IN THE SUPREME COURT OF MISSOURI

CASE NO. SC90107

JAMES KLOTZ AND MARY KLOTZ,

Appellants/Cross-Respondents,

vs.

MICHAEL SHAPIRO, M.D. AND METRO HEART GROUP, LLC,

Respondents/Cross-Appellants.

On Appeal from the Circuit Court of St. Louis County Case No. 06CC-4826
Honorable Barbara Wallace, Judge

AMICI CURIAE BRIEF OF THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS; THE MISSOURI COLLEGE OF EMERGENCY PHYSICIANS; and THE MISSOURI ASSOCIATION OF RURAL HEALTH CLINICS, IN SUPPORT OF RESPONDENTS/CROSS-APPELLANTS METRO HEART GROUP, LLC and MICHAEL SHAPIRO, M.D.

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JURISDICTIONAL STATEMENT

Amici Curiae the American College of Obstetricians and Gynecologists, the Missouri College of Emergency Physicians, and the Missouri Association of Rural Health Clinics adopt and incorporate herein the Jurisdictional Statement in the Brief filed on behalf of Respondents/Cross-Appellants Metro Heart Group, LLC and Michael Shapiro, M.D. The American College of Obstetricians and Gynecologists, the Missouri College of Emergency Physicians, and the Missouri Association of Rural Health Clinics file their Brief pursuant to Rule 84.05(f)(2) with the consent of all parties.

STATEMENT OF FACTS

For purposes of their Brief, *Amici Curiae* the American College of Obstetricians and Gynecologists**,** the Missouri College of Emergency Physicians**,** and the Missouri Association of Rural Health Clinics adopt and incorporate herein the Statement of Facts set forth in the Brief filed on behalf of Respondents/Cross-Appellants Metro Heart Group, LLC and Michael Shapiro, M.D.

INTEREST OF *AMICI CURIAE*

The American College of Obstetricians and Gynecologists

The American College of Obstetricians and Gynecologists ("the College") is a nonprofit educational and professional organization founded in 1951. With more than 53,000 members, including 956 in Missouri, the College is the leading professional organization providing health care to women. The College serves as a strong advocate for quality health care for women. In addition, the College works to maintain the highest standards of clinical practice and continuing education for its members. The College promotes patient education and patient understanding of and involvement in medical care.

Medical liability reform, such as the reforms contained in House Bill 393 and § 538.210 R.S.Mo. (Cum. Supp. 2008), is a top priority for the College. When obstetricians-gynecologists cannot find or afford medical liability insurance, they are forced to stop delivering babies, curtail surgical services, or close their doors. Across America and in Missouri, pregnant women cannot get the prenatal and delivery care they need. In addition, the College warns that the medical liability crisis hurts all women. With the physician shortages, there are fewer obstetricians-gynecologists available to provide gynecologic surgery and preventative care, such as screening and

special procedures. Women lose care that helps protect fertility, and treat pelvic pain, and treat cancer early. Women travel longer distances to find a doctor, have longer waiting periods for appointments, and have shorter visits once they get there. The constitutionality of House Bill 393 including the amendments to § 538.210 presented by this appeal generates considerable interest to the College members. The College believes that the resolution of the issues presented in this appeal could have a dramatic and substantial impact not only on Missouri tort law, but also on the availability and affordability of health care services to women across Missouri.

The College believes this Court will benefit from a policy-oriented discussion of some of the broad-based issues presented in this proceeding. Therefore, the purpose of this brief is to provide the Court with analysis of some of the issues from the perspective of a nonprofit educational and professional organization composed of professionals who specialize in the health care of women. ***The Missouri College of Emergency Physicians***

The Missouri College of Emergency Physicians ("MoCEP") is a nonprofit Missouri corporation comprised of approximately 350 emergency room physicians and 75 residents and medical students. MoCEP is the Missouri Chapter of the American College of Emergency Physicians (ACEP). The primary purpose of MoCEP is to promote the improvement of

the practice of emergency medicine. MoCEP is committed to promoting education of the general public and of patients who may require emergency medical care. MoCEP also encourages and implements training and continuing education of emergency physicians. MoCEP is committed to promoting research, which will result in improving emergency medicine.

MoCEP also promotes the coordination of community emergency care facilities and personnel. MoCEP is involved in the establishment of standards for emergency medicine. MoCEP also promotes policies which preserve the integrity of private practice. One of the purposes of MoCEP is to study and analyze socioeconomic aspects of emergency medical care. MoCEP also promotes the establishment of full and autonomous emergency departments within all hospital and medical staff structures providing full-time emergency department coverage by emergency room physicians. MoCEP continually monitors trends in the health care environment and analyzes issues affecting emergency physicians and their patients and strives to uphold the following values: quality emergency care is an individual right and should be available to all who seek it; there is a body of knowledge unique to emergency medicine that requires continuing refinement and development; quality emergency medicine is best practiced by qualified credentialed emergency physicians in a fair, equitable and supportive

environment; and the emergency physician has the responsibility to play the lead role in the definition, evaluation and improvement of quality emergency care.

As an organization composed of emergency physicians, MoCEP is concerned and interested in the establishment of fair and predictable laws affecting medical litigation that will maintain the integrity of fairness of civil litigation for both plaintiffs and defendants without compromising access to quality health care. The constitutionality of House Bill 393 and the amendments to § 538.230 presented by this proceeding generates considerable interest by emergency physicians. MoCEP believes that the resolution of the issues presented in this proceeding could have a dramatic and substantial impact not only on Missouri tort law, but also on the availability and affordability of emergency medical care in Missouri.

MoCEP believes this Court will benefit from a policy-oriented discussion of some of the broad-based issues presented by this proceeding. Therefore, the purpose of this brief is to provide the Court with an analysis of some of the issues from the perspective of an organization composed of emergency physicians who provide care to individuals requiring emergency medical care.

The Missouri Association of Rural Health Clinics

The Missouri Association of Rural Health Clinics ("MARHC") is a nonprofit corporation founded by health professionals committed to providing a forum to exchange information specific to federally-certified Rural Health Clinics. More than 330 Rural Health Clinics are members of MARHC, and together they provide primary health care to more than 500,000 low-income Missourians across rural Missouri. The specific purpose of MARHC is to study, discuss, and exchange professional knowledge, expertise, and ideas with regard to federally-certified Rural Health Clinics; to promote high standards for quality patient care; to stimulate interest in continuing education for Rural Health Clinic health care providers; to improve access to quality health care through the establishment of federally-certified Rural Health Clinics and through cooperative efforts with other professional health care organizations and individuals; and to promote and maintain communication and cooperative relations with other professional health care organizations. As an organization composed entirely of Missouri Rural Health Clinics, MARHC is concerned and interested in the establishment of fair and predictable laws affecting medical liability litigation that will maintain the integrity and fairness of civil litigation for both plaintiffs and defendants without compromising access to quality health care.

The constitutionality of House Bill 393 and the amendments to § 538.210 presented by this proceeding generates considerable interest by rural clinicians in Missouri. MARHC believes that the resolution of the issues presented in this proceeding could have a dramatic and substantial impact not only on Missouri tort law, but also on the availability and affordability of primary health care services in Missouri, and particularly in rural, low-income communities.

MARHC believes this Court will benefit from a policy-oriented discussion of some of the broad-based issues presented by this proceeding. Therefore, the purpose of this brief is to provide the Court with an analysis of some of the issues from the perspective of a nonprofit corporation composed of federally-certified Rural Health Clinics that provide care to individuals in lower-income, rural communities.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN FINDING THAT MISSOURI'S LIMITATION ON NONECONOMIC DAMAGE AWARDS IN MEDICAL LIABILITY CASES IS A VALID AND A CONSTITUTIONAL EXERCISE OF LEGISLATIVE AUTHORITY

A. Rational Basis Test

The preservation of public health and the maintenance of generally affordable health care costs are reasonable legislative objectives. *Adams v. Children's Mercy Hospital,* 832 S.W.2d 898, 904 (Mo. banc 1992). The primary goal of the General Assembly in passing House Bill 393—in particular, the limitation on one category of damages, noneconomic damage awards—was to confront a medical liability crisis that threatened to adversely affect health care in Missouri. The General Assembly was responding to a situation in Missouri where insurers were leaving the state and physicians were leaving "high risk" areas of practice, potentially leaving many Missourians, particularly those in rural areas, without access to affordable health care. House Bill 393, including the amendments to § 538.210, is rationally related to a legitimate state interest in confronting this situation.

It is the province of the legislature to determine socially and

economically desirable policy and to determine whether a medical liability crisis exists. *Adams*, 832 S.W.2d at 904. After conducting extensive hearings, the Legislature rationally believed that the limitation on noneconomic damages would work to reduce in the aggregate the amount of damage awards for medical liability and, thereby reduce medical liability insurance premiums paid by health care providers and increase the number of insurers writing coverage in Missouri. In turn, the Legislature could reason that physicians would be willing to continue "high risk" medical practices in Missouri providing quality medical services at a less expensive level statewide.

Legislation that touches only upon economic interests carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality. *In re Marriage of Kohring*, 999 S.W.2d 228, 233 (Mo. 1999). Under the rational-relationship test, a statute will be upheld if any set of facts reasonably may be conceived to justify it. *Doe v. Phillips*, 194 S.W.3d 833, 845 (Mo. 2006). When undertaking rationality review, it is not the province of the court to question the wisdom, social desirability or economic policy underlying a statute as these are matters for the Legislature's determination. *Id*. If a question of the legislative judgment remains at least debatable, the issue settles on the side of the validity. *Linton*

v. Missouri Veterinary Medical Board, 988 S.W.2d 513, 516-17 (Mo. 1999). Under a rational basis test, a court does not have to determine whether the Legislature "should have" done something different or whether there is a better means to accomplish the same goal, and certainly not whether the chosen means is the best method. *Id*. at 516. Thus, even if it is argued that the Legislature's choices are socially undesirable, unwise, or even unfair is of little consequence, if, as here, the Legislature's classification advances the Legislature's legitimate policy. *Adams*, 832 S.W.2d at 903-04. A law will be upheld, if it is justified by any set of facts. *Committee for Educational Equality v. State of Missouri*, ____ S.W.3d _____ 2009 WL 2762464.

Ensuring that physicians are able to practice in Missouri, and provide health care to Missouri residents, is clearly a legitimate end. *See Adams*, 832 S.W.2d at 904. The enactment of House Bill 393, which contains a $350,000.00 upper-limit on one category of damages, noneconomic damage awards in medical liability actions, is not irrational. No provision of the Missouri Constitution forbids this upper-limit on noneconomic damage awards in medical liability cases, and no mandate requires that noneconomic damages in every type of personal injury case be equal. *See Thompson v. Committee on Legislative Research*, 932 S.W.2d 392, 394 (Mo. banc 1996) (the Legislature has plenary power and may act unless denied power to do so

in the Constitution.)

B. Prior Tort Reform Has Survived Constitutional Challenges in this Court

In *Adams*, this Court was faced with constitutional challenges to tort reform enacted in 1986, which contained a provision that limited noneconomic damages for the first time in medical liability cases. In *Adams*, plaintiffs contended that the provisions of § 538.210 limiting noneconomic damages, of § 538.220 permitting payment of future damages in periodic or installment payments, and of § 538.230.2 modifying joint and several liability violated a host of provisions in the Missouri Constitution: the open courts provision, right to trial by jury, equal rights and opportunities, due process, special law, privileges and immunities, one subject requirement, separation of powers, and constitutional directives for amending statutes. This Court determined that because neither a denial of a fundamental right nor a suspect class was present, the challenged statutory provisions must be examined for purposes of the equal protection challenge under the rational basis test. *Id*. at 903.

This Court noted in *Adams* that the provisions of Chapter 538 were enacted in 1986 in an effort to address a perceived liability crisis in the health care industry, which in turn threatened the availability and

affordability of health care services. According to *amicus* briefs filed in *Adams*, the Legislature considered information that the number of medical liability claims in Missouri increased 249 percent between 1981 and 1986; that aggregate and individual damage awards had accelerated to the extent that the State risked losing insurers; and that many physicians were believed to be considering leaving high-risk areas of practice, such as neurosurgery, obstetrics and urgent care, potentially leaving many Missourians, particularly those in rural areas, without adequate medical protection. Thus, the statute was enacted in an effort to reduce rising medical liability insurance premiums and in turn prevent physicians and others from discontinuing high-risk practices and procedures.

After noting that both sides in *Adams* offered evidence that both supported and refuted the existence of a medical liability crisis, this Court concluded "it is a debatable proposition that such a crisis does in fact exist." *Adams*, 832 S.W.2d at 904. Thus, this Court found as follows:

> Under equal protection rational review, this doubt must be resolved in favor of the General Assembly. While some clearly disagree with its conclusions, it is the province of the Legislature to determine socially and economically desirable policy and

> to determine whether a medical malpractice crisis exists.
>
> Here, the preservation of public health and the maintenance of generally affordable health care costs are reasonably-conceived legislative objectives that can be achieved, if only inefficiently, by the statutory provision under attack here.
>
> The Legislature could rationally believe that the cap on noneconomic damages would work to reduce in the aggregate the amount of damage awards for medical malpractice and, thereby, reduce malpractice insurance premiums paid by health care providers. Were this to result, the Legislature could reason, physicians would be willing to continue "high risk" medical practices in Missouri and provide quality medical services at a less expensive level than what otherwise would be the case.

Id. at 904.

Thus, this Court determined that the limitation on noneconomic damages was a rational response to the legitimate legislative purpose of maintaining the integrity of health care for all Missourians.

C. Medical Liability Crisis

There is a plethora of empirical data to show that there has been a real medical liability crisis, both on a national and a state level.

1. *National Crisis*

In 2002, the Department of Health and Human Services declared that "the litigation system is threatening health care quality for all Americans as well as raising the cost of health care for all Americans." *See* David H. Sohn, J.D., M.D.; Javad Parvizi, M.D., F.R.C.S.; and Charles S. Day, M.D., M.B.A., *The Need for Tort Reform in the Current Healthcare Debate*, AAOS NOW (September 2009). In 2003, the National Association of Insurance Commissioners reported that medical liability insurance premiums had increased by 920 percent during the past three decades. *Id*. A 2004 Congressional Budget Office study concluded that average premiums for all physicians nationwide rose by 15 percent between 2000 and 2002, almost twice as fast as total health care spending per person during the same period due in large part to the payment of medical liability awards. Congressional Budget Office, *Limiting Tort Liability for Medical Malpractice*, Economic and Budget Issue Brief (January 8, 2004). The increases during that period were even more dramatic for certain specialties—22 percent for obstetricians/gynecologists and 33 percent for internists and general

surgeons. *Id*. Insurance premiums for emergency physicians grew on average by more than 50 percent from 2002 to 2003 to $53,500.00, with some paying more than $100,000.00 annually. *Medical Liability Crisis Fact Sheet*, ACEP. High medical liability insurance rates and the fear of lawsuits, particularly in the higher-risk environment of emergency departments, may lead to reductions on the number of specialists willing to offer on-call services to emergency departments. *The National Report Card on the State of Emergency Medicine: Evaluating the Emergency Care Environment State by State*, AM. COLLEGE OF EMERG. PHYSICIANS, (2002 Edition)

High insurance costs also discourage medical students from going into high-risk specialties, such as emergency medicine, surgery, neurosurgery, orthopedics and obstetrics. *Id*. Further aggravating the situation is evidence that the lack of access to on-call specialists contributes to adverse patient outcomes because of delayed treatment or the need to transfer patients long distances to obtain the care they need. Ann S. O'Malley, Debra A. Draper, Laurie E. Felland, *Hospital Emergency On-Call Coverage: Is There a Doctor in the House?* Center for Studying Health Systems Change, Issue Brief No. 115 (November 2007). In fact, two-thirds of emergency department directors in Level I and II trauma centers surveyed by the American College of Emergency Physicians in 2006 reported that more than

half of the patient transfers that they received were referred there because of a lack of timely access to specialty physicians in the emergency department of origin. *On Call Specialist Coverage in US Emergency Departments*, AM. COLLEGE OF EMERG, PHYSICIANS (April 2006). The unfortunate result of this situation is that pressures from a medical liability environment in crisis may result in a greater risk of adverse outcomes for patients.

Moreover, a number of major insurance companies started to restrict coverage based on geographic location, specialty, and provider's claims history and some discontinued the line of business altogether. Lan Zhao, The Impact of Medical Malpractice Reforms on Access to Hospital-Based Obstetric Services (2005) (unpublished Ph.D. dissertation, University of Maryland (College Park)). On the other hand, between 1997 and 2002, median jury awards for prevailing plaintiffs in medical liability lawsuits rose from $157,000.00 to $300,000.00. *Id.* Moreover, the Physicians Insurers Association of America (PIAA) reported that almost eight percent of all medical liability awards exceeded $1 million in 2003, doubling the percentage of million-dollar awards in 1998. *Id*.

In February 2003, TimeLine Recruiting, a retainer-based medical and allied-health professional recruiting firm, conducted a nationwide survey of rural health care providers. *Survey Identifies Major Challenges to Staffing*

in Rural Health Care; Medical Recruiting Firm Reveals Top 5 Specialties in Critical Need, Business Wire (March 17, 2003). The survey identified primary obstacles in recruiting quality medical professionals to America's rural health care facilities, where, according to the Rural Information Center Health Service (RICHS) and the American Medical Association (AMA), only 10 percent of the Nation's doctors practice in service to 20 percent of the Nation's population. *Id*. Forty-six percent of rural medical executives cited issues such as oppressive medical liability insurance premiums, inadequate Medicaid and Medicare reimbursement, and aging medical technology as reasons why they believe it is more difficult to recruit physicians into rural health care facilities than it was three years before the survey. *Id*.

A large percentage of family physicians work in small or medium sized practices of four physicians or fewer and operate with very tight financial margins. *Medical Liability Impact on Small Businesses Examined by House Committee*, WOMEN'S POLICY INC. (2005). However, those margins disappear with rising medical liability insurance premiums. *Id*. Furthermore, in rural areas, physicians are less likely to have access to advanced medical facilities such as neonatal intensive care units or to have colleagues who can help share the workload. Thomas D. Rowley, *High*

Insurance Premiums Jeopardize Rural OBs, RURAL HEALTH NEWS 9:1 (Spring-Summer 2002). Rural doctors also typically see a high percentage of Medicare and Medicaid patients, so they often get lower reimbursement levels than their urban counterparts. *Id*. These factors magnify the medical liability insurance crisis in rural areas. *Id*.

2. *Missouri Crisis*

In Missouri, the Missouri State Medical Association reported that more than 30 insurance companies were licensed to write medical liability insurance in 2001, but two years later in 2003, only three were willing or able to write new business. Lan Zhao, The Impact of Medical Malpractice Reforms on Access to Hospital-Based Obstetric Services (2005) (unpublished Ph.D. dissertation, University of Maryland (College Park)). Of those three, in 2003, one insurer raised its rates 44 percent in Missouri, while not raising rates since the mid-1990s in Kansas. M. Steele Brown and David Twiddy, *Rates Rise as Insurers Try to Catch Up with Costs*, K.C. BUS. J. (May 30, 2003). According to an executive with the insurer, "That's because the tort environment in Kansas is much better." *Id*.

The impact of the crisis is particularly profound in rural areas of Missouri and in "high risk" areas of practice. For example, Julie Wood, M.D., left her small hometown practice in Macon, Missouri, to continue her

full-service family practice in an academic health center in the Kansas City, Missouri area where her hospital could pay her liability premium. *See* E. Katherine Underwood and Joi Preciphs, *Premium Blues: Doctors' Insurance Costs Soar*, Missourian (Sept. 28, 2003); *Medical Liability Impact of Small Business Examined by House Committee*, WOMEN'S POLICY, INC. (2005). Dr. Wood made that decision after her insurer raised her annual premium from $19,000.00 to $71,000.00. E. Katherine Underwood and Joi Preciphs, *Premium Blues: Doctors' Insurance Costs Soar*, Missourian (Sept. 28, 2003). The result was that the indigent in her home community lost obstetrical and primary care because they could not afford the two-hour drive to her new office. *Medical Liability Impact of Small Business Examined by House Committee*, WOMEN'S POLICY, INC. (2005).

Another illustration of the impact of the medical liability environment prior to the enactment of House Bill 393 involves a gynecological oncologist. Dr. Al Elbendary left a group practice and eliminated a rural outreach clinic because of rising liability premiums. John Nelson, M.D., M.P.H., RE: Impact of Medical Liability Issues on Patient Care, Testimony Before the United States Senate Committee on the Judiciary (August 20, 2004). "Women with gynecologic cancers in Ste. Genevieve, Carbondale, and Chester now have to drive over a hundred miles to see a gynecologic

oncologist and receive the care they deserve," said Elbendary. *Id*. Furthermore, after obstetrician Jamie Ulbrich's liability insurance carrier stopped doing business in Missouri, the best coverage he and his three colleagues at their Marshall clinic could find would have cost them double what they paid in 2003. *Id*. The four doctors decided they could not each afford the $50,000.00 liability insurance premium so they decided to stop providing obstetric services and instead work as family physicians in 2004. *Id*.

According to the American Medical Association crises maps for the early 2000s, approximately two-fifths of this Nation's states were experiencing medical liability crises. *See* American Medical Association Crises Maps for July 2003, June 2004 and May 2005. From 2003 through 2005, Missouri was identified as a state in which tort reforms implemented to date have not been halting the crisis. *Id*. Although there have been two comparable periods of instability in the last 30 years, these predecessor crises differ from the current one in important ways. Niteesh K. Choudhry, David M. Studdert, and Allen Kachalia, *Physician Responses to the Malpractice Crisis: From Defense to Offense*, J. LAW MED. ETHICS (Fall 2005). First, while physicians mainly experienced dwindling options for obtaining coverage in the mid-1970s (i.e., availability) and exorbitant prices

in the mid-1980s (i.e., affordability), the current crises appears to have elements of both availability and affordability. *Id*. Because reimbursement rates for professional services tend to be tightly controlled through fee schedules or capitation arrangements, a physician's ability to raise charges to accommodate spikes in liability premiums are hampered in today's environment. *Id*. In addition, even if physicians are able to afford coverage in the current environment, some may not find any offerings. *Id*.

In addition, a 2003 survey conducted by the College revealed that 21.9 percent of its fellows in Missouri decreased the number of high-risk patients they treated as a result of the risk of professional liability claims or litigation. *2003 ACOG Survey on Professional Liability – Missouri as compared to National ACOG Statistics*, ACOG (2004). The survey also revealed that 28.1 percent of the College's Missouri fellows decreased the amount of high-risk obstetric care they provided because of professional liability insurance and affordability and availability issues. *Id*.

D. Cost of Medical Liability Insurance Premiums

Recent studies show that medical liability premiums are lower in states with limits on noneconomic damages. Carol K. Kane, Ph.D., and David W. Emmons, *Policy Research Perspectives: The Impact of Liability Pressure and Caps on Damages on the Healthcare Market: An Update of*

Recent Literature, AMA (2007). On average, internal medicine premiums in states with limits on noneconomic damages are 17.3 percent smaller than in states without limits. *Id*. The impact of limitations on general surgery and obstetrics/gynecology premiums is even larger—20.7 percent and 25.5 percent, respectively. *Id*. Moreover, every $100,000.00 increase in the limitation raised premiums by 3.9 percent. *Id*. These results suggest that enacting a $250,000.00 limitation in states without any limitations, or with higher level limitations, would result in premium savings of $1.4 billion (8 percent of current premiums). *Id*.

E. Effect of Tort Reform

In determining whether a statute is constitutional, this Court must look only to the constitutionality of the legislation and not to its propriety, justice, wisdom, necessity, expediency, or policy. *State v. Day-Brite Lighting, Inc.*, 240 S.W.2d 886, 893 (Mo. 1951). Under a rational basis test, this Court does not have to determine whether the legislature should have done something different or whether there is a better means to accomplish the same goal, and certainly not whether the chosen means is the best method. *Linton v. Missouri Veterinary Medical Board*, 988 S.W.2d 513, 516 (Mo. 1999). If the question of the legislative judgment remains at least debatable, the issue settles on the side of validity. *Id.* at 816-17. As discussed below,

tort reform, and in particular limitations on noneconomic damages, is not only achieving its goals, but it is having unexpected positive effects.

1. ***Tort Reform Increases Resources for Necessary Health Care Services***

Two recent reports have yielded additional evidence that tort reform reduces the use of health care services. Letter to Sen. Orrin G. Hatch from the Congressional Budget Office (CBO) Dir. Douglas Elmendorf, Oct. 9, 2009. Based in part on these reports, the latest analysis from the nonpartisan CBO estimates that government health care programs could save $41 billion over 10 years if nationwide limits on jury awards for pain and suffering and other similar curbs were enacted. *Id*. These savings would be nearly ten times greater than the CBO estimated just last year. *Id*. Previously, the CBO had ruled that any savings would be limited to lower medical liability insurance premiums for doctors, saying there was no clear evidence that physicians would also change their approach to treatment, but recent research has provided additional evidence that lowering the costs of medical liability tends to reduce the use of health care services. *Id*. Thus, the CBO essentially acknowledged what doctors have been arguing for years: Fear of being sued leads them to practice defensive medicine. *Id*. Ricardo Alonso-Zaldivar, *Report: Limiting Medical Lawsuits Could Save $41B*,

ASSOCIATED PRESS (October 9, 2009). As Senator Charles Grassley of Iowa, the ranking Republican on the Finance Committee, stated: "The more federal health care programs spent on unnecessary tests, the less money is available for necessary patient care." *Id*.

In 2005, a study was published in the *Journal of the American Medical Association* that reported results of a survey of six high-risk specialties in Pennsylvania in May 2003. *See* David M. Studdert, L.L.B., Sc.D., M.P.H., et al., *Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment*, JAMA 293: 2609-17 (2005). The specific questions studied were how often physicians changed their clinical behavior as a result of the threat of medical liability. *Id*. Ninety-three percent of the physicians who responded to the survey reported practicing defensive medicine, including ordering unnecessary imaging tests, referring patients unnecessarily to other specialties, and recommending unnecessary invasive tests. *Id*.

According to the College's 2009 survey on professional liability, more than 63 percent of OB/GYNs report making changes in their practice due to the risks or fear of liability claims of litigation, and 60 percent made changes to their practice because insurance is either unavailable or unaffordable. *ACOG Releases 2009 Medical Liability Survey: Results Paint Dismal*

Reality for OB-GYNs and Their Patients, ACOG (September 11, 2009). Of those reporting changes to their obstetric practices as a result of the risks or fear of professional liability claims or litigation, 30 percent decreased the number of high-risk obstetric patients that they accepted, 29 percent reported performing more cesarean deliveries, and 25.9 percent stopped offering or performing vaginal birth after cesareans (VBACs) *Id*. An additional 13.9 percent decreased the number of total deliveries. Of those OB/GYNs who reported making changes to their gynecologic practices as a result of the risks or fear of professional liability claims or litigation, 15 percent decreased gynecological surgical procedures, 5 percent ceased to perform major gynecologic surgery, and 2 percent stopped performing all surgery. *Id*. Nearly 91 percent of OB/GYNs indicated they had experienced at least one liability claim filed against them during their professional careers, for an average of 2.69 claims per physician. *Id*. Of the total reported claims, 62 percent were for obstetric care, and 38 percent were for gynecologic care. *Id*.

2. *Physician Supply is Higher in States with Limitation on Noneconomic Damage Awards*

National data indicates that physician supply is 12 percent higher in

states that impose limits on noneconomic damages compared to states that do not. F.J. Hellinger and W.E. Encinosa, *The Impact of State Laws Limiting Malpractice Awards on the Geographic Distribution of Physicians*, U.S. Department of Health and Human Services (July 3, 2003). Rural counties have appeared to have benefited the most from limitations on damages, as physician supply per capita in rural counties in states with limitations on damages is about 4 percent larger than in similar counties in states without limitations on damages. Carol K. Kane, Ph.D., and David W. Emmons, Ph.D., *Policy Research Perspectives: The Impact of Liability Pressure and Caps on Damages on the Healthcare Market: An Update of Recent Literature*, AMA (2007). In addition, the number of physicians in high-risk areas of medicine per capita in states with limitations on damages is between 4 and 7 percent larger than in states without such limitations. *Id*.

In Missouri, our citizens lost the services of 225 physicians in the three years leading up to tort reform, according to figures from the Board of Healing Arts. Terry Ganey, *Doctor's Malpractice Insurance Rates Drop with Fewer Negligence Claims*, COLUMBIA DAILY TRIB. (October 4, 2009). And, despite national reports indicating that it usually take six to 10 years for the full effects of the limitation to be felt on increasing physician supply, *see* Carol K. Kane, Ph.D., and David W. Emmons, Ph.D., *Policy Research*

Perspectives: The Impact of Liability Pressure and Caps on Damages on the Healthcare Market: An Update of Recent Literature, AMA (2007), since the first full year the new law was in place, Missouri citizens have already benefited from the added services of 486 more doctors. *Id*.

Moreover, with respect to the key healthcare services for women in Missouri provided by members of the College, the physician supply in the four years prior to the effective date of House Bill 393 remained flat at around 850 College members per year. *See* ACOG Total Members from Missouri 2001 – 2008. However, with the passage of House Bill 393 early in 2005, the College membership in Missouri quickly climbed to 910 (an immediate 7 percent increase). And, by 2008, that figure climbed by another 10 percent, reaching 1000 College members providing health care services to women in Missouri. *Id*.

3. *Limitations on Noneconomic Damage Awards Has Meaningful Effect on Reducing Growth of Medical Liability Insurance Premiums*

Researchers at the Lister Hill Center for Health Policy at the University of Alabama at Birmingham examined state medical liability reform legislation from 1975 to 2004 to evaluate the effects of medical

liability reforms on physician liability insurance premiums, general economic conditions on liability insurance premiums, and medical liability reforms on employer-sponsored health insurance premiums. The researchers found that in states that introduced limitations on noneconomic damages, medical liability insurance premiums decreased for internal medicine by 17.3 percent, general surgery by 20.7 percent, and obstetric/gynecology by 25.5 percent. *See* Robert Wood Johnson Foundation, *Insurance Premiums Decline in States Capping Malpractice Payouts, Alabama University Study Finds*, December 29, 2007. The study also found that if a limitation of $250,000.00 on noneconomic damages was introduced in all states that did not have a cap as of 2005, and was reduced to $250,000.00 in states that have higher limits, there could be annual savings of $1.4 billion, or 8 percent of total malpractice premium costs. *Id*. In addition, the study found that of the many types of medical liability reforms, only limitations on noneconomic damages have had a meaningful effect on reducing the growth of medical liability insurance premiums. *Id*.

4. *Texas as Example of the Efficacy of Tort Reform*

Texas is a good example about both the immediate and the expected long-term efficacy of tort reform. The Texas reforms implemented in 2003

provided for a limitation on noneconomic damages, product liability reform and changes to punitive damage and strict liability loss. Leary D. Weiss, M.D., J.D., F.A.A.E.M, *AAEM President's Message*: *Tort Reform: Our Permanent Issue*, AM. ACAD. OF EMERG. MED. (August 2008). At least five insurance companies significantly decreased the cost of premiums in Texas within the first two years after the enactment of Texas reforms. *See id.* In addition, in four years, the number of insurers offering medical liability coverage rose from 4 to 33. Eric Torbenson and Jason Roberson, *TORT REFORM: Debate Still Thrives Over Limit on Damages in Texas Malpractice Suits*, DALLAS MORNING NEWS (June 17, 2007).

By 2005, the volume of medical liability suits in Harris County (Houston) dropped to 50 percent of the 2001-2002 level. *Id.* This resulted in a net gain of 689 physicians, or 8.4 percent, in Harris County during that period of time. *Id*. In 2009, it was reported that more than 3,000 physicians had returned to the State since the passage of Proposition 12. *See* David H. Sohn, J.D., M.D.; Javad Parvizi, M.D., FRCS; and Charles S. Day, M.D., M.B.A., *The Need for Tort Reform in the Current Healthcare Debate*, AAOS NOW (September 2009). According to the Texas Alliance for Patient Access, since the passage of Proposition 12, 82 Texas counties have seen a net gain in emergency medicine physicians, including 43 medically

underserved counties, 29 counties that are partially medically underserved, and 33 rural Texas counties, including 24 counties that previously had none; 26 rural Texas counties have added at least one obstetrician, including 10 counties that previously had none; and 12 rural Texas counties have added at least one orthopedic surgeon, including 7 counties that previously had none. *See Eighty-Two Texas Counties See Gains in ER Docs*, TAPA (2009); *Twenty-Six Rural Texas Counties Add Obstetricians*, TAPA (2009); *Thirty-Three Rural Texas Counties See Gains in ER Docs*, TAPA (2008); *Gains in Rural Orthopedic Surgeons*, TAPA (2008); and *Twelve Texas Counties Add Obstetrician*, TAPA (2008).

In a 2008 survey of over 1,000 physicians practicing in Texas, the Texas Medical Association reported that the reduced threat of unlimited verdicts in lawsuits have made doctors more willing to accept high-risk patients and have helped bring more doctors into Texas. *See* Vic Kolenc, *Doctors Laud 5 Years of Malpractice Relief: Tort Reform: Keeping Physicians in Texas*, EL PASO TIMES (September 14, 2008). In addition, a survey conducted by the Texas Hospital Association in July 2008 found that 85 percent of hospitals were finding it easier to recruit medical specialists and subspecialists, and 69 percent of responding hospitals maintained or expanded services because of declining hospital liability costs. *Id.*

CONCLUSION

Based on the foregoing, *Amici Curiae* The American College of Obstetricians and Gynecologists, the Missouri College of Emergency Physicians, and the Missouri Association of Rural Health Clinics respectfully suggests that the upper-limit statutory limit on noneconomic damage awards in medical liability actions is a necessary and constitutional enactment to ensure the availability of affordable health care to Missourians.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULES 84.06(C) AND (G)

Robyn Greifzu Fox, the undersigned lead attorney of record for *Amici Curiae* The American College of Obstetricians and Gynecologists**,** The Missouri College of Emergency Physicians**,** and The Missouri Association of Rural Health Clinics in the above-referenced appeal, certifies pursuant to Rules 84.06(c) and (g) of the Missouri Supreme Court that:

1. The Brief complies with the limitations contained in Rule 84.06(c);

2. The Brief, excluding cover page, signature blocks, certificate of compliance, and certificate of service, contains 7,191 words, as determined by the word count tool contained in Microsoft Word software with which this Brief was prepared; and

3. The diskette accompanying this Brief has been scanned for viruses and to the best knowledge, information and belief of the undersigned is virus free.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify a copy of the foregoing brief and one copy of accompanying disk were mailed, postage prepaid, and sent electronically to the following this 5th day of November, 2009:

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