No. SC91867

IN THE SUPREME COURT OF MISSOURI

DEBORAH WATTS as Next Friend of NAYTHON KAYNE WATTS,

Appellant/Cross-Respondent,

v.

LESTER E. COX MEDICAL CENTERS d/b/a FAMILY MEDICAL CARE CENTER, LESTER E. COX MEDICAL CENTERS, MELISSA R. HERRMANN, M.D., MATTTHEW P. GREEN, D.O., and LAIRD ARTHUR BELL, M.D.,

Respondents/Cross-Appellants.

Appeal from the Circuit Court of Greene County, Missouri
Hon. Dan Conklin, Circuit Judge

AMICI CURIAE BRIEF OF THE MISSOURI CHAMBER OF COMMERCE AND INDUSTRY, NFIB/MISSOURI, MISSOURI INSURANCE COALITION, AMERICAN TORT REFORM ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NFIB SMALL BUSINESS LEGAL CENTER, HEALTH COALITION ON LIABILITY AND ACCESS, PHYSICIANS INSURERS ASSOCIATION OF AMERICA, AMERICAN INSURANCE ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AND NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES IN SUPPORT OF RESPONDENTS/CROSS-APPELLANTS

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INTEREST OF *AMICI CURIAE*

Amici are organizations representing a wide range of Missouri health care professionals, hospitals, business owners, and their insurers, that depend upon access to affordable health care for their patients and employees. These goals are furthered by Missouri's statutory upper limit on noneconomic damages in cases stemming from the provision of health care services, § 538.210, RSMo, and provision for periodic payment of future damages in health care liability actions, § 538.220, RSMo. The doctrine of *stare decisis* also supports upholding the constitutionality of these laws. *See Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. banc 1992) (upholding medical liability reforms providing for $350,000 limit on noneconomic damages, allowing periodic payment of future damages, and requiring apportionment of fault to include percentage allocated to released parties). *Amici* have a substantial interest in the constitutionality of the laws at issue and their members would be adversely impacted if they are nullified.

CONSENT OF PARTIES

The parties have consented to the filing of this brief. Therefore, *amici* file this brief pursuant to Rule 84.05(f)(2) of the Missouri Rules of Civil Procedure.

JURISDICTIONAL STATEMENT

Amici adopt Respondents/Cross-Appellants' Jurisdictional Statement.

STATEMENT OF FACTS

Amici adopt Respondents/Cross-Appellants' Statement of Facts as it relates to the constitutionality of the statutes at issue.

POINTS RELIED ON

THE TRIAL COURT DID NOT ERR IN FINDING THAT MISSOURI'S NONECONOMIC DAMAGES LIMIT IN HEALTH CARE LIABILITY CASES APPLIES, BECAUSE § 538.210, RSMO, LIMITS NONECONOMIC DAMAGES IN HEALTHCARE LIABILITY ACTIONS, IN THAT THE STATUTE IS A VALID EXERCISE OF LEGISLATIVE AUTHORITY.

Adams v. Children's Mercy Hosp., 832 S.W.2d 898 (Mo. banc 1992).

THE TRIAL COURT DID NOT ERR IN ESTABLISHING A PERIODIC PAYMENT SCHEDULE, BECAUSE § 538.220, RSMO, PROVIDES FOR PERIODIC PAYMENT OF FUTURE DAMAGES IN HEALTH CARE LIABILITY CASES, IN THAT THE STATUTE IS A VALID EXERCISE OF LEGISLATIVE AUTHORITY.

Adams v. Children's Mercy Hosp., 832 S.W.2d 898 (Mo. banc 1992).

INTRODUCTION AND SUMMARY OF ARGUMENT

Missouri's statutory upper limit on noneconomic damage awards and allowance of periodic payment of future damages in medical liability actions are key elements in maintaining an affordable, accessible health care system for all Missourians.

Noneconomic damages awards, such as for pain and suffering, are highly subjective and inherently unpredictable – there is "no market for pain and suffering." Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective View of the Problem and the Legal Academy's First Reponses*, 34 Cap. U. L. Rev. 545, 549 (2006). Legal scholars have long recognized that putting a

"monetary value on the unpleasant emotional characteristics of experience is to function without any intelligible guiding premise." Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 Law & Contemp. Probs. 219, 222 (1953). Thus, juries may place a price on pain and suffering based on the suggestions of plaintiffs' counsel, compute a noneconomic damage award as a multiple of the plaintiff's medical expenses, or arrive a figure based on some other means. Plaintiffs' lawyers understand these dynamics and suggest that juries award large amounts for pain and suffering. Here, the jury awarded plaintiffs nearly $1.5 million for pain and suffering on top of $2.3 million in economic damages in a sympathetic case alleging negligent prenatal care.

Large pain and suffering awards, such as in the subject appeal, are of fairly recent vintage. Historically, pain and suffering damages were modest in amount. That is not true today. In recent years, a confluence of factors has led to a significant rise in the size of pain and suffering awards, creating the need for statutory upper limits to guard against excessive and unpredictable outlier awards. Such awards may occur when juries are improperly influenced by sympathy for the plaintiff, bias against a deep-pocket defendant, or a desire to punish the defendant rather than compensate the plaintiff.

Broad experience from across the nation demonstrates that noneconomic damages limits are an important element of a well-functioning health care system. They control outlier awards, provide greater predictability in the medical liability system, lower insurance rates, reduce the cost of defensive medicine, and improve access to critical specialists for local residents. *See* Ronald M. Stewart, *Malpractice Risk and Cost Are Significantly Reduced After Tort Reform*, 212 J. Am. Coll. Surg. 463 (2011). They also

promote more uniform treatment of individuals with comparable injuries, facilitate settlements, and limit arbitrariness that may raise potential due process problems. *See generally* Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 Va. L. Rev. 1401, 1414 (2004) ("The relevant lesson to be 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.").

§ 538.210, RSMo, was a rational legislative response to outlier awards in health care liability cases, rising health care costs, and concerns about excessive liability that were contributing to an exodus of physicians from Missouri. The Legislature drew a careful balance when it enacted § 538.210, RSMo. To promote greater access to affordable health care for all Missourians, the Legislature decided upon a substantial, but not unlimited, remedy for the distinct minority of Missourians that may find themselves as plaintiffs seeking extraordinary noneconomic losses from allegedly deficient medical care. Overall, the law is pro-patient despite the claimed negative impacts to a few. The noneconomic damage limit does not take away from the claimant's ability to recover past and future medical expenses, lost wages, or other economic damages permitted by Missouri law, nor does it impact the ability to recover punitive damages where a health care provider "demonstrated willful, wanton or malicious misconduct." § 538.210, RSMo. Indeed, as this Court found in *Adams*, 832 S.W.2d at 904-05, Missouri's limit on noneconomic damages was "rationally related to the general goal of preserving adequate, affordable health care for all Missourians."

Likewise, periodic payment laws facilitate lower insurance premiums and more affordable medical care. Missouri law helps advance this goal by spreading future payments over time and giving health care providers more predictability in maintaining reserves. *Id*. at 905. Such systems are now much more commonplace than they were in 1986 when the General Assembly enacted § 538.220, RSMo. Recognizing the advantages of such systems to both plaintiffs and defendants, nearly two-thirds of states currently have some form of periodic payment law. *See infra* Section II.

This Court should respect the doctrine of *stare decisis* with regard to *Adams* and the Legislature's sound policy judgment in enacting the subject medical liability reforms. *See generally* Victor E. Schwartz et al., *Fostering Mutual Respect and Cooperation Between State Courts and State Legislatures: A Sound Alternative to a Tort Tug of War*, 103 W. Va. L. Rev. 1 (2000). *Amici* urge the Court to uphold §§ 538.210 and 538.220, RSMo, and remain among the clear majority of courts that have respected similar tort policy judgments by legislatures across the country.

I. STATUTORY UPPER LIMITS ON SUBJECTIVE PAIN AND SUFFERING AWARDS, SUCH AS IN § 538.210, RSMO, HAVE A POSITIVE IMPACT ON THE HEALTH CARE ENVIRONMENT.

A. The Evolution and Rise of Pain and Suffering Awards

1. Modest Beginnings

Initially, the common law rarely recognized damages beyond pecuniary harm. Until the mid-nineteenth century, damages that compensated plaintiffs for intangible losses were often referred to as "exemplary damages." Thomas B. Colby, *Beyond the*

Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs, 87 Minn. L. Rev. 583, 614-15 (2003). As an early law review article recognized, "[t]he difficulty of estimating compensation for intangible injuries, was the cause of the rise of [exemplary damages] . . . [W]hen the early judges allowed the jury discretion to assess beyond the pecuniary damage, there being no apparent computation, it was natural to suppose that the excess was imposed as punishment." Edward C. Eliot, *Exemplary Damages*, 29 Am. L. Reg. 570, 572 (1881) (presently entitled U. Pa. L. Rev.); *see also* Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 519 (1957) ("In the 1760's some courts began to explain large verdicts awarded by juries in aggravated cases as compensation to the plaintiff for mental suffering, wounded dignity, and injured feelings."). By the mid-1900s, the law firmly established that pain and suffering awards were to compensate for intangible injuries; punitive damages punished a defendant for wrongful conduct.

Historically, pain and suffering awards were modest by today's standards. Prior to the Twentieth Century, there were only two reported cases affirmed on appeal involving total damages in excess of $450,000 in current dollars that may have included an element of noneconomic damages. *See* Ronald J. Allen & Alexia Brunet, *The Judicial Treatment of Non-economic Compensatory Damages in the Nineteenth Century*, 4. J. Empirical Legal Stud. 365, 396 (2007). High noneconomic damage awards were uniformly reversed. *See id.* at 379-87.

2. The Turning Point

The size of pain and suffering awards took its first leap after World War II when pioneering trial lawyers such as Melvin Belli began a campaign to increase these awards. *See* Melvin M. Belli, *The Adequate Award*, 39 Cal. L. Rev. 1 (1951). Trial lawyers became adept at increasing pain and suffering awards. For example, during a nine-month period in 1957, there were fifty-three verdicts of $100,000 or more. *See* Merkel, 34 Cap. U. L. Rev. at 568. Scholars began to question the proper role and measurements for such awards. *See* Charles A. Wright, *Damages for Personal Injuries*, 19 Ohio St. L.J. 155 (1958).

Pain and suffering awards became the most substantial part of tort costs. As the Third Circuit found, by the 1970s, "in personal injuries litigation the intangible factor of 'pain, suffering, and inconvenience' constitutes 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) *see also* W. Kip Viscusi, *Pain and Suffering in Product Liability Cases: Systematic Compensation or Capricious Awards?*, 8 Int'l Rev. L. & Econ. 203, 207 (1988) (finding, based on product liability claims data from the mid-1970s, that pain and suffering awards ranged from one-third to nearly sixty percent of total compensatory damages depending on the type of injury, and constituted between half and three-quarters of total damages when excluding cases in which there was no award for pain and suffering).

Scholars largely attribute this rise 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).

3. The Recent and Rapid Skyrocketing of Awards

In recent years, pain and suffering awards skyrocketed. Between 1994 and 2000, jury awards in personal injury cases nationally grew by an alarming 176%. *See* Perry J. Argires, *There Is an Attack on Medical Profession*, Sunday News (Lancaster, Pa.), May 16, 2004, at 1 (citing Jury Verdict Research data).

Personal injury claims arising out of the rendering of health care services are particularly prone to this trend. According to Bureau of Justice Statistics data, the median damage award in cases involving an allegation of harm caused by a doctor, dentist, or other heath care provider, when adjusted for inflation, rose from $280,000 in 1992 to $682,000 in 2005 – a jump of nearly two-and-a-half times. *See* Lynn Langton & Thomas H. Cohen, Civil Bench and Jury Trials in State Courts, 2005, at 10 (2008). The study also found that while the period between 2001 and 2005 was "marked by stability in the median damage awards for general civil jury trials," medical liability was the exception, as median damage awards increased by 44% in medical malpractice trials. *Id*.

The bulk of this rise can be attributed to pain and suffering awards. For instance, studies continue to show that pain and suffering awards account for sixty to seventy percent of jury verdicts between 1990 and 2000. *See, e.g., Attack on Medical Profession, supra*, at 1 (citing Jury Verdict Research). Another study reaffirms that pain and suffering awards constitute the greatest portion of tort costs. *See* Tillinghast-Towers Perrin, *U.S. Tort Costs: 2003 Update, Trends and Findings on the Costs of the U.S. Tort System* 17 (2003), *at* https://www.towersperrin.com/tillinghast/publications/reports/2003_Tort_Costs_Update/Tort_Costs_Trends_2003_Update.pdf (finding that for each dollar spent on the tort system, 24 cents goes to pain and suffering awards, 22 cents goes to economic damages, 19 cents goes to the plaintiff's attorneys fees, 14 cents goes to defense costs, and 21 cents goes to administration of the tort system). As United States Circuit Court Judge Paul Niemeyer has recognized, "money for pain and suffering . . . provides the grist for the mill of our tort industry." Niemeyer, 90 Va. L. Rev. at 1401.

The most recent surge in the size of pain and suffering awards may be due, at least in part, to increasing statutory and constitutional restrictions on punitive damage awards, which led lawyers to bolster other forms of recovery. *See* Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into "Punishment,"* 54 S.C. L. Rev. 47 (2002).

B. The Litigation and Economic Climate in Missouri

Prior to the 2005 Amendment to § 538.210, RSMo.

Missouri first enacted a noneconomic damages limit for medical negligence actions in 1986. *See* 1986 Mo. Laws 879, § 538.210. The legislature initially set the limit at $350,000 with an annual adjustment for inflation. In 1992, this Court upheld this statutory limit in *Adams*, 832 S.W.2d 898. By 2005, the cap had crept up to $579,000, and Missouri's medical liability environment progressively worsened, prompting the Legislature to amend the law and restore the noneconomic damages limit at $350,000.

According to reports issued by the Missouri Department of Insurance, Financial Institutions & Professional Regulations (DIFP), the average damage award against medical care providers increased approximately fifty-two percent from $166,623 in 2001 to $253,304 in 2005. *See* Dept. of Ins., Fin. Inst. & Prof. Regs., 2005 Medical Malpractice Insurance Report 26 (Sept. 2006), *at* http://insurance.mo.gov/Contribute%20Documents/2005_Medical_Malpractice_Report.pdf [2005 Medical Malpractice Ins. Rep.]. For surgeons, in particular, this represented the continuation of a deteriorating situation, as the average amounts paid on claims increased approximately eight-four percent from 1999 to 2005. *See id.* at 27.

Over the same period, Missouri insurers experienced "depressed and even negative returns for the period of 1999-2003." Dept. of Ins., Fin. Inst. & Prof. Regs., 2008 Medical Malpractice Insurance Report, at iv (July 2009), *at* http://insurance.mo.gov/Contribute%20Documents/2008MedicalMalpracticeReport.pdf. In addition, insurers "costs had exceeded 100 percent of [earned] premium during seven of the eight years

preceding 2004." *Id.* Insurers had to increase premiums to avoid a collapse in Missouri's insurance market.

Higher premiums, in turn, placed greater financial strain on the medical community. Many physicians, particularly those in specialized practices, could no longer afford to maintain their insurance or chose to relocate in light of premium increases. *See* Dan Margolies, *Doctors Assail State for Soaring Premiums*, Kan. City Star, July 16, 2004, at C1, *at* 2004 WLNR 19108743 (reporting that forty percent of neurosurgeons in Missouri had retired and almost twenty-seven percent had relocated over the span of a few years); Bill Bell Jr., *Doctors Make House Call*, St. Louis Post-Dispatch, Jan. 30, 2003, at A1, *at* 2003 WLNR 1743817 (reporting medical liability insurance rates for obstetrician/gynecologists ranged from $60,000 to $120,000 per year); *see also* Alan Bavley, *Malpractice Fears Put Doctors on Defense*, Kan. City Star, June 1, 2005, at A1, *at* 2005 WLNR 22803779.

Increasing average awards, higher insurance premiums, and an exodus of medical professionals combined to create an untenable environment. The availability and affordability of medical liability insurance became seriously compromised. *See* 2008 Medical Malpractice Ins. Rep. at 17 (showing a gradual decrease in the number of companies writing medical liability insurance beginning in 2001); *see also* Mo. Dept. of Ins., 3 Public Policies 1, 3 (2004) (quoting Missouri Director of Insurance, Scott B. Lakin, that the "major problem is convincing companies to enter and compete in the Missouri market").

Recognizing the impact ever-increasing noneconomic damage limits had on this environment, the Legislature decided in 2005 to fix the health care liability noneconomic damages cap at $350,000. *See* § 538.210, RSMo. The Legislature additionally amended the law so plaintiffs could not separately apply the capped amount to each named defendant and "stack" the total recovery. *See id.* The new law, which applied to all causes of action filed after August 25, 2005, received overwhelming bipartisan support, passing 112-47 in the House and 23-8 in the Senate. *See* Mo. House J., Mar. 16, 2005, at 664-66; Mo. Sen. J., Mar. 16, 2005, at 478-79.

C. Limits on Subjective Noneconomic Damages Are a Key Component of Accessible Health Care Systems

Statutory upper limits on noneconomic damages promote access to more affordable health care, benefitting the vast majority of citizens that will never find themselves as plaintiffs in medical negligence lawsuits, while providing substantial compensation for plaintiffs that are harmed as a result of an accident during the provision of care. Through § 538.210, RSMo, the Legislature sought to provide greater consistency and predictability in Missouri's medical liability system. As the evidence below shows, such limits promote access to more affordable health care for all Missouri residents by reining in extraordinary noneconomic damage awards. *See* Ronen Avraham, *An Empirical Study of the Impact of Tort Reforms on Medical Malpractice Settlement Payments*, 36 J. of Legal Studies S183, S221 (2007).

1. Reducing Medical Liability Insurance and Health Care Costs

There is a sizable body of literature demonstrating that limits on noneconomic damages can significantly lower medical liability insurance premiums. *See* Carol Kane & David Emmons, *The Impact of Liability Pressure and Caps on Damages on the Healthcare Market: An Update of Recent Literature* at 1 (Am. Med. Ass'n 2007), *at* http://www.ama-assn.org/ama1/pub/upload/mm/363/prp2007-1.pdf. On average, internal medicine premiums are 17.3% less in states with limits on noneconomic damages. *See id.* at 3 (citing Meredith L. Kilgore et al., *Tort Law and Medical Malpractice Insurance Premiums*, 43 Inquiry 255 (2006)). Limits on noneconomic damages have an even greater impact on doctors practicing in critical areas. Those practicing general surgery and obstetrics/gynecology experienced 20.7 percent and 25.5 percent lower premiums, respectively, than in sister states permitting unbounded pain and suffering awards. *See id.*

Due to the adoption of reforms across the country, tort costs from medical liability have fallen nationwide four years in a row when adjusted for inflation. *See* Towers Perrin, *2009 Update on U.S. Tort Cost Trends*, at 11, 18, *at* http://www.towersperrin.com/tp/getwebcachedoc?webc=USA/2009/200912/2009_tort_trend_report_12-8_09.pdf; *see also* Daniel Kessler & Mark McClellan, *Do Doctors Practice Defensive Medicine?*, 111 Quarterly J. of Econ. 353 (1996) (finding that tort reforms such as reasonable limits on noneconomic damages, can reduce health care costs by five percent to nine percent without substantial effects on mortality or medical complications); Congressional Budget Office, *Reducing the Deficit: Spending and*

Revenue Options 35-36 (Mar. 2011) (estimating that federal medical liability reforms, including a cap on noneconomic damages, would reduce federal budget deficits by $62.4 billion over ten years). Even without an inflation adjustment, nationally, medical liability costs fell in 2008 for the first time ever. *Id.; see also* Amy Lynn Sorrel, *Liability Premiums Stay Stable, But Insurers Warn This Might Not Last*, American Medical News, Nov. 30, 2009, *at* http://www.ama-assn.org/amednews/2009/11/23/prl21123.htm.

2. Increasing Access to Health Care for Local Residents

Limits on noneconomic damages also increase access to health care by facilitating a legal environment that is welcoming and conducive to the practice of medicine. For instance, "[m]any 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 L. Barbieri, *Professional Liability Payments in Obstetrics and Gynecology,* 107:3 Obstetrics & Gynecology 578, 578 (Mar. 2006).

States with limits on noneconomic damages generally experience greater increases in the number of doctors per capita. *See* William E. Encinosa & Fred J. Hellinger, *Have State Caps on Malpractice Awards Increased the Supply of Physicians?*, 24 Health Aff. 250 (2005). Encinosa & Hellinger also found that a $250,000 limit on noneconomic damages had a much larger effect on the number of surgeons and OB-GYNs per capita in rural areas than limits above $250,000. *Id*. at W5-257. Such research suggests that noneconomic damage limits that are indexed to inflation may gradually lose their effectiveness, precisely the situation that was occurring in Missouri by 2005.

Missouri is not isolated in the economy; it must compete with other states. If a state's legal climate is not competitive, then doctors will go elsewhere, with profoundly deleterious consequences to that state's health and economy. *See* Chiu-Fang Chou & Anthony T. 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), *at* 2009 WLNR 15574372; Daniel P. Kessler et al., *Impact of Malpractice Reforms on the Supply of Physician Services*, 293 JAMA 2618 (2005); *see also* Joseph Nixon, Editorial, *Why Doctors Are Heading to Texas*, Wall St. J., May 17, 2008, at A9, *abstract at* 2008 WLNR 9419738; Ralph Blumenthal, *More Doctors in Texas After Malpractice Cap*, N.Y. Times, Oct. 5, 2007, *at* http://www.nytimes.com/2007/10/05/us/05doctors.html.

3. Reducing the Cost of Defensive Medicine

Limits on noneconomic damages reduce the practice of "defensive" medicine, such as tests ordered out of excessive caution because of concern over potential liability.

In a national survey, "79% of physicians said they had ordered more tests than they would, based only on professional judgment of what is medically needed, and 91% have noticed other physicians ordering more tests." 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* 4 (2002), *at* http://aspe.hhs.gov/daltcp/reports/litrefm.htm.

State-specific studies have found even more disturbing results. For example, a 2005 survey found that 93% of high-risk specialists in Pennsylvania ordered unnecessary

tests, performed unwarranted diagnostic procedures, and referred patients for unneeded consultations to protect themselves from litigation. *See* David M. Studdert et al., *Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment*, 293:1 JAMA 2609, 2609 (June 1, 2005). In a 2008 survey, 83% of Massachusetts physicians reported practicing defensive medicine; the survey also concluded that about 25% of all radiological imaging tests were ordered for defensive purposes, and 28% and 38%, respectively, of those surveyed admitted reducing the number of high-risk patients they saw and limiting the number of high-risk procedures or services they performed. *See* Massachusetts Medical Society, Press Release, *MMS First-of-its-kind Survey of Physicians Shows Extent and Cost of the Practice of Defensive Medicine and its Multiple Effects of Health Care on the State* (Nov. 17, 2008), *at* http://www.massmed.org/AM/Template.cfm?Section=Advocacy_and_Policy&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=23559.

These costs are passed almost entirely to the consumer, if not directly, then indirectly through private or public insurance plans. "[M]alpractice reforms that directly reduce provider liability pressure lead to reductions of 5 to 9 percent in medical expenditures without substantial effects on mortality or medical complications." Donald J. Palmisano, *Health Care in Crisis: The Need for Medical Liability Reform*, 5 Yale J. Health Pol'y, L. & Ethics 371, 377 (2005); *see also* Kessler & McClellan, *supra;* Leonard J. Nelson et al., *Medical Malpractice Reform in Three Southern States*, 4 J. Health & Biomedical L. 69, 84 (2008) (studies "have found a link between the adoption of malpractice reforms and the reduction of defensive medical practices").

Limits on noneconomic damages may also reduce another form of defensive medicine – i.e., the avoidance of higher risk patients. As explained by a blue-ribbon panel in Florida: "The concern over litigation and the cost and lack of medical malpractice insurance have caused doctors to discontinue high-risk procedures, turn away high-risk patients, close practices, and move out of the state. In some communities, doctors have ceased or discontinued delivering babies and discontinued hospital care." Richard E. Anderson, *Effective Legal Reform and the Malpractice Insurance Crisis*, 5 Yale J. Health Pol'y, L. & Ethics 341, 353-354 (2005) (quoting Governor's Select Task Force on Healthcare Professional Liability Insurance vi (Fla. 2003)); *see also* Jonathan Thomas, *The Effect of Medical Malpractice*, 19 Annals Health L. Advance Directive 306, 312 (2010); Laura Bischoff, *Taft Signs Malpractice Reform Bill*, Jan. 13, 2003, at B1, *at* 2003 WLNR 2160754 (reporting that before Ohio limited medical liability noneconomic damages, premium increases led "some doctors to retire early, move, or turn away high-risk patients, according to the Ohio State Medical Association.").

4. Ensuring that Pain and Suffering Awards

Serve a Compensatory, Not Punitive, Function

Since the Missouri Legislature enacted the initial $350,000 limit on noneconomic damages in 1986, new pressures have emerged that encourage plaintiffs' lawyers to urge juries to inflate pain and suffering awards. Most notably, increasing restrictions on punitive damages have led plaintiffs' lawyers to find other ways to increase total damages.

In 1991, the U.S. Supreme Court recognized in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 12 (1991), that punitive damages awards had "run wild" in this country and should be subject to due process limitations. Since then, the Court has increasingly placed legal controls on both the amount and procedures for exemplary awards while reemphasizing its concern that excessive punitive damages may infringe upon fundamental constitutional rights. These legal controls include substantive due process restrictions on the amount of punitive awards, procedural due process requirements for the assessment of punitive damages and for meaningful judicial review, and limitations on a state's ability to use activity outside its jurisdiction as a basis for punishment.

Juries may be influenced to award noneconomic damages based on a defendant's wrongful conduct or perceived wealth, leading to an award for pain and suffering that is inflated based on a desire to punish the defendant. There are numerous instances around the country in which this has occurred.[1] The resultant noneconomic damage awards are

[1] *See, e.g., Pellicer v. St. Barnabas Hosp.*, 974 A.2d 1070, 1089 (N.J. 2009) (finding that award of $50 million for pain, suffering, and loss of enjoyment of life, in addition to an award of over $20 million in economic damages, was due, in part, to argument designed to inflame the jury); *Harris v. Mt. Sinai Med. Ctr.*, 876 N.E.2d 1201, 1207-08 (Ohio. 2007) (granting new trial due to plaintiffs' counsel misconduct and improper passion and prejudice resulted in $30 million verdict, including $15 million in noneconomic damages); *Buell-Wilson v. Ford Motor Co.*, 46 Cal. Rptr. 3d 147, 154-55

over and above their compensatory purpose. Such awards, which are rooted in animus toward a particular defendant, are meant to punish, not compensate for injuries. Moreover, inflated noneconomic damage awards that include a punitive element may avoid constitutional standards applicable to punitive damage awards. Missouri's limit on noneconomic damages helps discourage such improper practices.

D. Limiting Noneconomic Damages Improves Access to Health Care

The evidence that limits on noneconomic damages in medical liability cases improves access to health care is not theoretical or hypothetical, but is demonstrated through proven results in Missouri and other states.

(Cal. Ct. App. 2006) (remitting award of $105 million for pain and suffering to a woman paralyzed in an SUV rollover case, in addition to $246 million in punitive damages), *vacated and remanded*, 127 S. Ct. 2250 (2007); *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, 62 (Miss. 2004) ("Plaintiffs' counsel was making a punitive damages argument for intentional fraud when the only issue before the jury was a compensatory damages claim for negligent failure to warn. Such statements made by counsel were intended to inflame and prejudice the jury."); *Velocity Express Mid-Atlantic, Inc. v. Hugen*, 585 S.E.2d 557, 559-66 (Va. 2003) (finding that plaintiffs' counsel's arguments improperly appealed to "the economic fears and passions" of the jury, leading to a $60 million compensatory award).

1. The Positive Impact of the 2005 Reform in Missouri

Missouri's 2005 noneconomic damages limit had an immediate and beneficial impact on the state's health care environment. Prior to the new law taking effect, the number of newly opened medical liability claims "spiked sharply" to 2,425 claims, eclipsing the previous record of 2,128 claims in 1986 when the original cap was enacted. 2005 Medical Malpractice Ins. Rep., Exec. Summary. Since 2005, the number of medical liability claims has declined dramatically and remained steady at levels roughly one-third lower than they were between 2000 and 2004. *See* Dept. of Ins., Fin. Inst. & Prof. Regs., 2010 Missouri Medical Malpractice Insurance Report: Statistics Section, at vii (Aug. 2011). In 2010, the number of pending medical liability claims reached the lowest level since 1993. *Id*.

In addition, the average medical liability award has significantly decreased. In 2010, the average award amount was $200,765, or approximately twenty percent less than in 2005. *See id.* at vi. These more manageable average award amounts have enabled several insurers to cut medical liability insurance rates. For instance, the Medical Liability Alliance, which underwrites about five percent of Missouri's medical insurance market, announced a six percent across-the-board rate reduction in July 2007; the Physicians Professional Indemnity Association, which underwrites about four percent of the market, implemented a fourteen percent base rate reduction at the beginning of 2008. *See* Terry Ganey, *Doctors vs. Lawyers*, Colum. Daily Trib., Oct. 4, 2009, *at* 2009 WLNR 19611660.

In addition, physicians and other medical personnel are returning to Missouri. According to the Board of Healing Arts, Missouri lost 225 physicians in the three years leading up to 2005 reform. Since the first full year the new law was in place, the state has *added* 486 doctors. *See id.* As former Missouri Governor Matt Blunt summarized:

> Missouri's medical malpractice claims are now at a 30-year low. Average payouts are about $50,000 below the 2005 average. Malpractice insurers are also turning a profit for the fifth year in a row—allowing other insurers to compete for business in Missouri.

Matt Blunt, *How Missouri Cut Junk Lawsuits*, Wall St. J., Sept. 22, 2009, at A23, *abstract at* 2009 WLNR 18711971. The limit has worked as the Legislature intended.

2. Limits on Noneconomic Damages in Medical Liability Cases Have Proven to be Beneficial in Other States

Missouri's experience is consistent with other states that have placed constraints on subjective noneconomic damages in medical liability cases. *Amici* bring to the Court's attention the experiences of Mississippi and West Virginia, both of which, like Missouri, tightened existing limits on noneconomic damages applicable to medical liability case with similar positive results.

a. Case Study: Mississippi

Between 1999 and 2001, Mississippi experienced a surge in medical liability lawsuits. As one reporter wrote in 2002: "Mississippi, largely because it is one of only a few states that does not cap verdicts on noneconomic damages, has become a hotbed for such litigation because jury verdicts have been unusually high . . . ." Tim Lemke, *Best*

Places to Sue? Big Civil Verdicts in Mississippi Attract Major Litigators, Wash. Times, June 30, 2002, at A1, *at* 2002 WLNR 402634. Mississippi's health care system was negatively impacted. *See* Sherman Joyce & Michael Hotra, *Mississippi's Civil Justice System: Problems, Opportunities, and Some Suggested Repairs*, 71 Miss. L.J. 395, 417 (2001). By 2002, Mississippi had the lowest number of physicians per capita in the country and was losing doctors to other states. *See* Lynne Jeter, *Tort Reform Impact Ripples Out Through Economy*, Miss. Bus. J., Nov. 29, 2004, at S30, *at* 2004 WL 14445074. Trying to recruit doctors to practice in the state was "a nightmare." *Id*. (quoting Mississippi State Medical Association's past president Hugh Gamble II, M.D.). Other doctors restricted their practices due to liability concerns, "leaving most Mississippi cities with populations of less than 20,000 people with no local obstetricians." Sarah Domin, Comment, *Where Have All the Baby-Doctors Gone? Women's Access to Healthcare in Jeopardy: Obstetrics and the Medical Malpractice Insurance Crisis*, 53 Cath. U. L. Rev. 499, 501 (2004).

The legislature responded by adopting a $500,000 medical liability noneconomic damage limit, among other reforms, in late 2002. *See* H.B. 2, 2002 3rd Ex. Sess. (Miss. 2002) (codified at Miss. Code § 11-1-60(2)(a)). Two years later, the state legislature strengthened the 2002 law by deleting exceptions as well as scheduled increases in the limit. *See* H.B. 13, 2004 1st Ex. Sess., § 2 (Miss. 2004) (codified at Miss Code § 11-1-60(2)(a)). "Limitations on the amount of money juries can award plaintiffs for non-economic damages arguably are the most important and necessary form of tort reform" for medical liability defendants. Domin, 53 Cath. U. L. Rev. at 534.

As result of these reforms, "the problems in malpractice insurance seem to have abated." Leonard J. Nelson et al., *Medical Malpractice Reform in Three Southern States*, 4 J. Health & Biomedical L. 69, 139 (2008). Data from the Medical Assurance Company of Mississippi, the state's leading medical liability insurer, conclusively demonstrate that tort reform in Mississippi reduced the number of professional liability lawsuits overall and particularly with respect to OB/GYNs. *See* Mark A. Behrens, *Medical Liability Reform: A Case Study of Mississippi*, 118:2 Obstetrics & Gynecology 335 (Aug. 2011). Further, medical liability premiums have been both reduced and refunded. *See id.* As recently summarized by the American Medical Association:

> In Mississippi, the Mississippi State Medical Association reports that the liability climate has improved significantly since the enactment of [medical liability reform.] Liability premiums have decreased for the largest liability carrier by five percent in 2006, 10 percent in 2007, 15.5 percent in 2008, 20 percent in 2009 and 10 percent in 2010. Insured physicians also received significant refunds during this time period as well. This is in stark contrast to the crisis years when premiums increased 12.5 percent in 2000, 11.1 percent in 2001, 10 percent in 2002, 45 percent in 2003 and 19.4 percent in 2004.

American Medical Association, *Medical Liability Reform – NOW!*, at 20-21 (Feb. 1, 2011), *at* http://www.ama-assn.org/ama1/pub/upload/mm/378/mlr-now-2011.pdf.

No longer considered a "crisis" state for medical liability insurance, *see* Amy Lynn Sorrel, *Tort Reforms Boost Some States' Liability Outlook*, Am. Med. News, Mar. 5, 2007, *at* http://www.ama-assn.org/amednews/2007/03/05/prsc0305.htm, Mississippi went "from being the poster child of litigation abuse to a shining example of how a state can join the legal mainstream and foster economic growth through legal reform." Mark

A. Behrens & Cary Silverman, *Now Open for Business: The Transformation of Mississippi's Legal Climate*, 24 Miss. C.L. Rev. 393, 395 (2005).

b. Case Study: West Virginia

In 2002, the National Governors Association listed West Virginia as a case study of a medical malpractice insurance crisis. *See* National Governors Ass'n Center for Best Practices, Addressing the Medical Malpractice Insurance Crisis, at 12 (2002), *at* http://www.nga.org/cda/files/1102medmalpractice.pdf. West Virginia doctors paid substantially higher premiums than those in neighboring Ohio and Virginia, liability carriers reported substantially higher defense costs than the national average, and a lead medical liability insurer left the market. *Id*. Four in ten physicians were considering leaving West Virginia, 30% were considering retirement, and all or part of 50 of 55 counties were considered medically underserved. *Id*. From the mid 1990s to 2002 there was a decline in the number of new licenses issued, s*ee* W. Va. Bd. of Med., *Licensure Activity*, *at* http://www.wvbom.wv.gov/activity.asp, demonstrating that West Virginia was an undesirable place to practice medicine.

As a result, residents in several areas of the state had little or no local access to neurosurgeons and trauma surgeons. *See, e.g.*, Therese Smith Cox, *Doctors Facing Dilemma: Neurosurgeons Must Pay Big Malpractice Fee or Leave*, Charleston Gazette, Apr. 10, 2002, at A1, *at* 2002 WL 1053244; Dawn Miller, *CAMC Loses Trauma Status: People With Serious Multiple Injuries To Go To Morgantown, Elsewhere*, Charleston Gazette, Aug. 24, 2002, at 1A, *at* 2002 WLNR 1058321. In fact, in early 2003, the American Congress of Obstetricians and Gynecologists issued a "red alert" for West

Virginia, finding that the state's high OB/GYN's premiums, then the second highest in the nation, threatened the ability of physicians to deliver babies. *See* American Congress of Obstetricians & Gynecologists, *The Current Tort System* (2003), *at* http://www.acog.org/from_home/publications/press_releases/Stats-ACM03-CurrentTorts.pdf (emphasis added).

West Virginia's Insurance Commissioner recognized that "[h]igher and more volatile jury awards" contributed to the crisis. *See* W. Va. Offices of the Ins. Commn'r, State of West Virginia: Medical Malpractice Report, Insurers With 5% Market Share 2 (Nov. 2009) [hereinafter W. Va. Rep.], *at* http://wvinsurance.gov/LinkClick.aspx?fileticket=KHt9sy2Fod4%3d&tabid=207&mid=798. Governor Bob Wise declared the "collapse of the medical malpractice insurance system." W. Va. State of the State Address 2002, Jan. 10, 2002, *at* http://www.stateline.org/live/details/speech?contentId=16098.

In that environment, the West Virginia legislature replaced a $1 million limit on noneconomic damages adopted in 1986 with a tiered system that caps pain and suffering awards at $250,000 in most medical professional liability cases and up to $500,000 for certain severe, permanent injuries. *See* W. Va. Code § 55-7B-8. In the four years following enactment, the average premium per physician dropped nearly by half. W. Va. Rep., *supra*, at 51. Physicians insured with the state's largest medical liability insurer experienced an overall average decrease in premiums of 32% with many specialists receiving as much as a 55% reduction since the insurer formed in 2004. *See* W. Va. Mut. Ins. Co., Annual Rep. 2 (2009). The insurer directly attributes its ability to provide rate

relief for policyholders to the 2003 reforms. *See* W. Va. Mut. Ins. Co., Quarterly Coverage (Spring 2011), *at* http://www.wvmic.com/docs/QuarterlyCoverageSpring 2011.pdf. The number of actively licensed physicians increased from 3,532 in 2004 to 3,864 in 2010. *See* W. Va. Bd. of Med., Licensure Activity, *supra*.

II. PERIODIC PAYMENT OF FUTURE DAMAGES, AS PROVIDED BY § 538.220, RSMO, REDUCES STRAIN ON THE HEALTH CARE SYSTEM.

Plaintiff also challenges the Legislature's authority to enact another measure that was designed to improve Missouri's medical liability environment and thereby render it more affordable and accessible to Missouri citizens – § 538.220, RSMo, which provides for periodic payment of future damages in health care liability actions. Many states have adopted similar laws, which, like the limit on noneconomic damages, have proven results.

Periodic payment of monetary reparations for personal injuries is not new. In fact, states have enacted such laws for decades. *See* Marcus L. Plant, *Periodic Payment of Damages for Personal Injury*, 44 La. L. Rev. 1327, 1327 (1984). For instance, in 1980, when the National Conference of Commissioners on Uniform State Laws ("NCCUSL") approved a "Model Periodic Payment of Judgments Act," fourteen states already permitted or required certain tort awards for future damages be paid in installments. NCCUSL adopted a revised and simplified "Uniform Periodic Payment of Judgments Act" in 1990. *See* Uniform Periodic Payment of Judgments Act (1990). By then, over thirty states had adopted some type of periodic-payment legislation. About two thirds of

states have some form of periodic payment law in effect today.[2] Oklahoma is the most recent state to adopt such a reform. *See* Okla. Stat. tit. 23, § 9.3 (effective Nov. 1, 2011).

Periodic payment systems are most often used where there is a catastrophic injury with considerable expenses that are likely to persist for the life of the plaintiff. As one commentator explained around the time the Missouri legislature enacted § 538.220:

> Under these circumstances, the traditional system of payment of a lump sum of money to the injured person may be costly and unwise for the claimant, unjust to the defendant, and burdensome for the public.

[2] Such laws vary as to whether they are limited to actions involving health care providers, the threshold level triggering periodic payments, whether periodic payments are mandatory or discretionary, and whether one or both parties may request periodic payments. *See* Ala. Code § 6-5-486; Alaska Stat. § 09.17.040, Ark. Stat. § 16-114-208(c); Cal. Civ. Proc. Code § 667.7; Colo. Rev. Stat. § 13-64-203; Conn. Gen. Stat. § 52-225d; Del. Code tit. 18 § 6864; Fla. Stat. § 768.78(2); Idaho Code § 6-1602; 735 Ill. Comp. Stat Ann. § 5/2-1705; Ind. Code § 34-18-14-4; Iowa Code § 668.3(7); Kan. Stat. § 60-2609; La. Rev. Stat. § 40:1299.44; Me. Rev. Stat. tit. 24 § 2951; Md. Cts. & Jud. Proc. Code § 11-109(c); Mich. Comp. Laws § 600.6307; Minn. Stat. § 549.25; § 538.220 Mo. Stat.; Mont. Code § 25-9-412; N.H. Rev. Stat. § 524:6-a; N.M. Stat. § 41-5-7; N.Y. C.P.L.R. §§ 5031-5039; N.D. Cent. Code § 32-03.2-09; R.I. Gen. Laws §§ 9-21-12 to -13; S.C. Code § 38-79-480(3); S.D. Codified Laws § 21-3A-1 to -13; Utah Code § 78B-3-414; Wash. Rev. Code § 4.56.260; Wis. Stat. § 655.015.

> Conversely, a periodic payment arrangement may be beneficial, financially and otherwise, to the claimant, fair to the defendant, and wise from the standpoint of the public's interest.

Plant, 44 La. L. Rev. at 1328.

Periodic payments benefit claimants by protecting them from the threat that they, or those who administer their funds, will dissipate the recovery in the years immediately following payment, leaving little or no assets for later health care needs. *See id.* at 1332 ("Studies have concluded that ninety percent of injured plaintiffs who receive substantial sums from settlements or other sources 'will have squandered the entire sum within five years, leaving them a public charge, dependent upon welfare, health care assistance, and the like.'") (quoting Vasilios B. Choulos, *Structured Settlements; Cure or Curse?*, 16 Trial 73, 74 (Nov. 1980)).

A periodic payment system is also more equitable than a lump sum payment because it ensures that defendants only pay for a plaintiff's future medical costs as they are incurred. *See id.*; *see also* Anthony Riccardi & Thomas Ireland, *A Primer on Annuity Contracts, Structured Settlements, and Periodic-Payment Judgments*, 12 J. Legal Econ. 1, 32-33 (2002) (lump-sum payments systematically overcompensate plaintiffs for future damages). The solution to the potential for overcompensation is a periodic payment system, whereby payments for medical expenses continue throughout the plaintiff's life.

Periodic payment laws also have a positive effect on the health care system. As courts have recognized, "one of the factors which contributed to the high cost of malpractice insurance was the need for insurance companies to retain large reserves to

pay out sizable immediate lump sum awards." *American Bank & Trust Co. v. Community Hosp.*, 683 P.2d 670, 679 (Cal. 1984). A periodic payment system allows insurers to retain fewer liquid reserves and increase their investments because they can predict their liability with greater certainty. The system reduces costs for insurers, which may be passed on to consumers in the form of lower insurance premium rates. *Id.*

This reasoning generally underlies the NCCUSL's Uniform Act, which was adopted by the American Bar Association (ABA). As the preface to the Uniform Act states, its purposes is " to compensate tort victims suffering bodily injury fully and fairly by requiring that certain awards for future economic damages be paid periodically as the losses accrue. . . ." *Id.* Among benefits of such a law, the NCCUSL and ABA recognized, is that it facilitates payment of medical costs throughout the life of the injured person, assures that damages serve the purposes for which they are awarded, reduces the burden on relatives of those who are injured and public assistance costs created by the premature dissipation of lump-sum payments, and makes the tort system "more efficient so as to keep liability insurance available and affordable." *Id.* at 2.

III. MISSOURI'S MEDICAL LIABILITY REFORMS REPRESENT LEGITIMATE, CONSTITUTIONAL LEGISLATIVE POLICY.

A. Most Courts Have Upheld Limits on Noneconomic Damages and Rejected Challenges to Periodic Payment Laws

Missouri is not alone in trying to restrain outlier pain and suffering awards. Approximately two-thirds of the states have enacted such limits. Missouri is among the

many states that have adopted a limit specifically applicable to health care liability actions.[3]

Furthermore, the clear trend among state supreme court decisions evaluating the constitutionality of such laws, and laws generally applicable to all tort or civil cases, is to uphold the legislation, as this Court did in *Adams*. *See* 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) ("Over the years, the scales in state courts have increasingly tipped toward upholding noneconomic damages caps.").

Many state courts that have considered the constitutionality of noneconomic damage limits applicable to medical liability claims have upheld the legislature's

[3] *See* Alaska Stat. § 09.55.549; Cal. Civ. Code § 3333.2(b); Colo. Rev. Stat. § 13-64-302; Fla. Stat. § 766.118; Ind. Code § 34-18-14-3; La. Rev. Stat. § 40:1299.42; Md. Cts. & Jud. Proc. Code § 3-2A-09; Mich. Comp. Laws § 600.1483; Miss. Code § 11-1-60(2)(a); § 538.220, RSMo; Neb. Rev. Stat. § 44-2825; N.C. Gen. Stat. § 90-21.19; Ohio Rev. Code § 2323.43; S.C. Code § 15-32-220; S.D. Codified Laws § 21-3-11; Tex. Civ. Prac. & Rem. Code § 74.301; W. Va. Code § 55-7B-8. Several states have enacted limits on noneconomic damages applicable to all personal injury claims. *See* Alaska Stat. § 09.17.010; Colo. Rev. Stat. § 13-21-102.5(3)(a); Haw. Rev. Stat. § 663-8.7; Idaho Code § 6-1603; Kan. Stat. § 60-19a02(b); Md. Ct. & Jud. Proc. Code § 11-108; Miss. Code § 11-1-60(2)(b); Ohio Rev. Code § 2315.18; Okla. Stat. tit. § 61.2; Tenn. Code § 29-39-102.

prerogative to set needed bounds on inherently subjective awards in order to preserve access to the health care system.[4] At least four state courts have upheld laws that go further, by limiting total recovery in medical liability cases, not just the noneconomic damage portion of the award.[5] Several other courts have upheld the constitutionality of

[4] *See Fein v. Permanente Med. Group*, 695 P.2d 665 (Cal. 1985); *Stinnett v. Tam*, 2011 WL 3862642 (Cal. App. Sept. 1, 2011); *Van Buren v. Evans*, 2009 WL 1396235 (Cal. App. May 20, 2009); *Yates v. Pollock*, 194 Cal. App. 3d 195 (1987); *Univ. of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993); *HCA Health Servs. of Fla., Inc. v. Branchesi*, 620 So. 2d 176 (Fla. 1993); *Parham v. Florida Health Sciences Ctr., Inc.*, 35 So. 3d 920 (Fla. App. 2010); *Butler v. Flint Goodrich Hosp. of Dillard Univ*., 607 So. 2d 517 (La. 1992); *Zdrojewski v. Murphy*, 657 N.W.2d 721 (Mich. App. 2002); *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., Inc*., 414 S.E.2d 877 (W. Va. 1991).

[5] *See Garhart v. Columbia/Healthone, L.L.C.*, 95 P.3d 571 (Colo. 2004); *Gourley v. Neb. 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. Hosp.*, 376 S.E.2d 525 (Va. 1989); *Johnson v. St. Vincent Hosp*., 404 N.E.2d 585 (Ind. 1980).

limits on noneconomic damages that apply to all personal injury actions.[6] Most recently, in *MacDonald v. City Hosp., Inc.*, 715 S.E.2d 405 (W. Va. 2011), West Virginia's highest court upheld that state's limit on noneconomic damages. In 2010, Maryland's highest court in *DRD Pool Serv., Inc. v. Freed*, 5 A.3d 45 (Md. 2010), upheld held that state's generally applicable noneconomic damages cap. State courts have also upheld noneconomic damage limits in various other contexts.[7] These state courts are joined by

[6] *See 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); *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993); *Scharrel v. Wal-Mart Stores, Inc.*, 949 P.2d 89 (Colo. Ct. App. 1998); *Kirkland v. Blaine County Med. Ctr.*, 4 P.3d 1115 (Idaho 2000); *Samsel v. Wheeler Transp. Servs., Inc.*, 789 P.2d 541 (Kan. 1990), *overruled in part on other grounds*, *Bair v. Peck*, 811 P.2d 1176 (Kan. 1991); *DRD Pool Serv. Inc. v. Freed*, 5 A.3d 45 (Md. 2010); *Oaks v. Connors*, 600 A.2d 423 (Md. 1995); *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007).

[7] *See Samples v. Florida Birth-Related Neurological Injury Comp. Ass'n*, 40 So. 3d 18 (Fla. App. 2010); *King v. Virginia Birth-Related Neurological Injury Comp. Program*, 410 S.E.2d 656 (Va. 1991); *Wessels v. Garden Way, Inc.*, 689 N.W.2d 526 (Mich. App. 2004); *Mizrahi v. North Miami Med. Ctr., Ltd.*, 761 So. 2d 1040 (Fla. 2000); *Leiker v. Gafford*, 778 P.2d 823 (Kan. 1989); *Adams v. Via Christi Reg'l Med. Ctr.*, 19 P.3d 132 (Kan. 2001); *Peters v. Saft*, 597 A.2d 50 (Me. 1991); *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722 (Minn. 1990); *Lawson v. Hoke*, 119 P.3d 210 (Or. 2005).

several federal courts that have rejected challenges based on the United States Constitution or an interpretation of applicable state law.[8] While these decisions are not binding upon this Court with respect to questions of Missouri constitutional law, they provide cogent analysis and persuasive reasoning for the Court's consideration.

Some state courts have engaged in judicial nullification of such laws, mostly in older cases,[9] and recently in Georgia and Illinois, *see Atlanta Oculoplastic Surgery, P.C.*

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[8] *See Estate of McCall ex rel. McCall v. United States*, 642 F.3d 944 (11th Cir. 2011) (upholding application of Florida's statutory cap on noneconomic medical liability damages against challenge on federal constitutional grounds); *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513 (6th Cir. 2005) (Mich.); *Patton v. TIC United Corp.*, 77 F.3d 1235 (10th Cir. 1996) (Kan.); *Owen v. United States*, 935 F.2d 734 (5th Cir. 1991) (La.); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989) (Va.); *Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989) (Virgin Islands); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985) (Cal.); *Federal Express Corp. v. United States*, 228 F. Supp. 2d 1267 (D. N.M. 2002) (N.M.); *Simms v. Holiday Inns, Inc.*, 746 F. Supp. 596 (D. Md. 1990) (Md.); *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989) (Md.); *Watson v. Hortman*, 2010 WL 3566736 (E.D. Tex. Sept. 13, 2010) (Tex.).

[9] *See Moore v. Mobile Infirmary Assoc.*, 592 So. 2d 156 (Ala. 1991); *Smith v. Dep't of Ins.*, 507 So. 2d 1080 (Fla. 1987); *Best v. Taylor Mach. Works, Inc.*, 689 N.E.2d 1057 (Ill. 1997); *Brannigan v. Usitalo*, 587 A.2d 1232 (N.H. 1991); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash.

v. Nestlehutt, 691 S.E.2d 218 (Ga. 2010); *LeBron v. Gottlieb Mem. Hosp.*, 930 N.E.2d 895 (Ill. 2010), but as shown the recent trend is to uphold such legislation. *See* Kelly & Mello, 33 J.L. Med. & Ethics at 527. In fact, more than two times as many state courts of last resort have upheld statutory limits on noneconomic damages awards than have struck them down. For example, the Ohio Supreme Court recently found that a cap:

> 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.

Arbino v. Johnson & Johnson, 880 N.E.2d 420, 435-36 (Ohio 2007). The Alaska Supreme Court has said that such laws "bear[ ] a fair and substantial relationship to a legitimate government objective." *C.J. v. Dep't of Corrections*, 151 P.3d 373, 381 (Alaska 2006). These courts and others have recognized, "It is not this court's place to second-guess the Legislature's reasoning behind passing the act," *Gourley v. Neb.*

1989); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Lakin v. Senco Prods. Inc.*, 987 P.2d 463 (Or. 1999); *Ferdon v. Wisconsin Patients Comp. Fund*, 701 N.W.2d 440 (Wis. 2005).

Methodist Health Sys., Inc., 663 N.W.2d 43, 69 (Neb. 2003), rather, "it is up to the legislature . . . to decide whether its legislation continues to meet the purposes for which it was originally enacted." *Estate of Verba v. Ghaphery*, 552 S.E.2d 406, 412 (W. Va. 2001).

Likewise, as discussed above, about thirty states have enacted some form of periodic payment law. Many courts have upheld the constitutionality of such laws.[10] While some courts have invalidated periodic payment laws based on particular aspects of the statute at issue and the state's own constitutional precedent,[11] such laws have remained in place in many states for years without challenge. As the California Supreme Court found, "there can be no serious question that the provision is rationally related to a legitimate state interest" because periodic payment laws ensure compensation will be

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[10] *See, e.g., American Bank & Trust Co*., 683 P.2d at 676; *HealthONE v. Rodriquez*, 50 P.3d 879, 896 (Colo. 2002); *Vitetta v. Corrigan*, 240 P.3d 322, 327-28 (Colo. Ct. App. 2009); *Bernier v. Burris*, 497 N.E.2d 763, 771-73 (Ill. 1986); *Doe v. State of New York*, 595 N.Y.S.2d 592, 598 (N.Y. App. Div. 1993); *Giampino v. Leonard Ricci, M.D., P.C*., 609 N.Y.S.2d 134, 137 (N.Y. Sup. 1994); *State ex rel. Strykoski v. Wilkie*, 261 N.W.2d 434, 443 (Wis. 1978).

[11] *See, e.g., Lloyd v. Noland Hosp. v. Durham*, 906 So. 2d 157, 172 (Ala. 2005); *Smith v. Myers*, 887 P.2d 541, 546-47 (Ariz. 1994); *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251, 260-63 (Kan. 1988); *Galayda v. Lake Hosp. Sys., Inc*., 644 N.E.2d 298, 302-03 (Ohio 1994); *Carson v. Mauer*, 424 A.2d 825, 838 (N.H. 1980).

available to the plaintiff when he or she incurs future medical expenses, limits a defendant's obligation to pay future damages to those that are actually incurred, and eliminates a windfall to plaintiffs' heirs when they inherit a portion of a lump-sum judgment that was intended to compensate the person for losses he or she never sustained. *See, e.g.*, *American Bank & Trust Co*., 683 P.2d at 676. Others, such as the Illinois Supreme Court, have both echoed the California Supreme Court's rationale and recognized that litigants have "no indefeasible interest in the continuation of a particular remedy or mode or form of recovery." *Bernier v. Burris*, 497 N.E.2d 763, 772-73 (Ill. 1986).

C. This Court Has Respected the Legislature's Prerogative To Place Rational Bounds on Tort Liability

This Court has traditionally respected the Legislature's overlapping authority to decide broad tort policy rules for Missouri. For instance, in *Adams,* this Court upheld both types of medical liability reforms at issue in this case – a limit on noneconomic damages and periodic payment of future damages in medical liability actions – as well as a provision requiring apportionment of fault to include percentage allocated to released parties. Such provisions, this Court held, did not violate equal protection under the Missouri or United States Constitutions, or the open courts, right to remedy, or due process provisions of the Missouri Constitution; the noneconomic damages cap also did not violate the right to jury trial in the Missouri Constitution. 832 S.W.2d at 905-07. This Court recognized:

> 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 would otherwise be the case.

Id. at 904. For these reasons, the Court concluded that the statutory limit was "rationally related to the general goal of preserving adequate, affordable health care for all Missourians." *Id*. at 904-05.

The *Adams* Court similarly recognized that the periodic payment law "is rationally related to the general goal of preserving adequate, affordable health care for all Missourians." *Id*. at 904. "By permitting installment payments, the legislature could reason that spreading future judgment payments over a period of time would reduce costs to insurance companies and reduce insurance premiums, lowering insurance premiums and making medical services less expensive and more available than would otherwise be the case." *Id*. at 905.

In addition, this Court has upheld:

- a $100,000 limit on tort recoveries against State agencies, *see Richardson v. State Hwy. & Transp. Comm'n*, 863 S.W.2d 876 (Mo. banc 1993) (statute limiting tort recoveries against State agencies to $100,000 did not violate equal protection provisions of Missouri or United States Constitutions); *Fisher v. State Hwy. Comm'n*

of Mo., 948 S.W.2d 607 (Mo. banc 1997) (statute did not violate state constitutional rights regarding "the enjoyment of the gains of their own industry," equal protection, or open courts and certain remedy).

- a ten-year statute of repose for improvements to real property, *see Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822 (Mo. banc 1991) (repose statute did not violate equal protection or due process provisions of Missouri or United States Constitutions, did not constitute prohibited special legislation, and did not violate open courts provision of Missouri Constitution); *Magee v. Blue Ridge Prof. Bldg. Co.*, 821 S.W.2d 839 (Mo. banc 1991) (statute did not violate open courts provision of Missouri Constitution or due process or equal protection provisions of Missouri or United States Constitutions);
- Missouri's Dram Shop Act, *see Snodgras v. Martin & Bayley, Inc.*, 204 S.W.3d 638 (Mo. banc 2006) (Act did not violate open courts provision of Missouri Constitution or equal protection provisions of Missouri or United States Constitutions);
- a punitive damages "sharing" statute, *see Hoskins v. Business Men's Assurance*, 79 S.W.3d 901 (Mo. banc 2002) (statute authorizing state to assert a lien of fifty percent of any final punitive damages judgment did not violate Excessive Fines provisions of Missouri or United States Constitutions); *Fust v. Attorney General*, 947 S.W.2d 424 (Mo. banc 1997) (statute did not violate single subject, "clear title," due process, equal protection, or special law provisions of the Missouri Constitution, the separation of powers, or represent an unconstitutional attempt to grant money to private persons in contravention of the Missouri Constitution);

- a sovereign immunity statute, *see Winston v. Reorganized Sch. Dist. R-2*, 636 S.W.2d 324 (Mo. banc 1982) (sovereign immunity law permitting tort claims only if arising from public employee's operation of a motor vehicle did not violate equal protection under the Missouri or United States Constitutions);
- an affidavit of merit requirement for health care liability actions, *see Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503 (Mo. banc 1991) (affidavit of merit requirement for medical liability actions did not violate right to jury trial, open courts, or separation of powers provisions of Missouri Constitution or equal protection or due process provisions of Missouri or United States Constitutions); and
- a statute that exempted health service corporations from some forms of liability for injuries to patients, *see Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58 (Mo. banc 1989) (statute did not violate open courts provision of Missouri Constitution and did not violate equal protection or due process provisions of Missouri or United States Constitutions).

As this Court made explicit in *Adams*, "[i]t is not [the Court's] province to question the wisdom, social desirability or economic policy underlying a statute as these are matters for the legislature's determination." 832 S.W.2d at 904 (quoting *Winston*, 636 S.W.2d at 327). "[T]he legislature has the right to abrogate a cause of action cognizable under common law completely" and "the power to limit recovery in those causes of action." *Id*. at 907 (internal citations omitted).

The United States Supreme Court has likewise said: "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 Envtl. Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978) (internal citations omitted).

The long-standing recognition of the separation of powers, both by this Court and by the United States Supreme Court, derives logical and factual support from the inherent strengths of the legislative process. This is particularly true with respect to tort law, because the impacts on Missouri's citizens go far beyond who should win a particular case. The Legislature can focus more broadly on how tort law impacts the availability and cost of health care delivery. The Legislature has the unique ability to weigh and balance the many competing societal, economic, and policy considerations involved.

Legislatures are uniquely well equipped to reach fully informed decisions about broad public policy changes in the law. Through the hearing process, the Legislature can hold a full discussion of the competing principles and controversial issues of tort liability, because it has access to broad information, including the ability to receive comments from persons representing a multiplicity of perspectives and to use the legislative process to obtain new information. If a point needs further elaboration, then an additional witness can be called to testify or a prior witness can be recalled. This process allows legislatures to engage in broad deliberations when formulating policy:

> The legislature has the ability to hear from everybody – plaintiffs' lawyers, health care professionals, defense lawyers, consumers groups, unions, and large and small businesses. . . . [U]ltimately, legislators make a judgment. If the people who elected the legislators do not like the solution, the voters have a good remedy every two years: retire those who supported laws the voters disfavor. These are a few reasons why, over the years, legislators have received some due deference from the courts.

Victor E. Schwartz, *Judicial Nullifications of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law*, 31 Seton Hall L. Rev. 688, 689 (2001). A similar point was made by Justice Harland Stone, who cautioned that "the only check upon [the Court's] exercise of power is [the Court's] own sense of self-restraint. For the removal of unwise laws from the statute books *appeal lies, not to the courts, but to the ballot and to the processes of democratic government*." *United States v. Butler*, 297 U.S. 1, 79 (1936) (emphasis added).

Furthermore, legislative development of tort law gives the public advance notice of significant changes affecting rights and duties, and the time to comport behavior accordingly. As the United States Supreme Court noted in a landmark decision regarding punitive damages, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive *fair notice* . . . of the conduct that will subject him to [liability]. . . ." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) (emphasis added). The Court's statement is particularly applicable here.

Courts, on the other hand, are uniquely and best suited to adjudicate individual disputes concerning discrete issues and parties. The judiciary decides "cases and controversies." This advantage also has its limitations: the focus on individual cases does not provide comprehensive access to broad scale information or the ability to fully consider the potential societal implications of its decisions.

In contrast to this Court's tradition and the greater weight of decisions from other states, Plaintiffs here seek to convince this Court to use an expansive view of the Missouri Constitution to sit as a "super legislature." Judicial decisions that conflict with the public policy decisions of the legislature create unnecessary tension between the branches of government and undermine confidence in the courts. *See* Comment, *State Tort Reform - Ohio Supreme Court Strikes Down State General Assembly's Tort Reform Initiative, State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999), 113 Harv. L. Rev. 804, 809 (2000) (judicial decision overturning tort reform law drove "a deeper wedge between the Ohio judiciary and its legislature" and "may have undermined the Ohio Supreme Court's valued position as a defender of the constitution"); M. Margaret Branham Kimmel, *The Constitutional Attack on Virginia's Medical Malpractice Cap: Equal Protection and the Right to Jury Trial*, 22 U. Rich. L. Rev. 95, 118 n.161 (1987) ("Whether these measures are advisable as a policy matter is not the issue properly before the courts, for in a democracy it is vitally important that the judiciary separate questions of social wisdom from questions about constitutionality. Questions of wisdom are more appropriately retained for decision by the more representative legislative organs of government.").

Furthermore, a decision to strike down the noneconomic damage limit would undermine the principle of *stare decisis*, and could lead to challenges to other legislative policy choices with respect to the extent of liability in Missouri.[12] Nothing has changed since the Court's decision in *Adams* that warrants abandoning precedent and the reliance interest of individuals and businesses in the law.

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[12] *See, e.g.*, § 191.737, RSMo (providing immunity to physicians or health care providers who report certain information in good faith to the department of health and senior services); § 196.981, RSMo (providing immunity to individuals and entities that donate, accept, or dispense prescription drugs under program that provides access to unused prescription drugs for persons who have economic need); § 340.287, RSMo (limiting liability of veterinarians who gratuitously and in good faith give emergency treatment to a sick or injured animal at the scene of an accident or emergency to instances of gross negligence); § 537.037, RSMo (limiting liability of volunteer physician who provides good faith render emergency care to instances of gross negligence or willful or wanton acts or omissions); § 537.325, RSMo (recognizing that there is no liability for inherent risks of equine activities); § 537.550, RSMo (limiting liability of small counties, cities, or villages for injuries at fairs or festivals); § 537.595, RSMo (providing, with certain exceptions, that there is no liability for claims relating to weight gain or obesity); § 538.228, RSMo (limiting liability of physicians who provide medical treatment at a city or county health department to instances of gross negligence or willful or wanton acts or omissions).

CONCLUSION

For these reasons, this Court should uphold §§ 538.210 and 538.220, RSMo.

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RULE 84.06(C) CERTIFICATION

Pursuant to Mo. R. Civ. P. 84.06(c), the undersigned hereby certifies that this Brief: (1) includes the information required by Rule 55.03; (2) complies with the limitations contained in Mo. R. Civ. P. 84.06(b); and (3) contains 11,009 words, as calculated by the Microsoft Word software used to prepare this Brief.

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CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing brief in paper form and one copy of the foregoing brief on disk (that the undersigned certifies was scanned for viruses and is virus free) have been mailed, first class mail postage prepaid, on December 30, 2011, to:

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