

IN THE SUPREME COURT OF MISSOURI

JAMES KLOTZ and MARY KLOTZ,)
)
 Appellants/Cross-Respondents,)
)
 vs.)
)
)
 MICHAEL SHAPIRO, MD and METRO)
 HEART GROUP OF ST. LOUIS, INC)
)
 Respondents/Cross-Appellants.)

Supreme Court No. 90107

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE IN SUPPORT OF APPELLANTS

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Interest of Amicus Curiae

National Association for the Advancement of Colored People (NAACP)

The NAACP is a non-profit organization established in 1909 to advocate on behalf of minority groups. Its mission is to ensure the political, social, and economic equality of rights of all people and to take all lawful action to secure constitutional rights. The NAACP strongly advises this Court to find Section 538.210 unconstitutional. Caps on non-economic damages create barriers to racial equality in the judicial process by denying minorities equal access to legal redress and good healthcare. Only by invalidating this statute can this Court restore the equal application of the law to all individuals injured by medical malpractice.

Consent of the Parties

The NAACP has received written consent from all parties to file this brief. Therefore, the NAACP is filing this brief pursuant to Rule 84.05(f)(2) of the Missouri Rules of Civil Procedure.

Points Relied On

I. THE TRIAL COURT ERRED IN REDUCING APPELLANTS' NON-ECONOMIC DAMAGES, AND THIS COURT SHOULD FIND SECTION 538.210 UNCONSTITUTIONAL UNDER STRICT SCRUTINY REVIEW BECAUSE IT DISPROPORTIONATELY AFFECTS MINORITIES, A SUSPECT CLASS; DENIES THE FUNDAMENTAL RIGHT OF OPEN ACCESS TO THE COURTS; AND IS NOT THE LEAST RESTRICTIVE MEANS OF LOWERING MEDICAL MALPRACTICE PREMIUMS IN MISSOURI.

A. This Court Should Find that Minorities Are a Suspect Class Because Section 538.210 Continues the Historical Pattern of Discrimination Against Minorities, and Minorities Are Politically Powerless Against Legislatures That Ignore the Lopsided Impact of Caps on Them.

Mass. Bd. of Ret. v. Murgia, 427 U.S. 307 (1976).

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State v. Whitfield, 837 S.W.2d 503 (Mo. banc 1992).

Nestlehutt v. Atlanta Oculoplastic Surgery, No. 2007EV002223-J (Ga. Super. Feb. 9, 2009).

B. Even if Minorities Are Not a Suspect Class, Section 538.210 Infringes on Minorities' Fundamental Right to Open Access to the Courts So That They

Struggle to Bring Malpractice Claims.

Mahoney v. Doerhoff Surgical Servs., 807 S.W.2d 503 (Mo. banc 1991).

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C. Section 538.210 Fails the Least Restrictive Means Test Because Other, Narrower Remedies Would Address Escalating Malpractice Premiums Without Capping Non-Economic Damages.

Ferdon v. Wis. Patients Comp. Fund, 284 Wis. 2d 573 (2005).

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Brannigan v. Usitalo, 587 A.2d 1232 (N.H. 1991).

II. ALTERNATIVELY, THE TRIAL COURT ERRED IN REDUCING APPELLANTS' NON-ECONOMIC DAMAGES BECAUSE SECTION 538.210 FAILS RATIONAL BASIS REVIEW ON THE GROUNDS THAT

**IT IN NO WAY ACHIEVES THE STATE'S OBJECTIVES; RATHER,
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Mahoney v. Doerhoff Surgical Servs., 807 S.W.2d 503 (Mo. banc 1991).

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Carver v. Schafer, 647 S.W.2d 570 (Mo. App. E.D. 1983).

Jurisdictional Statement

The Supreme Court has jurisdiction over this appeal because it involves a constitutional challenge to a statute of the State of Missouri. MO. CONST. art. 5, § 3. *Amicus curiae* National Association for the Advancement of Colored People contends that Section 538.210, the non-economic damage cap on medical malpractice claims, violates the Equal Protection Clause of Missouri's Constitution. *See* MO. CONST. art. I, § 2. *Amicus* asserts an interest in Appellants James and Mary Klotz's appeal of the judgment of the circuit court of St. Louis County in favor of Respondents. The circuit court previously reduced Appellants' non-economic damages and ordered those damages paid over time.

Statement of Facts

On March 17, 2004, St. Anthony's Medical Center ("SAMC") surpassed the twenty-four hour period during which it should have removed an IV from James Klotz's ("Mr. Klotz") wrist after he was admitted to the hospital. This failure to remove the IV caused cellulitis to develop on Mr. Klotz's wrist. The untreated cellulitis resulted in sepsis, renal failure, endocarditis, and a subarachnoid hemorrhage and forced a lower extremity amputation.

At trial, the lower court asked the jury to determine SAMC's percentage of fault for failing to timely remove the IV from Mr. Klotz's wrist and Dr. Michael Shapiro's ("Dr. Shapiro") and Metro Heart Group's ("MHG") percentage of fault for failing to treat Mr. Klotz's wrist or warn him of the increased risk of infection before Mr. Klotz underwent surgery to put in a pacemaker. The jury returned a verdict awarding \$2,580,000 in total damages for which SAMC was thirty-three percent liable and Dr. Shapiro and MHG sixty-seven percent liable. However, the circuit court reduced the non-economic damages to the amount of the statutory cap, leaving just \$1,089,000.

Appellants Mr. and Mrs. Klotz appeal the circuit court's judgment reducing the non-economic damages. They argue that the original damage award should be reinstated because they filed this action on December 14, 2004, before the revised cap went into effect. They further contend that Section 538.210 should be overturned for violating the Missouri Constitution.

Argument

Standard of Review

Courts review constitutional challenges to statutes de novo. *Franklin County ex rel. Parks v. Franklin County Comm'n*, 269 S.W.3d 26, 29 (Mo. 2008). Courts will invalidate a statute as unconstitutional when it clearly contravenes a constitutional provision. *Id.* The party challenging a statute's validity bears the burden of proving the statute clearly and undoubtedly violated constitutional limitations. *Id.*

The Missouri Constitution guarantees all citizens equal protection under the law. Mo. CONST. art. 1, § 2. Article 1, Section 2 is synonymous with the Fourteenth Amendment to the U.S. Constitution. *Adams ex rel. Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 903 (Mo. banc 1992). *See also* U.S. CONST. amend. XIV, § 1. Any individual who challenges the constitutionality of a law on equal protection grounds bears the burden of showing that the law violates the strict scrutiny or rational basis standards of review. *Adams*, 832 S.W.2d at 903. This Court should overturn Section 538.210, which limits non-economic damages for medical malpractice injuries, because the State cannot constitutionally justify caps under either strict scrutiny or rational basis review.

I. THE TRIAL COURT ERRED IN REDUCING APPELLANTS' NON-ECONOMIC DAMAGES, AND THIS COURT SHOULD FIND SECTION 538.210 UNCONSTITUTIONAL UNDER STRICT SCRUTINY REVIEW BECAUSE IT DISPROPORTIONATELY AFFECTS MINORITIES, A SUSPECT CLASS; DENIES THE FUNDAMENTAL RIGHT OF OPEN ACCESS TO THE COURTS; AND IS NOT THE LEAST RESTRICTIVE MEANS OF LOWERING MEDICAL MALPRACTICE PREMIUMS IN MISSOURI.

A statute that burdens a suspect class or infringes on a fundamental right will not survive an equal protection challenge if it does not also further a compelling government interest through the least restrictive means. *Ferdon v. Wis. Patients Comp. Fund*, 284 Wis. 2d 573, 605–06 (2005). The legislature has a compelling government interest in lowering malpractice premiums, and, therefore, this brief does not address this prong.

However, Section 538.210 perpetuates a miscarriage of justice because it continues a historical pattern of disadvantageous treatment of minorities by limiting their rights to bring a claim and fully recover for their injuries.

A. This Court Should Find that Minorities Are a Suspect Class Because Section 538.210 Continues the Historical Pattern of Discrimination Against Minorities, and Minorities Are Politically Powerless Against Legislatures That Ignore the Lopsided Impact of Caps on Them.

A suspect class refers to a particular group that has been saddled with disabilities, historically subject to unequal treatment, or placed in a position of political powerlessness. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976). The quality that places a person in a suspect class should be permanent in nature. *State v. Jeremy*, 278 Wis. 2d 366, 386 (App. 2004). Suspect classes have generally been formed on the basis of race, national origin, or illegitimacy. *Adams*, 832 S.W.2d at 903.

Laws that disproportionately impact minorities violate the Equal Protection Clause where there is an intent to discriminate. *State v. Whitfield*, 837 S.W.2d 503, 510 (Mo. banc 1992). But laws do not violate the U.S. or Missouri Constitutions where the “disparate impact” on minorities is “unintentional.” *Id.* Discrimination is defined as “the effect of a statute or established practice which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between whom and those not favored no reasonable distinction can be found.” BLACK’S LAW DICTIONARY 420 (5th ed. 1979).

State legislative history displays a disregard for how caps discriminate against

minority plaintiffs. *See* S.B. 475, 94th Gen. Assem., Reg. Sess. (Ill. 2005). One Illinois senator noted that it would be the “underprivileged communities on whose back” the medical malpractice crisis would be solved. *Id.* Another senator compared caps to putting a price tag on the pain and suffering of individuals who make less money or no money at all. *Id.* In spite of recognition that caps disproportionately affect minorities more than others, the legislature passed the cap in just four days after a rehearsed question and answer session. *Id.* In Missouri, the House began to perfect H.B. 393 within fourteen days of the bill’s introduction. Missouri House of Representatives, <http://www.house.mo.gov/content.aspx?info=/bills051/action/maHB393.htm>.

This discrimination stems from non-economic damage caps’ favoritism for higher wage earners, who are traditionally white men. Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women Children, and the Elderly*, 53 EMORY L.J. 1263, 1280 (2004). *See also* Joanne Doroshow & Amy Widman, *Racial Implications of Tort Reform*, 25 WASH U. J. L. & POL’Y 161, 169–70 n.37–38 (2007) (explaining that ethnic and racial minorities are disproportionately unemployed or employed in low-paying jobs). Minorities and other groups, such as women and the poor, receive lower economic damages. Finley, *supra*, at 1280. Even the equation many courts use to calculate future wages when they are determining economic damages reinforces the disparity because it presumes minorities and women will continue to earn less. *Id.* at 1280–81. So the “savings” generated by caps come from “wiping out” the non-economic damage awards of injured plaintiffs with few economic damages. David A. Hyman, *Not Worth the Pain and Suffering*, FORBES, Sept. 15, 2008, *available at* <http://www.forbes.com/forbes/>

2008/0915/034_print.html.

Here, although Section 538.210 is facially neutral, its effect of singling out minorities for worse treatment under the law merits judicial protection as a suspect class. Courts have already recognized race as a justification for a suspect class. Recognition is deserved here because the statute arbitrarily privileges high-salaried white men at the expense of low-salaried minorities. In placing a premium on economic damages, Section 538.210 creates the dichotomy of smaller recoveries for minorities with low salaries but crippling injuries and large recoveries for wealthy white men with less severe injuries. Because of their lower salaries, minorities will receive the greatest portion of their recoveries in non-economic damages, which are subject to the cap. *See Daniel Costello, Malpractice Law May Deny Justice*, L.A. TIMES, Dec. 29, 2007, available at <http://www.consumerwatchdog.org/patients/articles/?storyId=19144> (noting that caps in California have reduced jury awards by thirty percent at the expense of the most severely injured).

Nor is this imbalance between the majority and the minority unintentional. Legislative awareness of the unequal burden on minorities at the time of bill enactment shows the intent to pass legislation, regardless of the consequences. Whether four days or fourteen, the minimal time spent analyzing the real potential of caps to lower malpractice premiums highlights that legislatures are throwing aside their duty to protect the politically powerless to pin their hopes on a promise that has no chance of improving access to healthcare. *See also Nestlehutt v. Atlanta Oculoplastic Surgery*, No. 2007EV002223-J, slip op. at 19 (Ga. Super. Feb. 9, 2009) (concluding that the Georgia

legislature implemented its cap “arbitrarily” and “based on speculation and conjecture”). The ultimate message this minimum compensation sends to minorities is that survivors facing a lifetime of suffering should just be grateful to be alive. William M. Sage, *Understanding the First Malpractice Crisis of the 21st Century*, in 2003 HEALTH LAW HANDBOOK 1, 11 (Alice G. Gosfield ed., W. Group 2003).

Therefore, when minorities, who have already endured years of discrimination, can no longer trust the legislature to protect their rights, the courts have an obligation to balance the scales of justice.

B. Even if Minorities Are Not a Suspect Class, Section 538.210 Infringes on Minorities’ Fundamental Right to Open Access to the Courts So That They Struggle to Bring Malpractice Claims.

Fundamental rights are those rights the Constitution explicitly or implicitly guarantees, such as the rights to free speech; personal privacy; or interstate travel. *Mahoney v. Doerhoff Surgical Servs.*, 807 S.W.2d 503, 512 (Mo. banc 1991). Courts have not yet recognized access to the courts for redress of a medical malpractice injury as a fundamental right. *Id.* at 511–12.

Missouri’s Equal Protection Clause assures equality of opportunity under the law. MO. CONST. art. 1, § 2. The Missouri Constitution also guarantees that “the courts of justice shall be open to every person, and certain remedy afforded for every injury to person.” MO. CONST. art. 1, § 14. The open courts provision prohibits arbitrarily barring individuals or classes of individuals from enforcing recognized causes of action for personal injury in the courts. *Etling v. Westport Heating & Cooling Servs., Inc.*, 92

S.W.3d 771, 773 (Mo. banc 2003). Open access is impeded where there is a procedural bar to bringing a claim. *Id.* at 774–75. See *Blaske v. Smith & Entzeroth, Inc.* 821 S.W.2d 822, 833 (Mo. banc 1991) (prohibiting conditions precedent to the use of the courts). Open access is not implicated where a statute has modified the common law to eliminate a cause of action. *Id.* Thus, requiring any person with a malpractice claim against a healthcare provider to submit her claim to a review board before filing an action in court violated the open courts provision. *State ex rel. Cardinal Glennon Mem’l Hosp. v. Gaertner*, 583 S.W.2d 107, 109–10 (Mo. banc 1979). In contrast, the prior version of Missouri’s medical malpractice cap was upheld on the rationale that it only modified the common law. *Adams*, 832 S.W.2d at 905.

Here, Section 538.210 imposes an unconstitutional procedural barrier to open access to the courts that affronts the guarantee of equality of opportunity under Missouri’s Equal Protection Clause. Although Section 538.210 does not require an initial hearing, as in *Blaske*, the statute cleverly creates a procedural barrier by turning lawyers into the “gatekeepers” of the civil justice system. Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link Between Damage Caps and Access to the Civil Justice System*, 55 DEPAUL L. REV. 635, 637 (2005–06). Under Section 538.210, many malpractice victims will be denied their day in court not because of allegedly greedy lawyers, but because litigation costs, such as expert review of medical files and testimony or discovery, are continuing to rise. *Id.* at 661. Some cases will cost \$100,000 to try. *Id.* When these substantial costs are subtracted from the realistic recovery a low-wage-earning minority can expect to receive, there will be little left and certainly not enough to

compensate for the injuries suffered. Thus, in nearly eradicating the remedies for plaintiffs without economic damages, the legislature has marginalized victims' only advocates: lawyers. Jeff German, *They Think Hepatitis C Outbreak Has Shifted Public Sympathy Toward Plaintiffs*, LAS VEGAS SUN, Mar. 21, 2009, available at <http://www.lasvegassun.com/news/2009/mar/31/attorneys-hope-lift-malpractice-damages-cap/>.

This inability to bring a claim because of rising litigation costs renders the cap on non-economic damages more than just a substantive change to the common law. In Section 538.210, the legislature has stationed a guard at the courthouse doors to judge, of all the victims with a rightful claim, who will be heard. When people are denied their right to bring a claim, which is expressly given by Section 538.210, the system is not working. *See* MO. REV. STAT. § 538.210(1) (2005). Blaming lawyers because they cannot reasonably represent all victims is just a red herring to distract from the courts' failure to protect citizens' constitutional rights.

C. Section 538.210 Fails the Least Restrictive Means Test Because Other, Narrower Remedies Would Address Escalating Malpractice Premiums Without Capping Non-Economic Damages.

A law accomplished through the least restrictive means is “precisely tailored,” *Ferdon*, 284 Wis. 2d at 606, and fulfills the government interest where narrower regulation would not, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 539 (1993).

Here, lesser restrictive measures would decrease medical malpractice premiums without disproportionately stripping minorities of their constitutional rights. First, if the

cause of the healthcare crisis truly is damage awards, the judicial remedy of remittitur would fully compensate plaintiffs who merit substantial non-economic damages while also reigning in jury awards that go beyond the pale. *See Brannigan v. Usitalo*, 587 A.2d 1232, 1236 (N.H. 1991). Remittitur would alleviate the courthouse barriers that limit minorities with low incomes from bringing a claim. The opportunity to obtain full compensation would justify litigation expenses. And, although remittitur would promote judicial evaluation of jury awards, it would be no more arbitrary than designating a maximum of \$350,000 in non-economic damages, regardless of a plaintiff's injuries.

Alternatively, the legislature could – and should – impose insurance industry regulation. Insurance companies control rate increases. S.B. 475, *supra*. As long as they have the power to raise rates with impunity, caps will do little to relieve the financial strain on doctors. In fact, doctors in high-risk specialties in states with caps have suffered greater premium increases than doctors in states without caps. Finley, *supra*, at 1272. Only insurance reform, such as that enacted in California, has successfully reduced rates. Costello, *supra*. Until California instituted reform, malpractice rates rose sixfold after the 1975 MICRA cap. *Id.* Insurance rates also increased in Missouri and Texas despite caps. Nancy L. Zisk, *The Limitations of Legislatively Imposed Damages Caps: Proposing a Better Way to Control the Costs of Medical Malpractice*, 30 SEATTLE U. L. REV. 119, 143 (2006).

Overall, Section 538.210 regulates more broadly than necessary to realize the compelling state interest in lowering premiums, and, thus, should falter under any equal protection challenge.

II. ALTERNATIVELY, THE TRIAL COURT ERRED IN REDUCING APPELLANTS' NON-ECONOMIC DAMAGES BECAUSE SECTION 538.210 FAILS RATIONAL BASIS REVIEW ON THE GROUNDS THAT IT IN NO WAY ACHIEVES THE STATE'S OBJECTIVES; RATHER, CAPS CONTRIBUTE TO THE HEALTHCARE PROBLEM.

This Court should invalidate Section 538.210. A law will be defeated on equal protection grounds where its classifications are wholly irrelevant to meeting state objectives. *Mahoney*, 807 S.W.2d at 512. Courts, however, will not look into a policy's wisdom, fairness, or desirability if it is legitimate. *Adams*, 832 S.W.2d at 903. Section 538.210 should not pass rational basis review because caps worsen the healthcare system and access to it, creating more claims and further injuring minorities, without achieving lower malpractice premiums.

Courts may not avoid their duty to protect individual rights from legislative acts even where those acts have desirable or beneficial effects. *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 378 (1997). Thus, courts must “strike down” legislation that “invades” upon constitutional guarantees. *Ferdon*, 284 Wis. 2d at 609. Neither respect for the legislature nor presumptions of constitutionality should incur judicial acquiescence since it has been “the province of the judiciary to interpret the constitution and say what the law is” since *Marbury*. *Id.* at 609–10.

Several courts have concluded that caps on non-economic damages cannot survive rational basis review of their constitutionality. *Ferdon* overturned Wisconsin's previous cap. There, the Court held that the cap did not satisfy legislative objectives or provide

fair compensation. *Id.* at 625–26. The cap was “arbitrary” and caused “undue hardship” because it shifted the malpractice burden from insurance companies and negligent healthcare providers to injured patients. *Id.* Similarly, the *Best* Court remarked that caps remove consistency from the civil justice system. 179 Ill. 2d at 406. Reducing a plaintiff’s damages when an injury was caused by a statutorily-covered means but not when the same injury happened under other circumstances arbitrarily disregards an award’s fairness and rewards certain tortfeasors with less harsh punishment. *Id.* at 403.

In addition, caps on non-economic damages subvert healthcare improvement because they shield negligent healthcare providers. *Nestlehutt*, No. 2007EV002223-J, at 17. Caps represent a worthwhile solution only if rising premiums result from “meritless claims and overcompensated losses.” *Sage*, *supra*, at 5. But the Institute of Medicine stresses that claims arise because the medical industry continues to suffer from serious, avoidable errors that go undetected; an inability to learn from past mistakes; and a stubborn refusal to compensate victims. *Id.* Doctors who escape liability – or at least significant liability – to return to practice have no incentive to better their standards. *See Ferdon*, 284 Wis. 2d at 621. Caps, with their limited liability, may even generate worse standards and mass claims, as occurred in Nevada when an endoscopy practice transmitted Hepatitis C to several patients by reusing syringes and vials. *See German*, *supra*.

Here, the legislature has devised a statute in Section 538.210 that runs counterproductive to its stated goals of reducing premiums and thereby increasing access to healthcare providers. *See Adams*, 832 S.W.2d at 904. The *Ferdon* and *Best* Courts

both found that caps on non-economic damages could not meet even the low threshold of rational basis review. Evidence substantiates that this Court should find the same gap in logic between the legislature's objectives and the results produced by caps. The General Accountability Office's 2003 report attributes premium increases to several factors other than litigation. U.S. Gen. Accountability Office, *Medical Malpractice Insurance: Multiple Factors Have Contributed to Increased Premium Rates*, at 4–5 (2003). Those factors include decreased investment returns, bad pricing policies, and increasing reinsurance rates. *Id.* Premiums are also higher because healthcare costs have risen. *Sage, supra*, at 7. “*More than any other factor, malpractice expense tracks overall health care spending.*” *Id.* (emphasis added). When national healthcare expenditures rose to \$1.3 trillion in 2000 from \$251 billion in 1970, malpractice premiums simultaneously rose to \$5.2 billion in 1999 from \$1 billion in 1976. *Id.* at 7–8. Given the wealth of information on causation, the evidence does not support that caps will reduce premiums.

What the evidence does support is that caps will not stop doctors from fleeing, but encourage doctors with lower standards to move in. If caps have no effect on Missouri premiums, doctors have no incentive not to move their practices to states with cheaper insurance. Because the legislature refuses to regulate the body that sets malpractice rates – the insurance industry – minorities, who in general already suffer worse access to care and lower quality, preventive; primary; and specialty care, will continue to encounter reduced access to healthcare. Agency for Healthcare Research and Quality, *National Healthcare Disparities Report*, 2004, <http://www.ahrq.gov/qual/nhdr04/fullreport/> (last visited July 17, 2009). Doctors in disadvantaged areas will move away, or some doctors

may take advantage of caps' limited liability to cut costs. Missouri could end up with a healthcare crisis similar to the Hepatitis C crisis in Nevada. Overall, malpractice actions will always exist, especially considering many physicians must now diagnose and treat more patients in shorter periods of time. This Court should force the legislature to spend time evaluating the evidence in order to find a healthcare solution that actually works without treading on Missourians' and particularly minorities' rights.

Finally, this Court should return to Missouri's long legal tradition of fully compensating plaintiffs for injuries caused by defendants. *See Meyer v. Fluor Corp.*, 220 S.W.3d 712, 717 (Mo. banc 2007). *See also Carver v. Schafer*, 647 S.W.2d 570, 577 (Mo. App. E.D. 1983), *superseded by statute*, MO. REV. STAT. § 537.600 (1978) (on sovereign immunity) (stressing that it is Missouri policy to provide for dependents of a wrongful death decedent to prevent them from becoming wards of the state). Minorities with serious injuries or families of minorities who died because of medical malpractice will not receive full compensation when they lack sufficient income to receive significant economic damages. Missouri may ultimately find itself with fewer malpractice cases but more wards dependent on the state for care.

Therefore, this Court should overturn Section 538.210 on the grounds that it fails rational basis review because caps erode Missouri healthcare without stopping insurance increases.

Conclusion

Section 538.210 fails both strict scrutiny and rational basis review. It forces minorities, a suspect class, to bear the brunt of the burden of caps. The statute also impedes minorities' fundamental right of access to the courts because their lower economic damages block their legitimate claims. More importantly, Section 538.210's objectives could be accomplished less restrictively and more effectively. As it stands, caps on non-economic damages will not accomplish lower malpractice premiums or increased access to healthcare. Thus, this Court should invalidate Section 538.210 and restore the legal touchstone of fully compensating injured plaintiffs.

Respectfully submitted,

Certificate of Compliance

The undersigned certifies that a copy of the computer diskette containing the full text of Brief of *Amicus Curiae* National Association for the Advancement of Colored People In Support of Appellants is attached to the brief, has been scanned for viruses, and is virus-free.

Pursuant to Rule 84.06(c), the undersigned also hereby certifies that this brief (1) includes the information required by 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 4894 words, as calculated by Microsoft Word 2003 for Windows.

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