAIN AND SUFFERING AWARDS BY RESTORING PREDICTABILITY TO THE CIVIL JUSTICE SYSTEM

A. In the Twentieth Century, Pain and Suffering Awards Became Larger and More Unpredictable

Historically, the availability of noneconomic damages did not raise serious concern because "personal injury lawsuits were not very numerous and verdicts were not large." Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective Review of the Problem and the Legal Academy's First Responses*, 34 Cap. U. L. Rev. 545, 560 (2006). Further, prior to the twentieth century, courts often reversed large noneconomic awards. *See* Ronald J. Allen & Alexia Brunet Marks, *The Judicial Treatment of Noneconomic Compensatory Damages in the Nineteenth Century*, 4. J. Empirical Legal Stud. 365, 369 (2007) (finding "literally no cases affirmed on appeal prior to 1900 that plausibly involved noneconomic compensatory damages in which the total damages (noneconomic and economic combined) exceeded $450,000" in 2007 dollars (about $560,000 today)).

The size of pain and suffering awards took its first leap after World War II as personal injury lawyers became adept at finding ways to enlarge these awards. *See generally* Melvin M. Belli, *The Adequate Award*, 39 Cal. L. Rev. 1 (1951); *see also* Merkel, 34 Cap. U. L. Rev. at 560-65 (examining post-war expansion of pain and suffering awards). Early academic concerns were voiced, but went unheeded. *See, e.g.*, Marcus L. Plant, *Damages for Pain and Suffering*, 19 Ohio St. L.J. 200 (1958) (expressing concern over the ease of proof of pain and suffering

and the unpredictability of such awards, and proposing "a fair maximum limit on the award").

By the 1970s, "in personal injuries litigation the intangible factor of 'pain, suffering, and inconvenience constitute[d] the largest single item of recovery, exceeding by far the out-of-pocket 'specials' of medical expenses and loss of wages." *Nelson v. Keefer*, 451 F.2d 289, 294 (3d Cir. 1971).[2] As Judge Paul Neimeyer of the U.S. Court of Appeals for the Fourth Circuit observed, in the modern era, "[m]oney for pain and suffering . . . provides the grist for the mill of our tort industry." Paul Neimeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 Va. L. Rev. 1401, 1401 (2004); *see also* Stephen D. Sugarman, *A Comparative Look at Pain and Suffering Awards*, 55 DePaul L. Rev. 399, 399 (2006) (finding pain and suffering awards in the United States are more than ten times those in the most generous of other nations).

This trend has continued. According to the Bureau of Justice Statistics, the median damage award in medical liability jury trials in state courts, adjusted for inflation, was 2.5 times higher in 2005

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[2] Scholars largely attribute the rise in noneconomic damages to (1) the availability of future pain and suffering damages; (2) the rise in automobile ownership and personal injuries resulting from automobile accidents; (3) the greater availability of insurance and willingness of plaintiffs' attorneys to take on lower-value cases; (4) the rise in affluence of the public and a change in public attitude that "someone should pay"; and (5) better organization by the plaintiffs' bar. *See* Merkel, 34 Cap. U. L. Rev. at 553-66; Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. Rev. 163, 170 (2004).

($682,000) than in 1992 ($280,000). *See* Lynn Langton & Thomas H. Cohen, *Civil Bench and Jury Trials in State Courts, 2005*, at 10 tbl. 11 (Bur. of Justice Stats., Apr. 9, 2009). The median damage award in product liability jury trials in state courts grew even more substantially. Adjusted for inflation, product liability awards were five times higher in 2005 ($749,000) than in 1992 ($154,000). *Id.* Noneconomic damages accounted for approximately half of these awards. *See* Thomas H. Cohen, *Tort Bench and Jury Trials in State Courts*, 2005, at 6 fig. 2 (Bur. of Justice Stats., Nov. 2009).

B. Tennessee is Among Many States that Have Enacted a Reasonable Upper Limit on Noneconomic Damages

This dramatic rise of pain and suffering awards led many states, including Tennessee, to adopt commonsense statutory ceilings on noneconomic damages. These limits recognize that the broader public good is served when liability remains reasonable and predictable. These laws were designed to address outlier cases, promote uniform treatment of individuals with comparable injuries, facilitate fair settlements, and limit arbitrariness that may raise due process concerns.[3]

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[3] *See Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 400 n.22 (Mich. 2004) ("A grossly excessive award for pain and suffering may violate the Due Process Clause even if it is not *labeled* 'punitive.'"); Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 Hofstra L. Rev. 763, 769 (1995) (observing that unpredictability "undermines the legal system's claim that like cases will be treated alike"); *see also* Neimeyer, 90 Va. L. Rev. at 1414 ("The relevant lesson learned from the punitive damages experience is that when the tort system becomes infected by a growing pocket of irrationality, state legislatures must step forward and act to establish rational rules.").

Today, about half of the states limit noneconomic damages. Some states, including Tennessee, have adopted an upper limit that extends to all personal injury claims.[4] Without a statutory limit, a small business owner may face millions of dollars in liability for accidents ranging from a common slip-and-fall to, as here, a bruised foot from a beverage cooler. Likewise, a minor, everyday "fender bender" can result in demands for exorbitant awards for pain and suffering, driving up auto insurance rates. A generally applicable limit on noneconomic damages significantly reduces the potential for a runaway verdict and unreasonable settlement demands.

In addition, many states specifically limit noneconomic damages[5] and a few states cap total damages[6] in medical negligence cases.

Tennessee's limit on noneconomic damages is well within the

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[4] *See, e.g.,* Alaska Stat. § 09.17.010; Colo. Rev. Stat. § 13-21-102.5; Haw. Rev. Stat. § 663-8.7; Idaho Code § 6-1603; Md. Cts. & Jud. Proc. Code § 11-108; Miss. Code Ann. §11-1-60(2)(b); Ohio Rev. Code Ann. § 2315.18; Or. Rev. Stat. § 31.710.

[5] *See* Alaska Stat. § 09.55.549; Cal. Civ. Code § 3333.2; Colo. Rev. Stat. § 13-64-302; Iowa Code § 147.136A; Md. Cts. & Jud. Proc. Code § 3-2A-09; Mass. Gen. Laws ch. 231 § 60H, Mich. Comp. Laws § 600.1483; Mont. Code Ann. § 25-9-411; Nev. Rev. Stat. § 41A.035; N.C. Gen. Stat. § 90-21.19; N.D. Cent. Code § 32-42-02; Ohio Rev. Code Ann. § 2323.43; S.C. Code Ann. § 15-32-220; S.D. Codified Laws § 21-3-11; Tex. Civ. Prac. & Rem. Code § 74.301; Utah Code § 78B-3-410; W. Va. Code Ann. § 55-7B-8; Wis. Stat. § 893.55.

[6] *See, e.g.*, Ind. Code Ann. § 34-18-14-3; La. Rev. Stat. § 40:1299.42; Neb. Rev. Stat. § 44-2825; Va. Code Ann. § 8.01-581.15; *see also* N.M. Stat. Ann. § 41-5-6 (limiting total damages in medical liability actions except damages for medical care or punitive damages).

mainstream. Some states have limits significantly lower than Tennessee.[7] Others have limits in the same range as Tennessee.[8]

C. Limits on Noneconomic Damages are Critical to Tennessee's Healthcare Environment

While the constitutionality of the limit on noneconomic damages arises in this case in a premises liability action, the Court's decision will have significant implications for Tennessee's healthcare environment. Limits on noneconomic damages have proven effective and are particularly critical in the medical liability area. They lead to lower insurance premiums, higher physician supply, improved patient access to care, lower defensive medicine and health care costs, and lower claim severity and frequency. *See, e.g.,* Am. Med. Ass'n, *Medical Liability Reform NOW!*, at 11-13 (2019 ed) [hereinafter AMA, Med. Liab.

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[7] *See, e.g.*, Cal. Civ. Code § 3333.2(b) ($250,000 noneconomic damage limit in medical liability actions); Iowa Code § 147.136A (limiting noneconomic damages in medical liability actions to $250,000 except in cases of catastrophic injury, death, or actual malice); Idaho Code § 6-1603 ($250,000 noneconomic damages in personal injury actions limit, $357,210 when adjusted for inflation in 2019); Nev. Rev. Stat. § 41A.035 ($350,000 noneconomic damage limit in medical liability actions).

[8] *See, e.g.*, Colo. Rev. Stat. § 13-21-102.5(3)(a) ($468,010 noneconomic damage limit in personal injury actions, allowing awards as high as $936,030, as adjusted for inflation, upon justification through clear and convincing evidence); Md. Cts. & Jud. Proc. Code §§ 3-2A-09, 11-108 (generally limiting noneconomic damages to $815,000 and $860,000 in medical liability and other personal injury cases, respectively, as adjusted per statute for 2019); Miss. Code Ann. § 11-1-60(2) (limiting noneconomic damages to $500,000 and $1 million in medical liability and other personal injury actions, respectively).

Reform]; Mark Behrens, *Medical Liability Reform: A Case Study of Mississippi*, 118 Obstetrics & Gynecology 335 (Aug. 2011); Ronald Stewart et al., *Malpractice Risk and Cost are Significantly Reduced After Tort Reform*, 212 J. Am. Coll. Surg. 463 (2011); Patricia Born et al., *The Effects of Tort Reform on Medical Malpractice Insurers' Ultimate Losses*, 76 J. Risk & Ins. 197 (2009). Placing reasonable constraints on the subjective portion of awards is critical for ensuring that adequate, affordable health care is available to the public at large, particularly in states such as Tennessee that have significant rural areas where healthcare can be scarce.

Evidence indicates that limits on noneconomic damages increase physician supply and access to medical care. *See* AMA, Med. Liab. Reform at 3-4 (discussing studies). "Many studies demonstrate that professional liability exposure has an important effect on recruitment of medical students to the field and retention of physicians within the field and within a particular state." Robert Barbieri, *Professional Liability Payments in Obstetrics and Gynecology,* 107 Obstetrics & Gynecology 578, 578 (Mar. 2006). States that limit noneconomic damages generally experience increases in physician supply per capita compared to states without caps. *See* William Encinosa & Fred Hellinger, *Have State Caps on Malpractice Awards Increased the Supply of Physicians?*, 24 Health Aff. 250 (2005); Ronald Stewart et al., *Tort Reform is Associated with Significant Increases in Texas Physicians Relative to the Texas Population*, 17 J. Gastrointest. Surg. 168 (2013). If Tennessee's medical liability climate is not stable and competitive, doctors may decide to practice elsewhere. *See* Chiu-Fang Chou & Anthony Lo Sasso, *Practice*

Location Choice by New Physicians: The Importance of Malpractice Premiums, Damage Caps, and Health Professional Shortage Area Designation, 44 Health Serv. Res. 1271 (2009); Daniel Kessler et al., *Impact of Malpractice Reforms on the Supply of Physician Services*, 293 JAMA 2618 (2005).

Limits on noneconomic damages also reduce the pressure on providers to engage in costly and, often unnecessary, defensive medicine. "[T]he fear of being sued . . . leads to an increase in the quantity of care rather than an increase in the efficiency or quality of care." Scott Spear, *Some Thoughts on Medical Tort Reform,* 112 Plastic & Reconstructive Surgery 1159 (Sept. 2003). Open-ended liability can lead doctors to order costly tests purely due to the threat of a lawsuit.[9] Defensive medicine also manifests itself in physicians eliminating high-risk procedures and turning away high-risk patients. *See* Brian Nahed et al., *Malpractice Liability and Defensive Medicine: A National Survey of Neurosurgeons*, PLoS ONE, vol. 7, no. 6, at 6 (June 2012) ("Reductions in offering 'high-risk' cranial procedures have decreased access to care for potentially life-saving neurological procedures."). A study has found that "malpractice reforms that directly reduce provider

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[9] *See* AMA, Med. Liab. Reform at 5-7 (discussing studies); Timothy Smith et al., *Defensive Medicine in Neurosurgery: Does State-Level Liability Risk Matter?*, 76 Neurosurgery 105 (Feb. 2015) (neurosurgeons are 50% more likely to practice defensive medicine in high-risk states); Manish K. Sethi et al., *Incidence and Costs of Defensive Medicine Among Orthopedic Surgeons in the United States: A National Survey Study*, 41 Am. J. Orthop. 69 (2012) (96% of orthopedic surgeons surveyed reported having practiced defensive medicine to avoid liability).

liability pressure lead to reductions of 5 to 9 percent in hospital expenditures without substantial effects on mortality or medical complications." Donald Palmisano, *Health Care in Crisis: The Need for Medical Liability Reform*, 5 Yale J. Health Pol'y, L. & Ethics 371, 377 (2005) (citing Daniel Kessler & Mark McClellan, *Do Doctors Practice Defensive Medicine?*, 111 Q. J. of Econ. 353 (1996)); *see also* Leonard Nelson et al., *Medical Malpractice Reform in Three Southern States*, 4 J. Health & Biomed. L. 69, 84 (2008) (finding link "between the adoption of malpractice reforms and the reduction in defensive medical practices").

Recently, a peer-reviewed study examined the effect of damage caps on specific testing and treatment decisions for coronary artery disease, the leading cause of death in the United States. *See* Steven Farmer et al., *Association of Medical Liability Reform with Clinician Approach to Coronary Artery Disease Management*, 10 JAMA Cardiology E1, E2 (June 2018). After adoption of damage limits, "testing became less invasive (fewer initial angiographies and less progression from initial stress test to angiography), and revascularization through [percutaneous coronary intervention] following initial testing declined." *Id.* at E8; *see also* Daniel Kessler, *Evaluating the Medical Malpractice System and Options for Reform*, 25 J. Econ. Perspectives 93, 106 (2011) ("[R]eforms such as caps on damages . . . that have a direct effect on awards reduce malpractice pressure and, in turn, defensive medicine.").

Finally, a significant body of literature shows that placing constraints on noneconomic damages can reduce medical liability

premiums paid by physicians, claim severity, and claim frequency. *See* AMA, Med. Liab. Reform at 11-13.[10] For example, one study found that internal medicine premiums were 17.3% lower in states with limits on noneconomic damages than in states without such limits. Meredith L Kilgore, Michael A. Morrisey & Leonard J. Nelson, *Tort Law and Medical Malpractice Insurance Premiums*, 43 Inquiry 255, 265 (2006). Physicians in general surgery and obstetrics/gynecology experienced 20.7% and 25.5% lower insurance premiums, respectively, in states with damage caps compared to states without them. *Id.* at 268.

In short, limits on noneconomic damages are a legislative response to a growing distortion of liability law that has adverse consequences for businesses, healthcare providers, and the public. The reforms have worked. Tennessee's law should be upheld.

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[10] *See, e.g.,* Nelson, 4 J. Health & Biomed. L. at 84 ("It is clear . . . across a number of rigorous studies using a variety of data periods, measures and methods, damage caps have been shown to be effective in reducing medical malpractice insurance premiums."); Ronen Avraham, *An Empirical Study of the Impact of Tort Reforms on Medical Malpractice Settlement Payments*, 36 J. Legal Stud. S183, S221 (June 2007) (study of more than 100,000 settled cases showed that caps on noneconomic damages "do in fact have an impact on settlement payments"); Michelle Mello, *Medical Malpractice: Impact of the Crisis and Effect of State Tort Reforms*, Research Synthesis Rep. No. 10, at 12 (Robert Wood Johnson Found. 2006) (reporting "the most recent controlled studies show that caps moderately constrain the growth of premiums"); U.S. Dep't of Health & Human Servs., *Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs by Fixing Our Medical Liability System* 15 (2002) ("[T]here is a substantial difference in the level of medical malpractice premiums in states with meaningful caps . . . and states without meaningful caps.").

II. MOST COURTS HAVE UPHELD NONECONOMIC DAMAGE LIMITS

Courts have largely respected the prerogative of state legislatures to enact reasonable limits on awards for pain and suffering and other noneconomic damages. These courts have upheld limits on noneconomic damages that apply to all civil claims[11] and those that apply specifically to medical liability cases.[12] Courts have also upheld laws that limit a plaintiff's *total* recovery against healthcare providers,[13] as well as

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[11] *See, e.g., C.J. v. Dep't of Corrections*, 151 P.3d 373 (Alaska 2006); *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002); *Scharrel v. Wal-Mart Stores, Inc.*, 949 P.2d 89 (Colo. App. 1998); *Kirkland v. Blaine Cnty. Med. Ctr.*, 4 P.3d 1115 (Idaho 2000); *DRD Pool Serv., Inc. v. Freed*, 5 A.3d 45 (Md. 2010); *Green v. N.B.S., Inc.*, 976 A.2d 279 (Md. 2009); *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992); *Simpkins v. Grace Brethren Church of Del.*, 75 N.E.3d 122 (Ohio 2016); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007).

[12] *See, e.g., Fein v. Permanente Med. Group*, 695 P.2d 665 (Cal. 1985); *Garhart ex rel. Tinsman v. Columbia/HealthONE, L.L.C.*, 95 P.3d 571 (Colo. 2004); *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993); *Oliver v. Magnolia Clinic*, 85 So. 3d 39 (La. 2012); *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So. 2d 517 (La. 1992); *Zdrojewski v. Murphy*, 657 N.W.2d 721 (Mich. Ct. App. 2002); *Tam v. Eighth Jud. Dist. Ct.*, 358 P.3d 234 (Nev. 2015); *Condon v. St. Alexius Med. Ctr.*, 2019 ND 113 (2019); *Knowles v. United States*, 544 N.W.2d 183 (S.D. 1996), *superseded by statute*; *Rose v. Doctors Hosp.*, 801 S.W.2d 841 (Tex. 1990); *Judd v. Drezga*, 103 P.3d 135 (Utah 2004); *MacDonald v. City Hosp., Inc.,* 715 S.E.2d 405 (W. Va. 2011); *Estate of Verba v. Ghaphery*, 552 S.E.2d 406 (W. Va. 2001); *Robinson v. Charleston Area Med. Ctr.*, 414 S.E.2d 877 (W. Va. 1991); *Mayo v. Wisconsin Injured Patients & Families Comp. Fund*, 914 N.W.2d 678 (Wis. 2018).

[13] *See, e.g., Garhart ex rel. Tinsman v. Columbia/HealthONE, L.L.C.*, 95 P.3d 571 (Colo. 2004); *Gourley ex rel. Gourley v. Neb.*

damage limits that apply to various other types of claims or entities.[14]

A. A Legislative Limit on Noneconomic Damages Defines the Scope of the Available Remedy and Does Not Disturb a Jury's Fact-Finding Function

Courts in most states, many of which have constitutional language similar or identical to the Tennessee Constitution,[15] have squarely

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Methodist Health Sys., Inc., 663 N.W.2d 43 (Neb. 2003); *Pulliam v. Coastal Emer. Servs. of Richmond, Inc.,* 509 S.E.2d 307 (Va. 1999); *Etheridge v. Med. Ctr. Hosps.*, 376 S.E.2d 525 (Va. 1989); *Ind. Patient's Comp. Fund v. Wolfe*, 735 N.E.2d 1187 (Ind. App. 2000); *Bova v. Roig*, 604 N.E.2d 1 (Ind. App. 1992); *Johnson v. St. Vincent Hosp.*, 404 N.E.2d 585 (Ind. 1980), *overruled on other grounds by In re Stephens*, 867 N.E.2d 148 (Ind. 2007).

[14] *See, e.g., Quackenbush v. Super. Ct. (Congress of Cal. Seniors),* 60 Cal. App. 4th 454 (1997) (uninsured motorists, intoxicated drivers, and fleeing felons); *Samples v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 114 So.3d 912 (Fla. 2013) (birth-related neurological injuries); *Peters v. Saft*, 597 A.2d 50 (Me. 1991) (servers of alcohol); *Phillips v. Mirac, Inc.*, 685 N.W.2d 174 (Mich. 2004) (lessors of motor vehicles); *Wessels v. Garden Way, Inc.*, 689 N.W.2d 526 (Mich. Ct. App. 2004) (product liability actions); *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722 (Minn. 1990) (loss of consortium damages); *Oliver v. Cleveland Indians Baseball Co., LP*, 915 N.E.2d 1205 (Ohio 2009) (political subdivisions); *Horton v. Oregon Health & Science Univ.,* 376 P.3d 998 (Or. 2016) (state tort claims);

[15] Courts have upheld limits on noneconomic damages in states such as Idaho, Maryland, Nebraska, and Nevada, where the state constitution, like Tennessee, provides that the right to trial by jury shall remain "inviolate." *Compare* Tenn. Const. art. I, § 6 *with* Idaho Const. art. I, § 7; Md. Dec. of Rts. art. 23; Neb. Const. art. I, § 6; Nev. Const. art. 1, § 3; *see Kirkland,* 14 P.3d at 1120; *DRD Pool Serv., Inc. v. Freed*, 5 A.3d 45, 57 (Md. 2010); *Gourley, Inc.,* 663 N.W.2d at 75; *Tam v. Eighth Jud. Dist. Ct.*, 358 P.3d 234, 238 (Nev. 2015). As the Fifth Circuit recognized, "'[i]nviolability' simply means that the jury right is

rejected claims that noneconomic damage limits violate the right to a jury trial. These courts carefully distinguish the fact-finding function of the jury in assessing a plaintiff's losses from the law-applying role of the courts in arriving at a final judgment.

Courts spanning from Maryland to Alaska have found that a limit on noneconomic damages represents a policy judgment that does not interfere with the right to trial by jury. A jury still determines the facts and assesses liability; the statute applies only after the jury's determination. *See L.D.G., Inc. v. Brown*, 211 P.3d 1110, 1131 (Alaska 2009) (upholding limit on noneconomic damages); *DRD Pool Serv., Inc. v. Freed*, 5 A.3d 45, 57 (Md. 2010) (same). For example, the Nevada Supreme Court concluded that the state's $350,000 medical malpractice noneconomic damage limit satisfies the "inviolate" right to a jury trial. The statutory limit "does not interfere with the jury's factual findings because it takes effect only after the jury has made its assessment of damages, and thus, it does not implicate a plaintiff's right to a jury trial." *Tam v. Eighth Judicial Dist. Ct.*, 358 P.3d 234, 238 (Nev. 2015).

Other courts concur, finding that such limits do not impede a plaintiff's ability to present his or her case or hamper the jury's ability to assess the factual extent of the plaintiff's damages. *See Zdrojewski v. Murphy*, 657 N.W.2d 721, 737 (Mich. Ct. App. 2002). They in no way "alter the findings of facts themselves, thus avoiding constitutional conflicts." *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 432 (Ohio

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protected absolutely in cases where it applies; the term does not establish what that right encompasses." *Learmonth v. Sears, Roebuck & Co.,* 710 F.3d 249, 263 (5th Cir. 2013).

2007). As the Supreme Court of Virginia explained, "although a party has a right to have a jury assess his damages, he has no right to have a jury dictate through an award the legal consequences of its assessment." *Etheridge v. Med. Ctr. Hosps.*, 376 S.E.2d 525, 529 (Va. 1989). Once the jury "has ascertained the facts and assessed the damages . . . it is the duty of the court to apply the law to the facts." *Id.* It is "up to the court to conform the jury's findings to the applicable law." *Judd v. Drezga*, 103 P.3d 135, 144 (Utah 2004).

In fact, many Tennessee laws establish, constrain, or expand the remedy available in a civil action. For example, a Tennessee jury may find that a car accident resulted in $50,000 in medical expenses and lost income, and award $150,000 for pain and suffering. If the jury finds that the plaintiff was 25% at fault for the injury, the court reduces the damage award by his or her percentage of responsibility consistent with the jury's verdict. If the jury finds a plaintiff 51% at fault, however, the plaintiff does not receive $98,000—he or she receives nothing. *See generally McIntyre v. Balentine,* 833 S.W.2d 52 (Tenn. 1992). Other laws require Tennessee courts to enter a judgment for treble damages.[16] These laws are the flipside of statutes that limit damages; they require

[16] *See, e.g.*, Tenn. Code Ann. § 47-50-109 (treble damages for inducing breach of contract); Tenn. Code Ann. § 55-5-124 (treble damages in civil action for unlawfully moving motor vehicle from private property); Tenn. Code Ann. § 62-5-417 (treble damages in fraud action related to funeral services); Tenn. Code Ann. § 62-6-503(e) (treble damages in any tort action arising out of engaging in construction or the home improvement business without a license); *see also* Tenn. Code Ann. §§ 47-18-109(a)(3), 48-101-520(b)(1) (authorizing treble damages for willfully or knowingly engaging in deceptive act or practice).

increasing a jury's award in accordance with the law. Courts have found that if it is constitutional for a statute to require courts to triple a jury's damage award, it is constitutional to limit recoverable damages. *See, e.g., Kirkland,* 14 P.3d at 1119 (recognizing that "at the time the Idaho Constitution was adopted, there were territorial laws providing for double and treble damages in certain civil actions, . . . [t]herefore, the Framers could not have intended to prohibit in the Constitution all laws modifying jury awards").

Laws that limit noneconomic damages do not modify a jury's assessment of damages or fault. The judgment results from the court's proper application of the law to the jury's findings.

B. Courts Have Widely Rejected Other Attempts to Nullify Noneconomic Damage Limits

Courts across the country have also rejected equal protection and separation of powers challenges to noneconomic damage limits.

For example, the Ohio Supreme Court has recognized that a generally applicable limit on noneconomic damages in tort actions bears a real and substantial relation to the general welfare of the public. The General Assembly reviewed evidence demonstrating that uncertainty related to the existing civil litigation system and rising costs associated with it were harming the economy. It noted that noneconomic damages are inherently subjective and thus easily tainted by irrelevant considerations. The implicit, logical conclusion is that the uncertain and subjective system of evaluating noneconomic damages was contributing to the deleterious economic effects of the tort system. *See Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 435-36 (Ohio 2007).

Most recently, the North Dakota Supreme Court rejected an equal protection challenge to the state's $500,000 limit on noneconomic damages in medical liability actions, recognizing that this constraint "does not prevent seriously injured individuals from being fully compensated for any amount of medical care or lost wages," but only prevents them from receiving "more abstract damages" above the cap. *Condon*, 2019 ND 113 ¶ 16. These laws are also "rationally related to the legitimate governmental interests of ensuring that adequate and affordable health care is available" to state residents. *Tam*, 358 P.3d at 239; *see also Mayo v. Wisconsin Injured Patients & Families Comp. Fund*, 914 N.W.2d 678, 693-95 (Wis. 2018) (finding noneconomic damage limit does not violate equal protection or due process because it supports the legislature's "overarching goal of "ensur[ing] affordable and accessible health care for all of the citizens of Wisconsin while providing adequate compensation to the victims of medical malpractice") (quoting legislative findings, alteration in original).[17]

Courts have also rejected claims that noneconomic damages caps run afoul of the separation of powers doctrine. As the Ohio Supreme Court explained:

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[17] *See also Patton v. TIC*, 77 F.3d 1155, 1246-47 (10th Cir. 1996) ("When a legislature strikes a balance between a tort victim's right to recover noneconomic damages and society's interest in preserving the availability of affordable liability insurance, it is engaging in its fundamental and legitimate role of structuring and accommodating the burdens and benefits of economic life.") (internal quotations and alterations omitted); *C.J. v. Dep't of Corrections*, 151 P.3d 373, 381 (Alaska 2006) (recognizing limits on noneconomic damages "bear[ ] a fair and substantial relationship to a legitimate government objective").

> The argument that [a noneconomic damages cap] infringes on the judicial power to decide damages lacks merit. It is certainly a judicial function to decide the facts in a civil case, and the amount of damages is a question of fact. However, that function is not so exclusive as to prohibit the General Assembly from regulating the amount of damages available in certain circumstances.

Arbino, 880 N.E.2d at 438. The Idaho Supreme Court has also recognized that the legislature "has the power to limit remedies available to plaintiffs without violating the separation of powers." *Kirkland*, 14 P.3d at 1122. Michigan appellate courts agree. *See Zdrojewski*, 657 N.W.2d at 739 ("Because [noneconomic damages caps] are substantive in nature, rather than procedural, they do not infringe the Supreme Court's rulemaking authority.").

Although a noneconomic damages limit prevents some plaintiffs from obtaining the same dollar figures they may have received prior to the effective date of the statute, a person can still recover full economic damages, substantial noneconomic damages, and possibly punitive damages. *Arbino*, 880 N.E.2d at 477; *see also Judd*, 103 P.3d at 144 (observing that while a noneconomic damages cap may deprive "a few badly injured plaintiffs of full recovery," it is "constitutionally reasonable").

Finally, courts have rejected scattershot attempts, like the one before this Court, to invalidate noneconomic damage limits. *See, e.g., Simpkins v. Grace Brethren Church of Del.*, 75 N.E.3d 122, 136 (Ohio 2016) (holding Ohio's limit on tort damages for noneconomic loss does not violate right to trial by jury, right to remedy, due process, or equal protection, and reaffirming that the law is "rationally related to the

legitimate governmental purpose of improving the state's civil justice system and its economy").

In comparison, only a few state high courts have invalidated limits on noneconomic damages.[18] "Over the years, the scales in state courts have increasingly tipped toward upholding noneconomic damage caps." Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*, 33 J.L. Med. & Ethics 515, 527 (2005); *see also MacDonald*, 715 S.E.2d at 421 (upholding $500,000 limit on noneconomic damages in medical liability case "consistent with the majority of jurisdictions that have considered the constitutionality of caps on noneconomic damages in medical malpractice or in any personal injury action"). In fact, recently, the Supreme Courts of Oregon and Wisconsin expressly overruled earlier decisions nullifying such laws.[19] If the legislature has the power to

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[18] *See, e.g., N. Broward Hosp. Dist. v. Kalitan,* 219 So. 3d 49 (Fla. 2017); *Hilburn v. Enerpipe Ltd.*, No. 112,765, 2019 WL 2479464 (Kan. June 14, 2019); *Watts v. Lester E. Cox Med. Ctrs.,* 376 S.W.3d 633 (Mo. 2012); *Beason v. I.E. Miller Services, Inc.*, No. 114301, 2019 OK 28 (Okla. Apr. 23, 2019).

[19] *See Horton v. Oregon Health & Sci. Univ.*, 376 P.3d 998, 1044 (Or. 2016) (overruling *Lakin v. Senco Prods., Inc.*, 987 P.2d 463 (Or. 1999), finding "it is difficult to see how the jury trial right renders a damages cap unconstitutional. Neither the text nor the history of the jury trial right suggests that it was intended to place a substantive limitation on the legislature's authority to alter or adjust a party's rights and remedies."); *Mayo v. Wisconsin Injured Patients & Families Comp. Fund*, 914 N.W.2d 678, 684 (Wis. 2018) (overruling *Ferdon ex rel. Petrucelli v. Wisconsin Patients Comp. Fund*, 701 N.W.2d 440 (Wis. 2005), finding "*Ferdon* erroneously invaded the province of the legislature").

abolish or significantly modify a common law cause of action, then it must be able to limit the damages recoverable for that action. *See Kirkland,* 14 P.3d at 1119. The Court should join the majority of courts nationwide and uphold the legislative limit on noneconomic damages.

III. THIS COURT HAS TRADITIONALLY RESPECTED THE LEGISLATURE'S AUTHORITY TO MODIFY COMMON LAW RIGHTS AND REMEDIES

Upholding Tennessee's statutory limit on noneconomic damages is consistent with the state's longstanding presumption favoring constitutionality and the respect this Court has customarily provided to the General Assembly in shaping the civil justice system.

A. This Court Has Consistently Upheld Liability Reforms

This Court has recognized the legislature's authority "to weigh and to balance competing public and private interests in order to place reasonable limitations on rights of action in tort which it also has the power to create or to abolish." *Mills v. Wong*, 155 S.W.3d 916, 923 (Tenn. 2005). When faced with challenges to legislation that places reasonable constraints on liability, the Court has repeatedly recognized the legislature's power to modify common law rights, remedies, and punishments. *See, e.g.*, *Lynch v. City of Jellico*, 205 S.W.3d 384 (Tenn. 2006) (upholding Workers' Compensation Reform Act of 2004 under Tennessee and U.S. Constitutions); *Mills*, 155 S.W.3d at 916 (upholding three-year statute of repose for medical malpractice claims); *Newton v. Cox*, 878 S.W.2d 105 (Tenn. 1994) (upholding contingent fee cap for medical malpractice claims); *Jones v. Five Star Eng'g, Inc.*, 717 S.W.2d 882 (Tenn. 1986) (upholding ten-year statute of repose for product

liability actions); *Harmon v. Angus R. Jessup Assocs., Inc.*, 619 S.W.2d 522 (Tenn. 1981) (upholding four-year statute of repose for claims against architects, engineers, and contractors stemming from improvements to real property). In fact, in *Lavin v. Jordon,* 16 S.W.3d 362, 369-70 (Tenn. 2000), this Court applied a statute that capped actual damages at $10,000 in cases where parents are subject to liability for acts of their children, recognizing that the wisdom of a statutory limit on damages is a public policy issue for the legislature.[20]

The "primary aspect" of the right to jury trial in Tennessee is for an unbiased, impartial jury to determine "all contested factual issues." *Ricketts v. Carter*, 918 S.W.2d 419, 421 (Tenn. 1996). There is no right to unlimited awards, as the legislature can modify common law rights of action and define the damages or other relief available. *See Concrete Spaces, Inc. v. Sender*, 2 S.W.3d 901, 912 (Tenn. 1999) (finding punitive damages unavailable under Tennessee Consumer Protection Act because the General Assembly authorized treble damages for willful or knowing violations); *Mills*, 155 S.W.3d at 922 (recognizing the General Assembly has "sovereign power prospectively to limit and even to abrogate common law rights of action"). These holdings indicate that the scope of available remedies is a policy question for the General Assembly.

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[20] This Court's own rules place a $100,000 limit on reimbursement for losses caused by lawyer misconduct for one claimant, or $250,000 in the aggregate, paid through the Tennessee Lawyers' Fund for Client Protection. *See* Tenn. S. Ct. R. 25, § 13.01.

The Court should not abandon these principles when faced with a challenge to a limit on noneconomic damage awards. It should apply the "strong presumption" of constitutionality that Tennessee law extends to legislative enactments, *Lynch*, 205 S.W.3d at 390,[21] and find that a decision to limit the subjective and immeasurable portion of awards to $750,000 or, in cases of catastrophic injury, $1 million, is a rational, permissible public policy choice.

B. The Sixth Circuit Panel's "Guess" That This Court Would Rule That a Limit on Damages Violates the Right to Jury Trial Is Incorrect and Should be Repudiated

Plaintiff directs this Court's attention to the Sixth Circuit's recent decision in *Lindenberg v. Jackson National Life Insurance Co.*, 912 F.3d 348 (6th Cir. 2018). (Pl. Br. at 2). The panel's decision appears to be inconsistent with every federal circuit that has considered whether a statutory limit on damages violates the Seventh Amendment or a state right to jury trial, including the Sixth Circuit's own jurisprudence. Most important, it is inconsistent with Tennessee law. The Court should repudiate this decision, which has created confusion.

In *Lindenberg*, a split panel of the Sixth Circuit held that Tennessee's statutory limit on *punitive* damages violated the Tennessee Constitution's right to jury trial. *See id.* at 364-71. In reaching this outcome, the panel majority did not fully consider the Tennessee law

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[21] *See also Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003) ("We must 'indulge every presumption and resolve every doubt in favor of the statute's constitutionality.'" (quoting *State v. Taylor*, 70 S.W.3d 717, 721 (Tenn. 2002)).

discussed above. It made a "bad guess" on a matter of first impression under state law.

> The U.S. Supreme Court has recognized that:
>
> > Our cases have clearly established that a person has no property, no vested interest, in any rule of the common law. The Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object, despite the fact that otherwise settled expectations may be upset thereby. Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.

Duke Power Co. v. Carolina Envt'l Study Group, Inc., 438 U.S. 59, 88 n.32 (1978) (citations, quotations, and alterations omitted). For this reason, federal courts have, until *Lindenberg*, uniformly upheld limits on noneconomic damages in *civil* actions generally,[22] medical liability cases[23] as well as caps on total damages.[24] *Lindenberg* is an aberration.

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[22] *See, e.g., Learmonth v. Sears, Roebuck & Co.,* 710 F.3d 249 (5th Cir. 2013); *Patton v. TIC United Corp.*, 77 F.3d 1235 (10th Cir. 1996); *Clarendon Nat'l Ins. v. Phillips*, No. CV 04-247-E-LMB, 2005 WL 1041479 (D. Idaho Apr. 5, 2005); *Simms v. Holiday Inns, Inc.*, 746 F. Supp. 596 (D. Md. 1990); *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989).

[23] *See Estate of McCall v. United States*, 642 F.3d 944 (11th Cir. 2011); *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513 (6th Cir. 2005); *Owen v. United States*, 935 F.2d 734 (5th Cir. 1991); *Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985); *Watson v. Hortman*, 844 F. Supp. 2d 795 (E.D. Tex. 2012); *Federal Express Corp. v. United States*, 228 F. Supp. 2d 1267, 1271 (D. N.M. 2002).

[24] *See Schmidt v. Ramsey*, 860 F.3d 1038 (8th Cir. 2017) (Nebraska cap); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989) (Virginia cap).

For example, in *Learmonth v. Sears, Roebuck & Co.*, the Fifth Circuit ruled that a statute limiting noneconomic damages in personal injury cases did not violate the Mississippi Constitution's right to jury trial. *See* 710 F.3d 249, 255 (5th Cir. 2013). The panel unanimously upheld the statute, finding that a limit would not invade the jury's fact-finding role and fit within legislature's long-recognized authority to alter legal remedies. *See id.* at 261.

Similarly, the Fourth Circuit has ruled that a Virginia law limiting total damages recoverable in a medical malpractice action—including both compensatory and punitive damages—does not violate the Virginia or U.S. Constitutions. *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989) (finding it is the role of the legislature, not the jury, to determine the legal consequences of the jury's factual findings). The court recognized that as "[i]t is by now axiomatic that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object," a legislature "permissibly may limit damages recoverable for a cause of action . . . ." *Id.* (internal quotations and citations omitted); *see also Wackenhut Applied Tech. Ctr., Inc. v. Sygnetron Prot. Sys., Inc.*, 979 F.2d 980, 985 (4th Cir. 1992) (finding Virginia punitive damage cap rationally related to the "proper governmental purpose" of "limit[ing] juries' punitive damages awards to those that punish and deter and to prevent awards that burden the state's economy").

Likewise, the Third Circuit has held that the Seventh Amendment does not preclude a legislature from constraining noneconomic damages. After closely examining the historical underpinnings of the

right to jury trial, the court found that a legislature can make a "rational policy decision in the public interest" to limit damages without "reexamining" a jury's factual findings. *Davis v. Omitowoju*, 883 F.2d 1155, 1165 (3d Cir. 1989) (upholding Virgin Islands' law). The Eighth Circuit has also rejected a Seventh Amendment challenge to Nebraska's limit on noneconomic damages. *See Schmidt v. Ramsey*, 860 F.3d 1038, 1045-46 (8th Cir. 2017).

The *Lindenberg* panel decision is in tension with the Sixth Circuit's own precedent. In *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513, 519 (6th Cir. 2005), the court recognized that while it is the "jury's role as factfinder [is] to determine the extent of a plaintiff's injuries," it is not the jury's role "to determine the legal consequences of its factual findings." *Id.* (quoting with agreement *Boyd*, 877 F.2d at 1196). The court found a Michigan law limiting noneconomic damages "implicat[ed] no protected jury rights." *Id.*

This Court has called the Seventh Amendment "an analogous provision" and held that the Tennessee Constitution "should be given the same interpretation," *Newport Hous. Auth. v. Ballard*, 839 S.W.2d 86, 89 (Tenn. 1992). Every federal circuit that has considered the issue has found that a statute constraining noneconomic damages is consistent with the Seventh Amendment. This Court should reach the same result.

CONCLUSION

For these reasons, this Court should answer the three certified questions in the negative and find that Tennessee's statutory limit on noneconomic damages in personal injury cases is constitutional.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Section 3, Rule 3.02(c) of Tenn. Sup. Ct. R. 46, the undersigned certifies that this brief complies with the requirements set forth in Section 3.02(a)1 of Tenn. Sup. Ct. R. 46.

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/s/ John M. Kizer

CERTIFICATE OF SERVICE

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