IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1148

ESTATE OF MICHELLE EVETTE McCALL, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF THE STATE OF FLORIDA, AS AMICUS CURIAE, IN SUPPORT OF THE RESPONDENT

On Review of Certified Questions from the United States Court of Appeals for the Eleventh Circuit

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IDENTITY OF AMICUS CURIAE AND STATEMENT OF INTEREST

Attorney General Pamela Jo Bondi, on behalf of the State of Florida as amicus curiae, submits this brief in support of the Respondent, the United States of America. The State concurs with the brief of the United States on the issues presented, and submits this amicus brief to further develop the reasons why this Court should find no equal protection violation under the Florida Constitution.

Over the decades, the State of Florida, through its attorney general, has played an important role in defending on the merits, or as an amicus, legal challenges to legislative efforts addressing persistent problems and crises in the health care and insurance marketplaces, including efforts to reduce or contain the growth of insurance premiums imposed on physicians practicing in the state. As an example, Attorney General Bob Butterworth, in University of Miami v. Echarte, 618 So. 2d 189 (Fla. 1993), filed an amicus brief in support of the appellants, who prevailed in this Court. The Echarte decision upheld the statutory per incident caps on noneconomic damages at issue in that case (including an equal protection claim). The State, through its attorneys general, past and present, has a substantial ongoing interest in assuring the stability of judicial precedents, such as Echarte, that have upheld important legislative enactments in the tort and medical malpractice context, particularly when legal challenges—such as those in this case—seek to upset established law.

SUMMARY OF THE ARGUMENT

Section 766.118, Florida Statutes, which caps noneconomic damage awards in medical malpractice claims, does not violate the equal protection clause of the Florida constitution. This Court's decisions in Echarte and other similar equal protection cases control the outcome of this case. No principled basis exists under well-established caselaw to depart from the conclusion that an economic regulation is subject to any test other than the most deferential one of all: rational basis.

The question under the rational basis test is simply whether any conceivable basis exists for the economic regulation at issue. That basis is apparent in the Florida Legislature's attempts over the decades to control escalating medical insurance rates via damage caps. Whether the caps have proven the most effective means of accomplishing this legislative purpose is not a proper judicial inquiry. The reason is that the rational basis test is the weakest constraint on legislative power yet the strongest constraint on judicial power in our legal system. The test restrains courts from overturning a statute unless it is conclusively proven that absolutely no conceivable basis exists for the legislature's classification; indeed, the test is so deferential that a classification may be based on rational speculation without any evidentiary or empirical basis whatsoever. The determination of whether a rational basis exists may not be subject to courtroom fact-finding and a balancing of the policy, wisdom, or merits of the classification; instead, the law

must be upheld, even if the legislature's classification is improvident, ill-advised or unnecessary. If there is a single plausible reason for the classification, the judicial inquiry ends. Indeed, if a classification is subject to any debate, the duty of the judicial branch is to defer to the classification and allow the democratic process to address and resolve the matter via the legislative process.

Here, even assuming that section 766.118 creates a classification for equal protection purposes, the legislative rationality of the challenged caps is beyond dispute, as this Court concluded in Echarte, and as the federal trial and appellate courts concluded in this case. It would be anomalous and a marked departure from precedent for this Court to disengage the state's equal protection clause from its federal counterpart and create a differing and more stringent standard, as Petitioners and their amici suggest. To conclude that a state equal protection violation exists, when no federal equal protection violation exists, requires the judicial creation of a new, previously unknown, higher state standard of review for which no textual or precedential support exists. It also makes state and federal equal protection dissimilar and thereby "unequal" in application.

Moreover, any attempt to inject the access to courts portion of the state constitution into state (or federal) equal protection analysis—by declaring that "access to courts" is a new category of fundamental rights for equal protection purposes—is both doctrinally and practically insupportable. The jurisprudence of

access to courts is separate and apart from equal protection analysis. The practical consequence of merging the two doctrines would be to strip the highly deferential rational basis test in economic regulation cases of its continuing viability in this context and effectively overrule the Court's prior equal protection cases involving damages caps and other economic regulations.

ARGUMENT

Overwhelmingly, economic regulations—such as caps on damages—have withstood state and federal equal protection challenges nationwide including in this Court in University of Miami v. Echarte, 618 So. 2d 189 (Fla. 1993). This case is no different. As the federal trial and appellate courts held, section 766.118's caps on noneconomic damages do not violate federal equal protection principles because the legislative branch may reasonably conclude that aggregate limits on such damages are rationally related to lowering the costs of medical malpractice insurance and healthcare. The result is the same under Florida's equal protection clause, which this and other Florida courts have interpreted in lockstep with its federal counterpart. This Court should resist the efforts of Petitioners and their amici to uncouple the state and federal equal protection clauses by judicially creating a more stringent state standard, whether it be via judicial decree or by merging access to courts jurisprudence with equal protection jurisprudence, as the following sections explain.

I. It Is Settled Law That Caps on Noneconomic Damage Awards Are Economic Regulations That Meet the Rational Basis Test.

In challenging an economic regulation under equal protection principles, it is well-established under Florida law that the burden is on the challenger to "negate every conceivable basis which might support it." AHCA v. Hameroff, 816 So. 2d 1145, 1148 (Fla. 1st DCA 2002) (citing Coy v. Fla. Birth-Related Neurological

Injury Comp. Plan, 595 So. 2d 943, 945 (Fla. 1992)). Indeed, the federal standard is the same: the challenging party must negate "any reasonably conceivable state of facts that could provide a rational basis." Bd. of Trustees v. Garrett, 531 U.S. 356, 367 (2001) (quotation omitted).

The rational basis test is premised on the principle that a properly functioning legislative process often produces imperfect legislation, rough accommodations, and uneven compromises thereby providing "the most lenient level of scrutiny under the federal and state equal protection clauses." Amerisure Ins. Co. v. State Farm Mut. Auto. Ins. Co., 897 So. 2d 1287, 1290 (Fla. 2005). It is so deferential that the government is not required to produce any proof, Vance v. Bradley, 440 U.S. 93, 110 (1979), and may base its classification on "rational speculation unsupported by evidence or empirical data[,]" Heller v. Doe, 509 U.S. 312, 321 (1993), even if there is "substantial expert opinion to the contrary." Hamilton v. State, 366 So. 2d 8, 10 (Fla. 1978); *see also* Heller, 509 U.S. at 321 ("A classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.' ") (citation omitted); Ginsberg v. State of New York, 390 U.S. 629, 642-643 (1968) ("We do not demand of legislatures 'scientifically certain criteria of legislation.' ") (citation omitted); Sproles v. Binford, 286 U.S. 374, 388 (1932) ("To make scientific precision a criterion of constitutional power would be to subject the State

to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.").

Even if the assumptions underlying a legislative classification are erroneous, "the very fact that they are 'arguable' is sufficient, on rational-basis review, to 'immunize' the [legislative] choice from constitutional challenge." Heller, 509 U.S. at 333 (citing F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 320 (1993)). The inquiry into whether a rational basis exists is not subject to courtroom fact-finding or a judicial balancing of the "wisdom, fairness, or logic" of the classification. Beach Commc'ns, 508 U.S. at 313. "Nor does it authorize 'the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.' " Heller, 509 U.S. at 319 (quoting New Orleans v. Dukes, 427 U.S. 297, 303 (1976)). Instead, the law must be upheld, even if the classification is improvident, ill-advised or unnecessary, if any set of facts exists that may reasonably be conceived to justify it. Beach Commc'ns, 508 U.S. at 313-15. If a single plausible reason exists for the classification, the test is met and the court's work is over. Id. at 313-14 ("Where there are 'plausible reasons' for Congress' action, 'our inquiry is at an end.' ") (citation omitted); *see also* Gallagher v. Motors Ins. Corp., 605 So. 2d 62, 69 (Fla. 1992).

If the classification is based on debatable evidence, a court must uphold the classification. Sproles, 286 U.S. at 388-89; Haire v. Fla. Dep't of Agric. & Consumer Servs., 870 So. 2d 774, 787 (Fla. 2004). Because legislatures are not required to articulate their reasons for enacting statutes, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." Beach Commc'ns, 508 U.S. at 315. Thus, if an appellate court conceives of any ground to support the law, regardless of whether the trial court considered that ground, the law must be upheld. Johnson v. Bd. of Regents, 263 F.3d 1234, 1251 n.17 (11th Cir. 2001); Panama City Med. Diagnostic Ltd. v. Williams, 13 F.3d 1541, 1546 (11th Cir. 1994) ("it is entirely permissible to rely on rationales that were not contemplated by the legislature at the time of the statute's passage"); Id. n.3 (noting that "one of the rationales relied on [in Beach Commc'ns, 508 U.S. at 318] was proffered not by the legislature in support of the challenged statute, but rather by a circuit judge, concurring in the circuit court's opinion"). As the Eleventh Circuit has noted, "[a]lmost every statute subject to the very deferential rational basis … standard is found to be constitutional." Doe v. Moore, 410 F.3d 1337, 1346-47 (11th Cir. 2005) (citation omitted).

Applying these principles to this case, the Legislature reasonably concluded that placing a cap on noneconomic damage awards could lower the costs of medical malpractice insurance policies, make insurance more affordable for

physicians, reduce incentives for physicians to leave (and attract more physicians to) the state. It was also reasonable for the Legislature to believe that citizens would have improved access to health care. Studies it relied upon showed that as costs for insurance continued to increase, it became functionally unavailable for some physicians, leading them to move their practices to other states. *See* Governor's Select Task Force on Healthcare Professional Liability Insurance, Final Report and Recommendations 56 (Jan. 29, 2003); § 766.201, Fla. Stat. The Legislature could have reasonably believed that caps could discourage frivolous lawsuits, lead to less contentious litigation, or encourage civil settlements and alternative dispute resolution such as mediation and arbitration. It is also conceivable that the caps were enacted for a purely financial purpose: to level the playing field or foster competition among medical malpractice insurers in Florida, "something that has long been recognized as a legitimate basis for upholding economic legislation." Hameroff, 816 So. 2d at 1149.

Petitioners and their amici ask this Court to engage in de novo fact-finding on the question of whether the Legislature's purpose in enacting the caps was justified, achievable, or desirable. They purport to rely on information, data, and reports—neither presented below nor subject to independent verification or cross-examination—to establish the unreasonableness of the caps or to undermine legislative findings made almost a decade ago. This process is precisely what the

rational basis test does *not* allow. The only relevant question is whether a single plausible basis existed for the Legislature's economic regulation (it had many); whether Petitioner and others have alternative data or policy arguments is simply beside the point. Even if the rationale of the Legislature were proven to be erroneous (it has not), "the very fact that [it is] 'arguable' is sufficient, on rational-basis review, to 'immuniz[e]' the congressional choice from constitutional challenge.' " Beach Commc'ns, 508 U.S. at 320 (citation omitted).

Given the deference underlying equal protection analysis, it is unsurprising that this Court in Echarte specifically held that per incident caps on noneconomic damages awards do not violate the state equal protection clause. 618 So. 2d at 191 ("[W]e have also considered the other constitutional claims and hold that the statutes do not violate the right to … equal protection."). Indeed, caps on noneconomic damages have overwhelmingly withstood equal protection challenges nationwide; both federal[1] and state[2] courts have rejected equal

[1] At least five federal courts have upheld noneconomic damages caps against equal protection challenges. *See, e.g.*, Davis v. Omitowoju, 883 F.2d 1155, 1158-59 (3d Cir. 1989) (finding "no merit" to claim that damage caps violate equal protection); Boyd v. Bulala, 877 F.2d 1191, 1197 (4th Cir. 1989) (upholding damages caps on both economic and noneconomic damages in medical malpractice actions); Lucas v. United States, 807 F.2d 414, 422 (5th Cir. 1986) (upholding limit on recovery because claimant "failed to convince us that there is no reasonable basis for the Texas legislature to conclude that this ceiling on recovery … is not conceivably related to the availability and cost of malpractice insurance and that such insurance and the distribution of medical care in Texas are not conceivably linked."); *see*

protection challenges to damages caps. The federal trial judge and the Eleventh Circuit judges in this case reached the same conclusion. *See* Estate of McCall v. United States, 663 F. Supp. 2d 1276, 1303-04 (N.D. Fla. 2009), *aff'd,* 642 F.3d 944 (11th Cir. 2011). In rejecting an equal protection challenge to the noneconomic damages caps in section 766.118, the Northern District explained that caps leaving multiple beneficiaries to split one damage award are neither arbitrary nor unreasonable and serve the legitimate government purpose of making healthcare and liability insurance more affordable and available. Id. It noted that "although the statute at issue may have different practical effects on different sized families,

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also Estate of McCall v. United States, 663 F. Supp. 2d 1276, 1303-04 (N.D. Fla. 2009), *aff'd,* 642 F.3d 944 (11th Cir. 2011).

[2] At least twelve state courts have held that damages caps do not implicate equal protection guarantees. *See, e.g.*, Zdrojewski v. Murphy, 657 N.W. 2d 148 (Mich. App. 1999) (rejecting argument that victims of medical malpractice are a suspect class and concluding that noneconomic damage caps survive rational basis test); Adams v. Children's Mercy Hosp., 832 S.W. 2d 898 (Mo. 1992) (holding that limits on noneconomic damage awards are a rational response to the legislative purpose of maintaining health care for the citizens of the state and do not violate equal protection guarantees); Robinson v. Charleston Area Med. Ctr., 414 S.E.2d 877 (W. Va. 1991) (holding that statute limiting noneconomic damage recovery did not violate equal protection); *see also* MacDonald v. City Hosp., Inc., 2011 WL 2517201 (W. Va. Jun. 22, 2011) (upholding caps against multiple constitutional challenges) (citing Evans ex rel. Kutch v. State, 56 P.3d 1046 (Alaska 2002); Fein v Permanente Med. Gp., 695 P.2d 665 (Cal. 1985); Garhart ex rel. Tinsman v. Columbia/Healthtone, L.L.C., 95 P.3d 1155 (Colo. 2004); Samsel v. Wheeler Transport Servs., Inc., 789 P.2d 541 (Kan. 1990); Bair v. Peck, 811 P.2d 1175 (Kan. 1991); Gourley ex rel. Gourley v. Neb. Methodist Health Sys., Inc., 663 N.W.2d 43 (Neb. 2003); Arbino v. Johnson, 880 N.E.2d 420 (Ohio 2007); Pulliam v. Coastal Emergency Servs. of Richmond, Inc., 509 S.E.2d 307 (Va. 1999), among others).

it draws no distinctions based on the size of a family; the statute differentiates claims only on the basis of each occurrence of medical malpractice." Id. at 1303. "Thus, one occurrence of wrongful death due to medical negligence gives rise to one cause of action for the benefit of the estate and the survivors … all families who have lost a loved one due to an occurrence of medical negligence are treated similarly." Id.

Furthermore, the Northern District recognized that the Florida Legislature had a "rational and legitimate governmental purpose for this per-occurrence classification, i.e., the goal of making healthcare and professional liability insurance affordable and available by reducing the costs of malpractice insurance and the unpredictability of excessive noneconomic damage awards." Id. at 1303-04. The Eleventh Circuit affirmed on federal constitutional grounds. McCall, 642 F.3d 944. As the next section explains, this Court should apply the deferential rational basis standard under the state's equal protection clause to reach the same result and not create a stricter standard or muddle the clarity of equal protection analysis as Petitioners seek to do in this case.

II. No Principled Basis Exists for Creating a Stricter Equal Protection Standard Under the State Constitution or to Apply Strict Scrutiny By Merging Access to Courts and Equal Protection Analysis.

No basis exists to depart from the reasoning, principles, and standards that courts have applied in Florida and federal equal protection cases. For decades,

Florida courts have interpreted state and federal equal protection in lockstep. *See, e.g.*, Sasso v. Ram Prop. Mgmt., 431 So. 2d 204, 211 (Fla. 1st DCA 1983) ("we use federal authority as a guide because of the parallel commands of the federal and Florida constitutions") (citing Schreiner v. McKenzie Tank Lines & Risk Mgmt. Servs., Inc., 408 So. 2d 711 (Fla. 1st DCA 1982) (approved, 432 So. 2d 567 (Fla. 1983))); *see also* A Choice For Women, Inc. v. Fla. Agency For Health Care Admin., 872 So. 2d 970 (Fla. 3d DCA 2004) (rejecting a claim that Florida's equal protection clause affords greater protection than the U.S. Constitution). This Court routinely relies on federal law as controlling authority in state equal protection cases. *See, e.g.*, Warren v. State Farm Mut. Ins. Co., 899 So. 2d 1090 (Fla. 2005); Hechtman v. Nations Title Ins. Co. of N.Y., 840 So. 2d 993, 996-97 (Fla. 2003); The Fla. H.S. Activities Ass'n, Inc. v. Thomas, 434 So. 2d 306, 308 (Fla. 1983).

To prevail on the state equal protection claim, the Petitioner and its amici suggest that a more stringent analysis is necessary, and they encourage the Court to adopt a strict scrutiny test by merging access to courts jurisprudence and equal protection analysis. This Court should reject this plea for institutional, prudential, and practical reasons.

First, nothing in the text of the state equal protection clause suggests that it should be applied in a more stringent way than its federal counterpart. Though the provisions are worded a bit differently, nothing in their text or histories suggests a

different, more stringent test. Indeed, history and tradition—as well as caselaw—confirm the prevailing principle that the two clauses are functionally identical. For institutional reasons, the Court simply has no basis to devise some non-textual and previously unknown judicial test that would displace the rational basis test in economic regulation cases.

Second, for prudential reasons this Court does not depart from prior precedent and establish new standards in constitutional cases except in the most compelling of changed circumstances. Strand v. Escambia County, 992 So. 2d 150, 159-60 (Fla. 2008). As this Court noted in Strand, "the presumption in favor of precedent is strong" and the following three questions must be considered:

> (1) Has the prior decision proved unworkable due to reliance on an impractical legal "fiction"? (2) Can the rule of law announced in the decision be reversed without serious injustice to those who have relied on it and without serious disruption in the stability of the law? And (3) have the factual premises underlying the decision changed so drastically as to leave the decision's central holding utterly without legal justification?

992 So. 2d at 159 (quoting N. Fla. Women's Health v. State, 866 So. 2d 612, 637 (Fla. 2003)). Here, no basis exists to depart from the rational basis test in economic cases under these three inquiries. No "legal fiction" is involved under equal protection analysis; indeed, it is questionable whether the caps in section 766.118 even constitute a "classification" for equal protection purposes given they apply without regard to any statutorily defined subcategories of claimants. Further, a

serious disruption in the stability of equal protection analysis would result from a judicially-created higher standard whose effects would ripple far beyond the instant case. To do so would also undermine the separation of powers doctrine, displacing the historic deference owed the legislative branch and creating even greater judicial power to intrude upon and overturn economic policy judgments inherent in the exercise of legislative power under the Florida Constitution. Additionally, no sufficient showing has been made that the basis for the legislative action underlying the caps, which have been used for decades, has somehow rendered the equal protection caselaw in this field "utterly without legal justification." To the contrary, both the majority view and national trend *favor* the constitutionality of the challenged caps. *See, e.g.*, MacDonald v. City Hosp., Inc., 2011 WL 2517201, at *15 (W. Va. Jun. 22, 2011) (upholding caps on damages) ("We note that our decision today is consistent with the majority of jurisdictions that have considered the constitutionality of caps on noneconomic damages in medical malpractice actions or in any personal injury action.").

Third, the practical ramifications of charting a separate course for state equal protection analysis are that it would invite claimants to seek ever more widening—and ever more dubious—protection under the new state standard. Confusion would result as the commonly held understanding of the equivalence of the two constitutional protections is thrown into disarray. Courts would have to apply

differing tests to identical facts, thereby making the application of equal protection principles "unequal" under the state and federal constitutions.

Finally, the suggestion that this Court should raise the equal protection standard of the economic regulation at issue to a strict scrutiny standard because a claimed fundamental right of access to courts is at issue should be emphatically rejected.[3] Access to courts jurisprudence is based on a separate and distinct portion of the Florida constitution. Art. I, § 21, Fla. Const. The judicial standards applied in access to courts cases are unique and do not mirror those of equal protection. To conflate the two, and announce that the strictest equal protection test of all will henceforth be applied to economic legislation that relates to damages awards, would severely undermine the legislature's traditional role in this field. While the access to courts clause is an important protection, it has not been used historically to question the wisdom of economic regulation that is universally considered to be subject only to rational basis analysis.

CONCLUSION

This Court has previously upheld noneconomic damages caps in similar cases, and it should do so here. Petitioners' equal protection arguments have been rejected by this Court and others nationwide. This Court should continue to follow its own equal protection precedent and the body of settled caselaw on this topic,

[3] As the United States and its other amici argue, the caps at issue do not violate access to courts principles based on Echarte and related precedent.

which forms the overwhelming majority view in state and federal courts. No reason exists to depart from this settled law; this Court should therefore answer the certified questions in the negative.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

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