No. SC11-1148

IN THE SUPREME COURT OF FLORIDA

ESTATE OF MICHELLE EVETTE MCCALL, by and through co-personal representatives EDWARD M. MCCALL, II, MARGARITA F. MCCALL, and JASON WALLEY,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON DISCRETIONARY REVIEW FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, NO. 09-16375-J

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

STATEMENT OF THE ISSUES PRESENTED

After a trial on the merits of this Federal Tort Claims Act case, the United States District Court for the Northern District of Florida found that negligence by U.S. Air Force medical personnel proximately caused the death of Michelle McCall. Expanded Record Excerpts ("ERE") 68:12.[1] The court determined that Ms. McCall's survivors had suffered $2.98 million in economic and noneconomic

[1]Citations to the Expanded Record Excerpts are of the form "[Tab Number]:[Page Number]."

damages, but limited its award to $1.98 million based on the application of Florida's statutory caps on noneconomic damages in medical negligence actions, § 766.118, Fla. Stat. (2011). *Id.* at 37. The United States Court of Appeals for the Eleventh Circuit determined that the caps did not violate the United States Constitution or the takings provision of the Florida Constitution, and certified four questions to this Court:

1. Does Florida's statutory cap on noneconomic damages violate the right to equal protection under Article I, Section 2 of the Florida Constitution?

2. Does Florida's statutory cap on noneconomic damages violate the right of access to the courts under Article I, Section 21 of the Florida Constitution?

3. Does Florida's statutory cap on noneconomic damages violate the right to trial by jury under Article I, Section 22 of the Florida Constitution?

4. Does Florida's statutory cap on noneconomic damages violate the separation of powers guaranteed by Article II, Section 3 and Article V, Section 1 of the Florida Constitution?

STATEMENT OF THE CASE

Michelle Evette McCall gave birth to a son, W.W., while under the care of United States Air Force medical personnel. ERE 68:2-3. Ms. McCall lost consciousness shortly thereafter and died four days later. *Id.* at 5-6.

Ms. McCall's estate—represented by her parents, Edward M. McCall II and Margarita McCall, and her son's father, Jason Walley (together, "plaintiffs")—filed suit in the United States District Court for the Northern District of Florida. ERE 1:1-16. Invoking the court's jurisdiction under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, ERE 1:1-2, plaintiffs alleged that the Air Force medical personnel's negligence caused Ms. McCall's death, ERE 1:9-13.

After a bench trial, the district court entered judgment for plaintiffs and, applying Florida's $1 million statutory cap on noneconomic damages in suits involving negligence by practitioners that results in death, awarded plaintiffs $1.98 million in damages. ERE 68:37. In so doing, the court rejected plaintiffs' argument that Florida's statutory damages caps are unconstitutional under the Florida and United States Constitutions.

Plaintiffs appealed to the United States Court of Appeals for the Eleventh Circuit. The court of appeals affirmed the district court's rulings regarding the constitutionality of the cap under the United States Constitution and Article X, Section 6 of the Florida Constitution (the takings provision). *See Estate of McCall v. United States*, 642 F.3d 944, 951 (11th Cir. 2011). The court of appeals certified four questions to this Court regarding the constitutionality of the statutory cap under various other provisions of the Florida Constitution. *Id.* at 952-53.

STATEMENT OF THE FACTS

I. STATUTORY BACKGROUND

A. The Federal Tort Claims Act

The Federal Tort Claims Act ("FTCA") provides a limited waiver of the United States' sovereign immunity for tort actions for "personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment[.]" 28 U.S.C. § 1346(b)(1). The FTCA's waiver of sovereign immunity generally provides that the United States is liable in tort "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 2674, and limits jurisdiction to "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred," 28 U.S.C. § 1346(b)(1).

Accordingly, under the FTCA, both the elements of a cause of action and the measure of damages, including damages caps, are taken from the law of the state where the tort occurred. *See Bravo v. United States*, 532 F.3d 1154, 1160-61 (11th Cir. 2008); *Scheib v. Florida Sanitarium & Benevolent Ass'n*, 759 F.2d 859, 864 (11th Cir. 1985). In this case, the medical negligence at issue occurred in Florida, and the district court thus applied Florida law, including Florida's statutory cap on

noneconomic damages in medical negligence suits, § 766.118, Fla. Stat.

B. Florida's Damages Caps

1. In 2003, the Florida Legislature enacted statutory limitations on noneconomic damages in medical negligence actions. *See generally* § 766.118, Fla. Stat. (2011). Florida law provides several different damages caps, ranging from $150,000 to $1.5 million per incident of negligence, regardless of the number of claimants in a particular case. Which of these caps applies depends on (1) whether the negligence occurred in an emergency situation; (2) whether the negligence resulted in catastrophic injury or death; and (3) whether the negligence was committed by a "practitioner" or a "nonpractitioner." *See id.*

As relevant here, noneconomic damages in a medical negligence action against practitioners providing nonemergency care are capped at $1 million per incident if the negligence results in a permanent vegetative state or death. *See* § 766.118(2)(b), Fla. Stat. The relevant provision states:

> (a) With respect to a cause of action for personal injury or wrongful death arising from medical negligence of practitioners, regardless of the number of such practitioner defendants, noneconomic damages shall not exceed $500,000 per claimant. No practitioner shall be liable for more than $500,000 in noneconomic damages, regardless of the number of claimants.
>
> (b) Notwithstanding paragraph (a), if the negligence resulted in a permanent vegetative state or death, the total noneconomic damages

> recoverable from all practitioners, regardless of the number of claimants, under this paragraph shall not exceed $1 million. . . .

§ 766.118(2), Fla. Stat.

2. The Florida Legislature enacted these damages caps in response to "a medical malpractice insurance crisis of unprecedented magnitude." Ch. 416, § 1(1), Laws of Fla. (2003). In April 2002, the American Medical Association issued a report identifying Florida as one of 12 states in the midst of a medical liability insurance crisis. *See* Governor's Select Task Force on Healthcare Professional Liability Insurance ("Task Force Report") at iii, Supplemental Excerpts of Record 25-1:11, *available at* http://www.doh.state.fl.us/myflorida/DOH-Large-Final%20Book.pdf. In response, Florida's Governor created a task force to examine the crisis and to make recommendations for "protecting Floridians' access to high-quality and affordable healthcare." *Id.* at iii-iv (quotation marks omitted).

In January 2003, the task force issued a 345-page report making findings and issuing 60 recommendations on topics such as improving the quality of medical care, tort reform, alternative dispute resolution, and insurance reform. The "centerpiece" of the task force's report, "and the recommendation that will have the greatest long-term impact on healthcare provider liability insurance rates, and thus on the availability and affordability of healthcare in Florida," was a recommended

$250,000 cap on noneconomic damages in medical negligence cases. *Id.* at 336. The task force concluded that such a cap was a necessary part of any reform given Florida's history of failed medical malpractice reforms, none of which had included a cap on noneconomic damages. *Id.* at 219.

The Florida Legislature enacted the damages cap at issue here after reviewing the Task Force Report and conducting its own investigation, including hearing sworn testimony and considering 16,000 affidavits from individuals across Florida. *See* Fla. H.R. Select Comm. on Med. Liab. Ins., *Report* (March 2003), *available at* http://tinyurl.com/6eknhq; ERE 20-7-8:81 (Fla. H.R. Floor Debate, Aug. 13, 2003) (statement by Rep. Harrell) (discussing hearings and affidavits). Together with the damages caps, the legislature also enacted numerous other reforms, including a requirement that companies issuing medical malpractice insurance policies adjust their rates to reflect the savings provided by the damages caps, as calculated by the Florida Office of Insurance Regulation. Ch. 416, § 40, Laws of Fla. (2003); §§ 627.062(8)(a), (b), Fla. Stat. (Sept. 15, 2003).[2] On November 10, 2003, that office determined that the damages cap would result in a 7.8% reduction in medical malpractice insurance premiums. *See* Florida Office of

[2]Effective May 17, 2011, the Florida Legislature amended § 627.062(8) so that it no longer contains the language added by the 2003 law. The adjusted rates mandated by the 2003 law, however, were required to take effect no later than January 1, 2004. *See* § 627.062(8)(b), Fla. Stat. (Sept. 15, 2003).

Insurance Regulation, *Informational Memorandum* (Nov. 10, 2003), *available at* http://www.floir.com/ siteDocuments/OIR-03-020m.pdf

In a report issued October 1, 2010, the Florida Office of Insurance Regulation analyzed the state of the medical malpractice insurance market in Florida and determined that "the 2003 changes to the law have benefited policyholders and strengthened the solvency of medical malpractice carriers." Florida Office of Insurance Regulation, *2010 Annual Report*, at 4 (Oct. 1, 2010), *available at* http://www.floir.com/siteDocuments/ MedicalMalReport10012010.pdf. The report found that "the solvency of the medical malpractice insurers has been enhanced by the introduction of the legislative reforms. Further, it appears that physicians malpractice premiums have generally decreased significantly since the reforms were implemented." *Id.* at 45.

II. THIS LITIGATION

A. Factual Background

The facts of this case as found by the district court after a bench trial are as follows. Michelle McCall became pregnant in June 2005. ERE 68:2. Ms. McCall, a U.S. Air Force dependent, obtained prenatal care from the Air Force's family practice department at the Eglin Air Force Base clinic. *Id.*

On February 21, 2006, test results revealed that Ms. McCall was suffering

from severe preeclampsia, a condition that required her to be hospitalized immediately for labor to be induced. *Id.* Because Eglin Air Force Base's hospital was temporarily unavailable for obstetric and delivery services, Ms. McCall was admitted to a private hospital, the Fort Walton Beach Medical Center, where the Air Force maintained its own nursing station and delivery rooms, and where Ms. McCall was treated by Air Force medical personnel. *Id.* at 2 n.4. Ms. McCall's doctors induced labor, and, at 1:25 a.m. on February 23, 2006, Ms. McCall gave birth to a healthy son. *Id.* at 3.

When Ms. McCall's placenta did not deliver as expected, her doctors attempted manual extraction. *Id.* at 3-4. These attempts were unsuccessful, so Ms. McCall's doctors called for assistance from an Air Force obstetrician, Major Frank Archbald, who removed Ms. McCall's placenta and then surgically repaired lacerations on her vaginal wall. *Id.* at 4. After completing the vaginal repair, Dr. Archbald instructed one of Ms. McCall's doctors to perform a blood count and to order two units of blood for transfusion if needed. *Id.* at 5. When a nurse went to draw Ms. McCall's blood for the blood count, Ms. McCall was unresponsive. *Id.* at 5-6. Emergency measures were undertaken, but Ms. McCall never regained consciousness. *Id.* at 6. She died on February 27, 2006, after being removed from life support. *Id.* The cause of Ms. McCall's death was shock and cardiac arrest

precipitated by severe blood loss. *Id.*

B. The United States District Court Decision

The district court accepted plaintiffs' expert's opinion that the medical personnel attending Ms. McCall during and after her delivery provided care below the standard required under the circumstances. *Id.* at 9-10. Because the medical staff attending Ms. McCall were federal government employees, the court found the United States liable for Ms. McCall's death. *Id.* at 12.

The district court then calculated the damages due Ms. McCall's estate. ERE 68:13-19, 37; *see generally* §§ 768.16-768.26, Fla. Stat. (Wrongful Death Act). It found that plaintiffs had suffered $980,462.40 in economic damages (primarily loss of past and future household and related services) and $2 million in noneconomic damages ($750,000 by each of Ms. McCall's parents and $500,000 by her son). ERE 68:37. However, because of Florida's statutory limitation on awards of noneconomic damages in medical malpractice cases, § 766.118(2)(b), Fla. Stat., the court capped its award of noneconomic damages at $1 million, divided proportionately, for a total award of $1.98 million. ERE 68:37.

In so doing, the district court rejected plaintiffs' arguments that Florida's damages cap violates the Florida and United States Constitutions. *Id.* at 19-37. The court held that the cap does not violate the Florida Constitution's "Access to

Courts" provision, Art. I, § 21, Fla. Const., because the Florida Legislature had found both an overpowering public necessity for the caps and that no alternative method of meeting the necessity existed. ERE 68:25-28. The court explained that its holding on this point mirrored *University of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993), in which this Court rejected a similar Access to Courts challenge to a statutory cap on noneconomic damages for personal injury due to medical negligence. ERE 68:28.

The district court likewise held that the cap did not violate equal protection. ERE 68:29-35. Applying rational basis review, the court concluded that "the Florida legislature had a rational and legitimate governmental purpose" for enacting the caps, which were "neither arbitrary nor unreasonable because limiting the amount of money available for each occurrence of medical negligence furthers the goal of reducing costs and making the insurance risk more predictable." ERE 68:31-32.

Finally, the district court rejected plaintiffs' arguments that the damages cap violated Florida's doctrine of separation of powers, constituted a taking of property without just compensation, and violated plaintiffs' right to trial by jury under the Florida Constitution. The court explained that the cap "does not impermissibly interfere with the function of the judiciary," but instead "defines the substantive

and remedial rights of the litigants," and therefore is not an impermissible legislative remittitur. ERE 68:35-36. The court observed that the cap is not an illegal taking because plaintiffs' right to sue did not arise until after the cap was instituted. *Id.* at 36. And the court held that plaintiffs' right to a jury trial was not violated because plaintiffs had no such right under the Federal Tort Claims Act. ERE 68:24 n.37.

C. The United States Court of Appeals Decision

Plaintiffs appealed to the United States Court of Appeals for the Eleventh Circuit, which affirmed in part and certified four questions to this Court. *See Estate of McCall v. United States*, 642 F.3d 944 (11th Cir. 2011).

The court of appeals rejected plaintiffs' claim that Florida's damages cap violates their right to equal protection under the United States Constitution. Because the statute does not burden a fundamental right or draw a suspect classification, the court analyzed the cap under rational basis review. It found that the Florida Legislature had a legitimate governmental purpose in enacting the cap, "namely to reduce the cost of medical malpractice premiums and health care." *Id.* at 951. And, the court determined, the means that the Florida Legislature chose to further that purpose, "a per incident cap on noneconomic damages, bears a rational relationship to that end." *Id.* "The Florida legislature could reasonably have

concluded that such a cap would reduce damage awards and in turn make medical malpractice insurance more affordable and healthcare more available." *Id.*

The court of appeals further determined that the damages cap was not a taking without just compensation in violation of the United States and Florida Constitutions. Because the medical negligence at issue took place three years after the Florida Legislature enacted the damages cap, the cap did not deprive plaintiffs of a vested right, and therefore did not constitute a taking. *Id.*

The court of appeals then turned to plaintiffs' arguments that the damages cap violates their right to equal protection under Article I, Section 2 of the Florida Constitution; their right of access to the courts under Article I, Section 21 of the Florida Constitution; their right to trial by jury under Article I, Section 22 of the Florida Constitution; and the principle of separation of powers found in Article II, Section 3 and Article V, Section 1 of the Florida Constitution. The court stated that Florida law in these areas is "unsettled," *Estate of McCall*, 642 F.3d at 952, and therefore certified those four questions to this Court, *id.* at 952-53.

SUMMARY OF ARGUMENT

After a bench trial on the merits in this Federal Tort Claims Act case, plaintiffs prevailed and were awarded $1.98 million in damages. The United States did not contest that judgment on appeal, and has already paid plaintiffs the $1.98

million they were awarded. Instead, it is plaintiffs who appealed the district court's award, seeking an additional $1 million in damages, arguing that Florida's limitation on noneconomic damages in medical negligence actions is unconstitutional under numerous provisions of the United States and Florida Constitutions. The United States Court of Appeals for the Eleventh Circuit rejected plaintiffs' arguments under the United States Constitution and one of their arguments under the Florida Constitution, and certified four questions to this Court regarding the constitutionality, under the Florida Constitution, of Florida's statutory limitation on noneconomic damages in medical negligence actions.

The United States thus appears in this Court to defend the constitutionality, under the Florida Constitution, of Florida law. The United States is in this position because the Federal Tort Claims Act requires that, in tort actions against the United States, the elements of a cause of action and the measure of damages, including damages caps, be taken from the law of the state where the tort occurred.

Applying this Court's interpretation of its own State constitution, there is no basis to conclude that the statutory damages cap at issue here exceeds constitutional limitations. This Court has expressly held that even lower damages caps do not violate the Florida Constitution's access to courts provision, its guarantee of the right to trial by jury, its equal protection provision, or its

separation of powers principle. *See University of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993) (access to courts, jury trial and equal protection); *Smith v. Department of Ins.*, 507 So. 2d 1080 (Fla. 1987) (separation of powers); *Cauley v. City of Jacksonville*, 403 So. 2d 379 (Fla. 1981) (jury trial). Plaintiffs seize on statements from this Court's prior opinions addressing damages caps, but it is this Court's prior holdings, not its dicta, that control.

Fundamentally, as we explain in more detail below, plaintiffs' arguments reflect their disagreement with the empirical and legislative judgments made by the Florida Legislature in enacting the damages caps at issue. But plaintiffs have presented no evidence that could plausibly call into question those judgments, relying instead on law review articles and other assorted studies. This Court defers to the legislature's factual findings and policy judgments unless they are "clearly erroneous, arbitrary or wholly unwarranted." *Moore v. Thompson*, 126 So. 2d 543, 549 (Fla. 1960); *see also Echarte*, 618 So. 2d at 196. In this case, the legislature's judgments were supported by the Task Force Report, sworn testimony, and affidavits from thousands of Floridians, and thus cannot be considered clearly erroneous. The constitutionality of the damages cap at issue should therefore be upheld.

ARGUMENT

I. Florida's Damages Cap Does Not Violate Plaintiffs' Right to Equal Protection Under the Florida Constitution

A. The Cap Survives Rational Basis Review

1. The Florida Constitution guarantees the equal protection of the laws. *See* Art. I, § 2, Fla. Const. When a statute, such as the damages cap at issue here, does not impair a fundamental right or affect a suspect class of persons, it is reviewed under the rational basis test, and must be upheld if the classification bears a rational relationship to a legitimate governmental objective. *See, e.g.*, *Warren v. State Farm Mut. Auto. Ins. Co.*, 899 So. 2d 1090, 1095 (Fla. 2005). The relevant inquiry under this test is "(1) whether the challenged statute serves a legitimate governmental purpose, and (2) whether it was reasonable for the Legislature to believe that the challenged classification would promote that purpose." *Id.* "The burden is upon the party challenging the statute or regulation to show that there is *no* conceivable factual predicate which would rationally support the classification under attack. Where the challenging party fails to meet this difficult burden, the statute or regulation must be sustained." *Florida High Sch. Activities Ass'n v. Thomas*, 434 So. 2d 306, 308 (Fla. 1983).

As both the United States District Court and the United States Court of Appeals have recognized in this case, Florida's cap on noneconomic damages in

medical negligence cases easily passes the rational basis test. *See* ERE 68:29-35; *Estate of McCall*, 642 F.3d at 951. The Florida Legislature's various purposes for enacting the cap—including "making quality health care available to the citizens of this state," "ensuring that physicians continue to practice in Florida," and "ensuring that those physicians have the opportunity to purchase affordable professional liability insurance," Ch. 416, § 1(14), Laws of Fla. (2003)—are undeniably legitimate.

And it was entirely reasonable for the legislature to believe that limiting noneconomic damages in medical negligence cases on a per-incident basis would promote its legitimate purposes. The Task Force Report upon which the legislature relied expressly concluded, based on Florida's history of failed reforms, that "[a] cap on non-economic damages must be part of a package of reforms," and that a per-incident cap in particular "is the only available remedy that can produce a necessary level of predictability." Task Force Report at 219. Published studies addressing the issue also supported the Florida Legislature's approach. *See id.* at 192-200 (listing and discussing articles). As this Court recognized in addressing an equal protection challenge to a statute precluding recovery of nonpecuniary damages by a decedent's adult children in medical negligence cases, "[c]learly, limiting claims that may be advanced by some claimants would proportionally

limit claims made overall and would directly affect the cost of providing health care by making it less expensive and more accessible." *Mizrahi v. North Miami Med. Ctr., Ltd.*, 761 So. 2d 1040, 1042 (Fla. 2000). Similarly in this case, "[t]he Florida legislature could reasonably have concluded that such a cap would reduce damage awards and in turn make medical malpractice insurance more affordable and healthcare more available." *Estate of McCall*, 642 F.3d at 951.

2. Plaintiffs maintain that the damages cap at issue cannot pass the rational basis test. *See* Initial Brief for Plaintiffs-Appellants ("Pl.'s Br.") at 18-29. This argument applies the wrong legal standard and is also incorrect on its own terms.

Plaintiffs assert that the Eleventh Circuit's rational basis analysis "was severely flawed" because it "imposed an impossible and unreasonable burden on the Plaintiffs of disproving 'every conceivable basis which might support' the statute." *Id.* at 19 (quoting *Estate of McCall*, 642 F.3d at 950). Plaintiffs argue that, rather than being held to this standard, they should be able to "disprove the 'rational basis' for a law by demonstrating that it is arbitrary and oppressive." *Id.*

When evaluating statutes under the Florida Constitution's equal protection clause, however, this Court has employed the precise "every conceivable basis" test invoked by the Eleventh Circuit. *See, e.g.*, *Thomas*, 434 So. 2d at 308 ("The burden is upon the party challenging the statute or regulation to show that there is *no*

conceivable factual predicate which would rationally support the classification under attack."); *Lewis v. Mathis*, 345 So. 2d 1066, 1069 (Fla. 1977) ("Those who complain of unjust discrimination by the State in violation of the State and Federal constitutions have the burden of showing that the alleged discrimination has no conceivable basis, in differences of conditions, sufficient to justify the statutory regulation under attack."). The Florida Court of Appeal uses the same test. *See, e.g.*, *Samples v. Florida Birth-Related Neurological Injury Comp. Ass'n*, 40 So. 3d 18, 23 (Fla. 5th DCA 2010) ("The statute must be upheld if there is any conceivable state of facts or plausible reason to justify it, regardless of whether the Legislature actually relied on such facts or reason."); *Amerisure Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 865 So. 2d 590, 592 (Fla. 2d DCA 2004) ("The party challenging the statute has the burden to establish that there is no conceivable factual predicate that would rationally support the classification."). There is thus no basis for plaintiffs' suggestion that they should be held to a less demanding standard under Florida law than under federal law.

Plaintiffs' arguments that the Florida Legislature had no factual basis to assume that capping noneconomic damages would reduce malpractice insurance premiums, Pl.'s Br. at 21, and no reason to believe that insurers would pass any savings on to doctors, *id.* at 24, are likewise severely flawed. The Florida

Legislature reasonably believed that insurers would pass savings on to doctors in the form of lower malpractice insurance premiums because, as previously noted, the 2003 law itself dictated that result. *See* Ch. 416, § 40, Laws of Fla. (2003); §§ 627.062(8)(a), (b), Fla. Stat. (Sept. 15, 2003) (requiring companies issuing medical malpractice insurance policies adjust their rates to reflect the savings provided by the damages cap, as calculated by the Florida Office of Insurance Regulation). And while plaintiffs criticize the task force's reliance on California's experience with a cap on noneconomic damages, Pl.'s Br. at 21-22, the task force did so based on evidence that California's "cap on non-economic damages has lowered medical malpractice premiums, which, in turn, has lowered healthcare costs and increased access to healthcare for all Californians." Task Force Report at 194 (citing study). Other studies and testimony before the task force also supported its conclusion that a cap on noneconomic damages would reduce medical malpractice insurance premiums. *See id.* at 198-201. Plaintiffs' disagreement with the task force's and the Legislature's empirical and predictive judgment on this issue falls far short of meeting their burden "to show that there is *no* conceivable factual predicate which would rationally support the classification under attack." *Thomas*, 434 So. 2d at 308.

B. Plaintiffs' Other Equal Protection Arguments Are Meritless

Plaintiffs further contend that the damages cap at issue violates the Florida Constitution's equal protection guarantee because it treats an act of medical negligence that gives rise to multiple claims differently from an act of medical negligence that gives rise to only a single claim, Pl.'s Br. at 8; because it discriminates against "the relatively few most seriously harmed victims of medical malpractice," *id.* at 28; and that it should be analyzed under strict scrutiny because it "implicates fundamental rights under the Florida Constitution's access to courts and jury-trial provisions," *id.* at 12. These arguments are contrary to controlling Florida Supreme Court precedent and are also meritless.

1. Relying on *St. Mary's Hospital v. Phillipe*, 769 So. 2d 961 (Fla. 2000), Plaintiffs argue that the damages cap violates the state equal protection guarantee because it treats an act of medical negligence that gives rise to multiple claims differently than an act of medical negligence that gives rise to only a single claim. *See* Pl.'s Br. at 8. In *St. Mary's Hospital*, this Court addressed the question whether a $250,000 statutory cap on noneconomic damages in medical negligence cases submitted to arbitration applied on a per-claimant or a per-incident basis. The Court explained that the statute was ambiguous, and held that it applied on a per-claimant basis because that interpretation best promoted the legislative intent

underlying the particular provision at issue. *St. Mary's Hospital*, 769 So. 2d at 970.

The Court also stated that the alternative interpretation "would create equal protection concerns." *Id.* at 971. The Court noted that, were the statute to apply on a per-incident basis, it would treat the death of a wife who leaves only a surviving spouse differently from the death of a wife who leaves a spouse and four minor children, by causing the larger family to divide a same-size award. *Id.* at 972. The Court "fail[ed] to see how this classification bears any rational relationship to the Legislature's stated goal of alleviating the financial crisis in the medical liability industry" by encouraging voluntary arbitration of medical negligence claims. *Id.*

Plaintiffs' reliance on *St. Mary's Hospital* is misplaced. As the U.S. District Court correctly recognized, ERE 68:34 n.43, *St. Mary's Hospital*'s equal protection discussion was dicta—the Court's interpretation of the statute was driven not by equal protection concerns but was instead a reflection of the legislature's intent. *See St. Mary's Hospital*, 769 So. 2d at 968 ("Where there is ambiguity and uncertainty in the words employed in a statute, we must look to the legislative intent for guidance."). In contrast, this Court in *Mizrahi* expressly addressed an equal protection challenge to a statute that limited damages in medical negligence cases and held that the statute was "rationally related to controlling healthcare costs and accessibility." *Mizrahi*, 761 So. 2d at 1043. Like the statute at issue in *Mizrahi*,

the damages cap at issue here serves to "limit claims made overall and . . . directly affect the cost of providing health care by making it less expensive and more accessible." *Id.* It is therefore rationally related to the legislature's legitimate purpose in controlling healthcare costs and accessibility. *Accord Estate of McCall*, 642 F.3d at 951.

Were this Court to deem its *St. Mary's Hospital* dicta controlling here, its decision would not only conflict with *Mizrahi*, but it would also conflict with the Eleventh Circuit's decision in this case, and suggest—for the first time—that the Florida Constitution's equal protection guarantee is to be interpreted differently than that found in the United States Constitution. The Eleventh Circuit considered, and expressly rejected, plaintiffs' argument that the legislature's use of a "per incident" cap was not rationally related to a legitimate governmental purpose. *See Estate of McCall*, 642 F.3d at 951. The Eleventh Circuit explained that "[t]he legislature identified a legitimate governmental purpose in passing the statutory cap, namely to reduce the cost of medical malpractice premiums and health care." *Id.* As the Eleventh Circuit concluded, the means chosen to further that purpose, "a per incident cap on noneconomic damages, bears a rational relationship to that end. The Florida legislature could reasonably have concluded that such a cap would reduce damage awards and in turn make medical malpractice insurance more

affordable and healthcare more available." *Id.*

This Court has explicitly found "that the framers of this constitutional provision [the Florida Constitution's equal protection guarantee] did not intend that article I, section 2, have a broader application than the related provision of the fourteenth amendment to the United States Constitution." *Schreiner v. McKenzie Tank Lines*, 432 So. 2d 567, 568 (Fla. 1983). This Court thus explained that, "although the United States Supreme Court's construction of the fourteenth amendment is not controlling, it does give us persuasive advice as to how to construe article I, section 2 of the Florida Constitution." *Id.* at 569; *see also Osterndorf v. Turner*, 426 So. 2d 539, 543 (Fla. 1982) (stating that cases interpreting the federal constitution are "relevant and persuasive to the consideration of whether Florida's equal protection clause has been violated"). Following this Court's guidance, other courts have also interpreted the two provisions consistently. *See, e.g., Florida League of Cities, Inc. v. Department of Envtl. Regulation*, 603 So. 2d 1363, 1368 (Fla. 1st DCA 1992) ("In that the federal definition of the rational basis test is applicable to Florida's equal protection clause, *Osterndorf v. Turner*, 426 So. 2d 539, 543 (Fla. 1982), we turn to the federal sector and examine particular cases in order to determine how the test has there been applied."); *M.D. v. United States*, 745 F. Supp. 2d 1274, 1279 (M.D. Fla. 2010)

("Florida courts have traditionally interpreted the state provision consistently with judicial interpretations of the Fourteenth Amendment.").

2. Plaintiffs' separate argument that the damages cap violates their right to equal protection because it discriminates against "the relatively few most seriously harmed victims of medical malpractice," Pl.'s Br. at 28, was considered and rejected by this Court in *University of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993). In *Echarte*, this Court considered various constitutional challenges to two state statutes that, among other things, limited noneconomic damage awards in medical negligence cases to (a) $250,000 in cases submitted to voluntary arbitration, and (b) $350,000 in cases in which the plaintiff rejects the defendant's offer to enter voluntary binding arbitration. The two dissenting Justices in *Echarte* would have held that these damages caps violate equal protection by "creating two classes of medical malpractice victims, those with serious injuries whose recovery is limited by the caps and those with minor injuries who receive full compensation." *Id.* at 198 (Barkett, C.J., dissenting); *id.* at 202 (Shaw, J., dissenting) (concurring with Chief Justice Barkett). The majority, however, held that there was no equal protection violation. *Id.* at 191; *see also St. Mary's Hospital*, 769 So. 2d at 971 n.3 (explaining that, in *Echarte*, the Court rejected an equal protection argument "concern[ing] whether the cap on noneconomic

damages created two classifications of medical malpractice victims—those with insignificant injuries who are compensated in full, and those with serious injuries who are deprived of full compensation"). Plaintiffs fail to address this Court's holding in *Echarte*, and identify no reason for the Court to depart from that case.

3. Plaintiffs' assertion that the damages cap at issue should be analyzed under strict scrutiny because it "*implicates* fundamental rights under the Florida Constitution's access to courts and jury-trial provisions," Pl.'s Br. at 12 (emphasis added), is equally meritless. As this Court has recognized, strict scrutiny is only triggered when a statute *violates* a fundamental right. *See Renee B. v. Florida Agency for Health Care Admin.*, 790 So. 2d 1036, 1040 (Fla. 2001) ("The strict scrutiny standard, however, would only be necessary in the instant case if it is first determined that the challenged rules violate the petitioners' right of privacy.").

Thus, in *Acton v. Ft. Lauderdale Hospital*, 440 So. 2d 1282, 1284 (Fla. 1983), this Court employed rational basis review despite the plaintiff's assertion that the statute at issue denied him access to the courts without providing a reasonable alternative. The Court used the same approach when faced with a similar access to courts challenge in *Sasso v. Ram Property Management*, 452 So. 2d 932, 934 (Fla. 1984). Indeed, even the dissenting Justices in *Echarte* would have analyzed the damages caps at issue in that case under the rational basis test

despite the fact that the plaintiffs there, like those here, asserted that the caps violated their rights of access to the courts and trial by jury. *See Echarte*, 618 So. 2d at 198 (Barkett, C.J., dissenting) (finding that damages cap does not "bear[] any rational relationship to the Legislature's stated goal of alleviating the financial crisis in the medical liability insurance industry"); *id.* at 202 (Shaw, J.) (concurring with Chief Justice Barkett). Rational basis, not strict scrutiny, provides the appropriate equal protection standard.

II. Florida's Damages Cap Does Not Violate The Florida Constitution's "Access to Courts" Provision

A. This Court's Decision in *Echarte* is Controlling

The "Access to Courts" provision of the Florida Constitution states that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." Art. I, § 21, Fla. Const. In *Kluger v. White*, this Court interpreted the provision as preventing the Legislature from abolishing certain common law and statutory rights unless it (1) "provid[es] a reasonable alternative to protect the rights of the people of the State to redress for injuries," *or* (2) "can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown." 281 So. 2d 1, 4 (Fla. 1973).

This Court's decision in *University of Miami v. Echarte*, 618 So. 2d 189

(Fla. 1993), compels the conclusion that the caps at issue here satisfy *Kluger*'s second exception. In *Echarte*, this Court upheld against an Access to Courts challenge two state statutes that, among other things, limited noneconomic damage awards in medical negligence cases to (a) $250,000 in cases submitted to voluntary arbitration, and (b) $350,000 in cases in which the plaintiff rejects the defendant's offer to enter voluntary binding arbitration. Most relevant here, the Court explained that the damages caps satisfied *Kluger*'s second exception, and therefore did not violate the Access to Courts guarantee, because (1) the legislature had determined that there was a "medical malpractice insurance crisis" that constituted an "overpowering public necessity," *id.* at 196-97, and (2) a task force report upon which the legislature relied supported a finding that no alternative or less onerous method of addressing the crisis existed, *id.* at 197.

As the U.S. District Court correctly concluded here, the facts of this case are indistinguishable from those in *Echarte*. *See* ERE 68:28. Here, as in *Echarte*, the Florida Legislature enacted damages caps after specifically finding that "Florida is in the midst of a medical malpractice insurance crisis of unprecedented magnitude" that "threatens the quality and availability of health care for all Florida citizens." Ch. 416, §§ 1(1), (2), Laws of Fla. (2003). The legislature also found that numerous "overwhelming public necessities"—including "making quality health

care available to the citizens of this state," "ensuring that physicians continue to practice in Florida," and "ensuring that those physicians have the opportunity to purchase affordable professional liability insurance"—justified imposition of the caps. *Id.* § 1(14).

And, as in *Echarte*, the legislature relied on task force findings—the 345-page Task Force Report—to conclude that there was no alternative or less onerous method of addressing the crisis. *See id.* §§ 1(14), (16). The task force explained that a cap on noneconomic damages "is essential to the success of any reform plan," Task Force Report at 213, and that "without the inclusion of a cap on potential awards of non-economic damages in the package, no legislative reform plan can be successful in achieving a goal of controlling increases in healthcare costs and thereby promoting improved access to healthcare," *id.* at 218. The task force "heard testimony, and received written submissions, proclaiming the potential benefits of other conceivable—but untested—measures," *id.* at 218-19, but determined that "[n]o alternative or less onerous method for meeting the public necessity would be successful," *id.* at 220.

Plaintiffs attempt to distinguish *Echarte* on the ground that the statutes at issue there "substituted binding arbitration for the common-law means of adjudicating," and that, here, "there is no similar offsetting benefit[.]" Pl.'s Br. at 34

n.7. But the statutes at issue in *Echarte* capped damages at $350,000 when the plaintiff *rejected* the defendant's offer to enter voluntary binding arbitration, *see Echarte*, 618 So. 2d at 193 (describing § 766.209(4), Fla. Stat.), and thus capped damages when no commensurate benefit was provided. Equally importantly, the question of a commensurate benefit is relevant only to *Kluger*'s first exception; the second exception, at issue here, provides an alternative basis to satisfy the Access to Courts guarantee.

The Florida Legislature's findings that a cap on noneconomic damages in medical negligence actions was necessary because an overwhelming public necessity existed and because there was no alternative method of meeting that necessity "are presumed correct and entitled to deference, unless clearly erroneous." *Echarte*, 618 So. 2d at 196; *see also id.* ("The Legislature has the final word on declarations on public policy, and the courts are bound to give great weight to legislative determinations of facts."); *Moore v. Thompson*, 126 So. 2d 543, 549 (Fla. 1960) ("The courts will abide by such legislative [findings and declarations of policy] unless such are clearly erroneous, arbitrary or wholly unwarranted."). Because the damages cap at issue here satisfies *Kluger*'s second exception, it does not violate the Florida Constitution's Access to Courts provision.

B. Plaintiffs' Additional Access to Courts Arguments Are Without Basis

Plaintiffs make several additional arguments in support of their access to courts claim. Plaintiffs assert that the cap is "indistinguishable" from a cap on noneconomic damages in all tort cases struck down in *Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987), *see* Pl.'s Br. at 33, and that *stare decisis* mandates that it be invalidated, *id.* at 36. Plaintiffs claim that the legislature's findings of an overwhelming public necessity and no alternative method of meeting that necessity do not survive judicial scrutiny. *Id.* at 34, 37. And plaintiffs argue that the *Kluger* test "is functionally equivalent to the strict scrutiny test under equal protection," and that the caps at issue should be invalidated because they cannot survive strict scrutiny. *Id.* at 32-33. None of these arguments has merit.

1. Plaintiffs' reliance on *Smith* is misplaced, and was properly rejected by the U.S. District Court. *See* ERE 68:28-29. In *Smith*, this Court found that a cap on noneconomic damages in all tort cases did not satisfy *Kluger*'s first exception because it did not provide an alternative remedy. *Smith*, 507 So. 2d at 1088. But the Court explicitly declined to address whether the damages cap satisfied *Kluger's* second exception. *Id.* at 1089 ("[T]he trial judge below did not rely on—nor have appellees urged before this Court—that the cap is based on a legislative showing of 'an overpowering public necessity for the abolishment of such right, and no

alternative method of meeting such public necessity can be shown.'") (quoting *Kluger*, 281 So. 2d at 4). Accordingly, as the district court here correctly concluded, *see* ERE 68:28-29, it is *Echarte*, not *Smith*, that controls.

2. Plaintiffs are equally mistaken when they assert that the legislature's findings of an overwhelming public necessity and no alternative method of meeting that necessity do not withstand judicial scrutiny. As previously noted, the legislature's findings in this regard "are presumed correct and entitled to deference, unless clearly erroneous." *Echarte*, 618 So. 2d at 196; *Moore*, 126 So. 2d at 549 ("The courts will abide by such legislative [findings and declarations of policy] unless such are clearly erroneous, arbitrary or wholly unwarranted."); *see generally Dorsey v. State*, 868 So. 2d 1192, 1208 n.16 (Fla. 2003) (explaining that a finding of fact is clearly erroneous "when, although there is evidence to support such finding, the reviewing court upon reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed"). None of the materials cited by plaintiffs comes close to overcoming this high bar.

Plaintiffs attack the legislature's finding of a medical malpractice insurance crisis on the ground that "the number of doctors practicing in Florida had steadily increased over the decade preceding enactment of the statute." Pl.'s Br. at 35, *see also id.* at 13-14; Amicus Br. Of Professors Neil Vidmar et al. at 5-14. This fact,

however, in no way establishes that the legislature's finding of a crisis was clearly erroneous. Indeed, the year before the legislature found an overwhelming public necessity for the caps at issue, the American Medical Association identified Florida as one of 12 states in the midst of a medical liability insurance crisis. *See* Task Force Report at iii. Moreover, the number of doctors in Florida says nothing about whether those doctors are discontinuing high-risk procedures or turning away high-risk patients, both of which the task force found to be occurring. *See* Task Force Report at vi. Nor does the number of doctors address the facts that five major insurance companies withdrew from the Florida market in 2001 and 2002, *id*. at 56; that only seven insurance companies were accepting new business in Florida, three of which were accepting only certain types of new business, *id.* at 57; or that doctors' insurance premiums had doubled or tripled in the previous two years, *id*. at 60.

Plaintiffs' criticism of the legislature's finding that there was no alternative method of addressing these problems fares no better. Plaintiffs assert that "[t]he Legislature has broad powers and an array of options to make Florida more financially attractive to physicians," such as regulating insurance premiums or providing tax incentives to offset premium increases. Pl.'s Br. at 37; *see also* Amicus Br. of Florida Justice Association et al. at 11-12 (suggesting other

alternatives); Amicus Br. of Floridians for Patient Protection Inc. et al. at 18-19 (same). Plaintiffs' speculation that the Florida Legislature could have responded to Florida's medical malpractice insurance crisis in a different way, however, is insufficient to overcome the legislature's explicit findings that the caps at issue were necessary to address the crisis. Plaintiffs here offered no proof, such as expert testimony, that their proposed reforms would actually work in practice. In contrast, the task force "heard testimony, and received written submissions, proclaiming the potential benefits of other conceivable—but untested—measures," Task Force Report at 218-19, and determined that "[n]o alternative or less onerous method for meeting the public necessity would be successful," *id*. at 220; *see generally Westerheide v. State*, 831 So. 2d 93, 101 (Fla. 2002) ("In light of the differing opinions of the scientific community . . . the Legislature's determination . . . is not clearly erroneous and is entitled to deference."). The case relied upon by plaintiffs in urging "judicial scrutiny" of the Legislature's factual findings underscores the fundamental flaws in their approach. In *North Florida Women's Health & Counseling Services v. State*, this Court approved the trial court's refusal to defer to legislative statements of fact, and its decision to rely instead on its own findings. 866 So. 2d 612, 630 (Fla. 2003). Crucially in that case, however, and in stark contrast to the present matter, the trial court conducted extensive factfinding

proceedings—a two-and-a-half day evidentiary hearing and a five-day bench trial at which numerous experts testified for both parties. *Id.* at 616, 630. After these proceedings, the trial court "assessed the credibility of the competing witnesses, weighed the conflicting evidence," and then "issued a detailed eighteen-page written order" in which it "paid due recognition to the Legislature's statements of fact and purpose . . . [but] properly did not accede to those statements[.]" *Id.* at 630.[3]

[3]This Court also criticized the process by which the Legislature found the facts at issue in *North Florida Women's Health*. It noted that all but one of the legislature's findings were added by a drafting service that had "neither the authority nor the means for gathering and evaluating evidence and making factual determinations"; that the Senate committees to which the bill was referred were not "charged with fact-finding, and neither committee made a formal effort to gather evidence and render findings of fact"; and that the testimony given to the Senate committees was "pro forma": none of the witnesses were sworn, and their testimony was limited to a total of 20 minutes. *North Fla.*, 866 So. 2d at 629-30.

This case is different in every respect. Here, not only did the Governor's task force extensively study the medical malpractice liability crisis and issue a detailed report of its own findings, but both the Florida Senate and House of Representatives heard voluminous sworn testimony and considered thousands of affidavits from individuals across Florida. *See* Task Force Report; Fla. H.R. Select Comm. on Med. Liab. Ins., *Report* (March 2003), *available at* http://tinyurl.com/6eknhq; ERE 20-5-6:19-21 (Fla. Sen. Floor Debate, Aug. 13, 2003) (statement by Sen. Villalobos); ERE 20-7-8:81 (Fla. H.R. Floor Debate, Aug. 13, 2003) (statement by Rep. Harrell).

In this case, plaintiffs might in theory have sought to build an analogous evidentiary record in the district court, but they elected not to do so. Instead, plaintiffs urge this Court to reject the legislature's factual findings not on the basis of evidence presented to and evaluated by the trial court, but on the basis of (1) highly generalized legal authority possessed by the Florida Legislature, and (2) assorted law review articles and other studies. *See* Pl.'s Br. at 35, 37; *see also id.* at 13-14, 21-24. Nothing in *North Florida Women's Health* suggests that this Court may decline to follow the presumption of correctness due the legislature's factual findings, and declare those findings "clearly erroneous," based on such a paltry showing. Indeed, this Court previously has found a record consisting of "briefs and . . . packets of research materials [submitted] to the trial court" to be "insufficient" to determine the constitutionality of a statute. *Cox v. Florida Dep't of Health & Rehabilitative Servs.*, 656 So. 2d 902, 903 (Fla. 1995). Plaintiffs have presented nothing that could plausibly call into question the Florida Legislature's empirical judgments underlying the medical negligence damages caps at issue in this case.

3. Finally, plaintiffs urge that the *Kluger* test "is functionally equivalent to the strict scrutiny test under equal protection," and that the caps at issue should be invalidated because they cannot survive strict scrutiny. *See* Pl.'s Br. at 32-33. This argument, however, completely ignores this Court's decision in *Echarte*, where the

Court held that similar caps on noneconomic damages satisfied the *Kluger* test. As previously discussed, the facts of this case are materially indistinguishable from *Echarte,* and therefore *Echarte* controls.

In any event, strict scrutiny does not apply here. In *Mitchell v. Moore,* this Court stated that "there is no relevant difference between the 'compelling governmental interest/strict scrutiny' test and the 'no alternative method of correcting the problem/overpowering public necessity' test set forth in *Kluger*." 786 So. 2d 521, 528 (Fla. 2001). But the Court in *Mitchell* also explained that it "has concluded that statutes had passed the [*Kluger*] test because the right of action at issue had been only marginally limited." 786 So. 2d at 526. And it distinguished *Kluger* on the basis that "[i]n *Kluger*, only one type of possible legal action was curtailed. In *this* case, the right to gain access to the courts itself has been infringed." *Id.* at 527. These statements suggest that *Mitchell* applied a strict scrutiny-type analysis because of the magnitude of the access to courts restriction at issue, and did not mean for strict scrutiny to apply whenever access to courts is arguably limited, however minor the restriction. *See, e.g., Smith v. Department of Health & Rehabilitative Servs.*, 573 So. 2d 320, 323 (Fla. 1991) (stating that the Access to Courts provision "is typically applied to guarantee every person the right of access to the courts for claims of redress of injury free of *unreasonable* burdens

and restrictions") (emphasis added); *Warren State Farm Mut. Auto. Ins. Co.*, 899 So. 2d 1090, 1097 (Fla. 2005) (finding no access to courts violation because "the statute imposes a reasonable condition precedent to filing a claim"); *id.* at 1099 (Lewis, J., dissenting) (criticizing majority for analyzing access to court claim under rational basis standard).

There is a significant difference between the severity of the access to courts restriction at issue in *Mitchell* and that at issue here. In *Mitchell*, the Court addressed the copy requirement of the Prisoner Indigency Statute, which it found to be so restrictive as to constitute "a door to the Court that some inmates simply cannot open." *Id.* at 525. The Court found this limitation to be "far greater than the right taken in *Kluger*, or any of this Court's previous access to courts cases," *id.* at 527, including cases involving caps on noneconomic damages such as *Echarte* and *Smith*.

Here, plaintiffs are not barred from asserting their claims in court; rather, one category of damages they may potentially recover is limited in amount. While this limitation may be sufficient to implicate the Access to Courts provision, *see Smith*, 507 So. 2d at 1087, it is, as this Court has recognized, nowhere near as severe as that at issue in *Mitchell*. In any event, regardless of the appropriate level of scrutiny, *Echarte* compels the conclusion that the cap here satisfies *Kluger*'s

second exception and thus does not violate plaintiffs' right of access to the courts.

III. Florida's Damages Caps Do Not Violate The Florida Constitution's Jury Trial Guarantee

A. Florida's Jury Trial Right is Not Implicated By the Cap

Article I, Section 22 of the Florida Constitution guarantees that "[t]he right of trial by jury shall be secure to all and remain inviolate." This provision "guarantees the right to trial by jury in those cases in which the right was enjoyed at the time this state's first constitution became effective in 1845." *In re 1978 Chevrolet Van*, 493 So. 2d 433, 434 (Fla. 1986).

1. As an initial matter, a survivor in a wrongful death context had no right to pain and suffering damages in 1845, and therefore plaintiffs' reliance on Article I, Section 22 is misplaced for that reason alone. As this Court has explained, "[i]t is well known that at common law the cause of action died with the person[.]" *Klepper v. Breslin*, 83 So. 2d 587, 592 (Fla. 1955). It was only in 1899 that the Florida Legislature first enacted a statute allowing parents to recover pain and suffering damages for the death of their minor child. *Id.* at 591. Other survivors, including surviving children, were not entitled to recover pain and suffering damages until 1972, when the legislature passed the Wrongful Death Act. *See Lifemark Hosps. of Fla., Inc. v. Afonso*, 4 So. 3d 764, 769 (Fla. 3d DCA 2009) ("A survivor's right to recover pain and suffering did not become part of the

Wrongful Death Act until 1972[.]"); *see also Martin v. United Sec. Servs., Inc.*, 314 So. 2d 765, 767-68 (Fla. 1975) (describing causes of action and damages allowed before Wrongful Death Act, which did not include pain and suffering damages for a surviving child). Thus, because plaintiffs would not have had a right in 1845 to recover *any* damages in the circumstances of Ms. McCall's death, the statutory limitation on the amount of noneconomic damages they may now recover simply does not implicate the Florida Constitution's jury trial guarantee. *See In re 1978 Chevrolet Van*, 493 So. 2d at 434; *see also Department of Revenue v. Printing House*, 644 So. 2d 498, 500 (Fla. 1994) ("To properly answer the certified question [regarding the constitutional right to a jury trial], we must determine whether at the time Florida's first constitution became effective there existed a common law right to a jury trial."); *accord*, *e.g.*, *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 845 (Tex. 1990) (holding that cap on noneconomic damages did not implicate the Texas Constitution's open courts provision when applied in wrongful death context because no such cause of action existed at common law).

2. In any event, even if the right to a jury trial under the Florida Constitution were properly at issue, this Court has directly rejected the proposition that limitations on recoverable damages may violate that right. In *Cauley v. City of Jacksonville*, the Court addressed a statute that limited the amount of damages

recoverable in tort against a municipality to $50,000 per person and $100,000 per incident. 403 So. 2d 379, 380 (Fla. 1981). Among other things, the plaintiffs argued that the statute violated their right to trial by jury under the Florida Constitution. *Id.* at 384. This Court disagreed, holding that "[t]he statute does not violate the right to due process, jury trial, access to the courts, or the separation of powers rule." *Id.* at 387. And, in *Echarte*, discussed above, this Court likewise expressly held that the medical negligence damages caps at issue in that case "do not violate the right to trial by jury" guaranteed by the Florida Constitution. 618 So. 2d at 191.

This Court's holdings in these cases are consistent with the decisions of the many federal courts[4] that "uniformly have held that statutory damage caps do not violate the Seventh Amendment," *Estate of Sisk v. Manzanares*, 270 F. Supp. 2d 1265, 1277-78 (D. Kan. 2003), decisions this Court has found "helpful and persuasive in construing this state's constitutional provision of like import," *In re 1978 Chevrolet Van*, 493 So. 2d at 434-35.

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[4]*See Smith v. Botsford Gen. Hosp.*, 419 F.3d 513, 519 (6th Cir. 2005); *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1202 (9th Cir. 2002); *Madison v. IBP, Inc.*, 257 F.3d 780, 804 (8th Cir. 2001), *judgment vacated on other grounds*, 536 U.S. 919 (2002); *Davis v. Omitowoju*, 883 F.2d 1155, 1159-65 (3d Cir. 1989); *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989); *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325, 1330-35 (D. Md. 1989).

The federal courts have identified various reasons why a limitation on recoverable damages does not violate an individual's right to trial by jury. For example, the United States Court of Appeals for the Fourth Circuit has explained that, while "it is the role of the jury as factfinder to determine the extent of a plaintiff's injuries . . . it is not the role of the jury to determine the legal consequences of its factual findings." *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989). Instead, that is a matter for the legislature: "once the jury has made its findings of fact with respect to damages, it has fulfilled its constitutional function; it may not also mandate compensation as a matter of law." *Id.*; *see also Madison v. IBP, Inc.*, 257 F.3d 780, 804 (8th Cir. 2001) (holding that damages cap "does not impinge upon the jury's fact finding function" because "a court does not 'reexamine' the jury's verdict or impose its own factual determination as to what a proper award might be. Rather, it implements the legislative policy decision by reducing the amount recoverable to that deemed to be a reasonable maximum by Congress."), *judgment vacated on other grounds*, 536 U.S. 919 (2002). As likewise explained by Justice Stevens of the United States Supreme Court:

> It is well settled that jury verdicts are not binding on either trial judges or appellate courts if they are unauthorized by law. A verdict may be insupportable as a matter of law either because of deficiencies in the evidence or because an award of damages is larger than permitted by law. . . . These principles are sufficiently well established that no Seventh Amendment issue would arise if an appellate court ordered a

> new trial because a jury award exceeded a monetary cap on allowable damages.

Gasperini v. Center for Humanities, 518 U.S. 415, 442 (1996) (Stevens, J., dissenting).

A statutory cap on recoverable damages also does not violate an individual's right to trial by jury for a separate reason. Under Florida law, it is settled that outright abolition of a cause of action does not violate the Florida Constitution's jury guarantee. *See Lasky v. State Farm Ins. Co.*, 296 So. 2d 9, 22 (Fla. 1974). But "[i]f a legislature may completely abolish a cause of action without violating the right of trial by jury," it necessarily follows that it "may limit damages recoverable for a cause of action as well." *Boyd*, 877 F.2d at 1196. Plaintiffs' right to a trial by jury simply is not implicated here.

B. Plaintiffs' Jury Trial Arguments Are Fundamentally Flawed

Plaintiffs' insistence that statutory damage limitations nonetheless impinge the jury's factfinding functions, *see* Pl.'s Br. at 38-42, conflates factual findings with the legal consequences of those findings. The damage a particular plaintiff has suffered is a fact subject to jury determination; the amount of compensation a plaintiff may recover as a result of that damage is a legal conclusion subject to legislative definition. *See Boyd*, 877 F.2d at 1196 ("[O]nce the jury has made its

findings of fact with respect to damages, it has fulfilled its constitutional function; it may not also mandate compensation as a matter of law."). When applying a damages cap, the trial court simply implements the law determined by the legislature; it in no way substitutes its factual findings for the jury's. *See IBP*, 257 F.3d at 804 (explaining that, in applying a statutory damages cap, "a court does not 'reexamine' the jury's verdict or impose its own factual determination as to what a proper award might be"); *Estate of Sisk*, 270 F. Supp. 2d at 1278 ("[T]he court need not 'reexamine' the jury's verdict in order to implement the legislative [caps on damages]. The court need only apply the statute."); *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325, 1331 (D. Md. 1989) ("Juries always find facts on a matrix of laws given to them by the legislature and by precedent, and it can hardly be argued that [damages] limitations imposed by law are a usurpation of the jury function."). In that way, damages caps are unlike remittitur, which implicates the jury trial right because the trial court does, in fact, act on its own factual findings. *See, e.g.*, *Hetzel v. Prince William County*, 523 U.S. 208, 211 (1998) (per curiam) ("In determining that the evidence did not support the jury's general damages award and in ordering the District Court to recalculate the damages, the Court of Appeals in this case imposed a remittitur.").

At least equally mistaken is plaintiffs' reliance on *Smith v. Department of*

Insurance, 507 So. 2d 1080 (Fla. 1987), and *Feltner v. Columbia Pictures Television*, 523 U.S. 340 (1998). *Smith*, discussed above, was an Access to Courts case that nowhere purported to address whether the damages cap at issue complied with the Florida Constitution's jury trial guarantee. Perhaps more importantly, the dicta in *Smith* that plaintiffs rely on—"Nor, we add, because the jury verdict is being arbitrarily capped [by a statutory damages limitation], is the plaintiff receiving the constitutional benefit of a jury trial as we have heretofore understood that right," *Smith*, 507 So. 2d at 1088-89—was directly rejected by this Court in *Echarte*. In *Echarte*, the dissenting Justices would have held that the noneconomic damages caps there at issue violate the Florida Constitution's jury trial guarantee. *See Echarte*, 618 So. 2d at 198 (Barkett, C.J., dissenting) ("The reasoning in *Smith* is equally applicable to the arbitrary damage caps at issue in this case."). But the majority rejected this argument, squarely holding that there was no violation of the right to trial by jury. *Id.* at 191; *see Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002) (explaining that the Court will "adhere to our express holding . . . and recede from the dicta . . . which is inconsistent with this holding").

Plaintiffs attempt to distinguish *Echarte*, arguing that it "is inapposite to the jury-trial issue" because a party's agreement to participate in arbitration is, in plaintiffs' view, a waiver of the jury trial right. *See* Pl.'s Br. at 43 n.9. But the

$350,000 cap at issue in *Echarte* applied when a plaintiff declined a defendant's offer of arbitration and thus did *not* waive his or her right to a trial by jury. *See Echarte*, 618 So. 2d at 193 (describing § 766.209(4), Fla. Stat.). Presumably for this reason, the appellant in *Echarte* did not assert that there was a waiver of the jury trial right. *See* Appellant's Initial Brief in *University of Miami v. Echarte*, No. 78,210 (filed Aug. 19, 1991), at 32-34; Appellant's Reply Brief in *University of Miami v. Echarte*, No. 78,210 (filed Nov. 27, 1991), at 8-9. This Court in *Echarte* expressly concluded that the cap did not violate the Florida Constitution's jury trial guarantee. *See Echarte*, 618 So. 2d at 191. That holding is controlling here.

The U.S. Supreme Court's decision in *Feltner* similarly provides no support for plaintiffs' argument. *Feltner* did not address the constitutionality of damages caps, but instead addressed whether there was a right to have a jury determine statutory (rather than actual) damages. *See Feltner*, 523 U.S. at 342. Relying on historical practice, *id.* at 347-355, the Court determined there was such a right. This holding says nothing about whether a statutory cap on noneconomic damages violates the right to trial by jury. *See Pulliam v. Coastal Emergency Servs., Inc.*, 509 S.E.2d 307, 313 (Va. 1999) (addressing argument that damages cap violates right to trial by jury and noting that "[t]he plaintiff's reliance on *Feltner* is also misplaced"); *see also Smith v. Botsford Gen. Hosp.*, 419 F.3d 513, 519 (6th Cir.

2005) (rejecting Seventh Amendment challenge to damages cap after *Feltner*); *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1202 (9th Cir. 2002) (same); *IBP*, 257 F.3d at 804 (same); *Estate of Sisk*, 270 F. Supp. 2d at 1277-78. Plaintiffs' jury trial claim must be rejected as a matter of law.[5]

IV. Florida's Damages Caps Do Not Violate the Separation of Powers

A. The Damages Cap is A Substantive Law In An Area of Legitimate Legislative Concern

Plaintiffs argue lastly that the damages cap violates the separation of powers principle enshrined in the Florida Constitution. The "Branches of Government" provision of the Florida Constitution provides that "[t]he powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Art. II, § 3, Fla. Const. Interpreting this provision, this Court has explained that, "[g]enerally, the Legislature is empowered to enact substantive law while [the judicial branch] has the authority to enact procedural law." *Massey v. David*, 979 So. 2d 931, 936 (Fla.

[5]In a footnote, plaintiffs assert that § 766.118 violates their right to a jury trial by allowing the court, rather than a jury, to determine whether "the special circumstances of the case" merit a higher noneconomic damage cap. *See* Pl.'s Br. at 42 n.8 (citing § 766.118(2)(b)(1), Fla. Stat.). But that provision was not at issue in this case, and therefore plaintiffs have no basis upon which to challenge it.

2008). "If a statute is clearly substantive and operates in an area of legitimate legislative concern, this Court will not hold that it constitutes an unconstitutional encroachment on the judicial branch." *Id.* at 937 (quotation marks omitted).

In *Adams v. Wright*, this Court described the applicable inquiry for determining whether a statute constitutes a "substantive law" within the scope of the legislature's power, or, instead, a matter of court procedure that is properly left to the judicial branch. 403 So. 2d 391 (Fla. 1981). Substantive statutes "fix and declare the primary rights of individuals as respects their persons and property," whereas "'[p]ractice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof." *Id.* at 393-94. Stated differently, practice and procedure "is the method of conducting litigation," while substantive law "creates, defines, and regulates rights." *State v. Raymond*, 906 So. 2d 1045, 1048 (Fla. 2005).

Applying this distinction, the U.S. District Court here properly recognized that the damages caps at issue "do[] not impermissibly interfere with the function of the judiciary," but instead "define[] the substantive and remedial rights of the litigants." ERE 68:35-36. Indeed, this Court has expressly held that a statutory cap on punitive damages does not violate separation of powers. *See Smith v. Department of Ins.*, 507 So. 2d 1080, 1092 & n.10 (Fla. 1987). There is no reason

why a statutory cap on noneconomic damages should be treated differently: both limitations fix the rights of individuals who have suffered an injury, and say nothing about the method by which those individuals are to conduct litigation. Rather than governing the administration of the remedies available in medical negligence cases, the damages caps simply set forth the remedies themselves. *See Allen v. Butterworth*, 756 So. 2d 52, 60 (Fla. 2000) ("'As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals.'") (quoting *In re Fla. Rules of Crim. Proc.*, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring)).

B. Plaintiffs' Separation of Powers Arguments Are Baseless

Plaintiffs' arguments to the contrary, *see* Pl.'s Br. at 47-50, are baseless. At least seven state supreme courts have recognized that damages caps are not a legislative remittitur. *See Garhart v. Columbia/ HealthONE, L.L.C.*, 95 P.3d 571, 581 n.10 (Colo. 2004) (listing cases); *Maurin v. Hall*, 682 N.W.2d 866, 889 (Wis. 2004); *see generally Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325, 1331 (D. Md. 1989) ("The power of the legislature to define, augment, or even abolish complete causes of action must necessarily include the power to define by statute what damages may be recovered by a litigant with a particular cause of action."). And nothing in the statute at issue requires the judge to "enter judgment for an

amount of damages at odds with the credible evidence adduced at trial." Pl.'s Br. at 47. Plaintiffs' argument assumes that the judge must always and automatically enter a verdict reflecting whatever damages a jury chooses to award. But, as previously explained, "once the jury has made its findings of fact with respect to damages, it has fulfilled its constitutional function; it may not also mandate compensation as a matter of law." *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989). As Justice Stevens has explained, "[i]t is well settled that jury verdicts are not binding on either trial judges or appellate courts if they are unauthorized by law. A verdict may be insupportable as a matter of law either because of deficiencies in the evidence or because an award of damages is larger than permitted by law." *Gasperini v. Center for Humanities*, 518 U.S. 415, 442 (1996) (Stevens, J., dissenting).

CONCLUSION

For the foregoing reasons, the Court should hold that the damage cap at issue does not violate plaintiffs' right to equal protection under Article I, Section 2 of the Florida Constitution; their right of access to the courts under Article I, Section 21 of the Florida Constitution; their right to trial by jury under Article I, Section 22 of the Florida Constitution; or the principle of separation of powers found in Article II, Section 3 and Article V, Section 1 of the Florida Constitution.

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SEPTEMBER 2011

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I hereby certify that on September 20, 2011, I filed and served the foregoing brief by overnight delivery, by causing the original and seven copies to be sent to this Court by Federal Express overnight, and by causing one copy to be sent Federal Express overnight to:

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I hereby certify that this brief complies with the type-volume limitation set forth in Florida Rule of Appellate Procedure 9.210(a)(2) & (5). This brief was produced using 14-point Times New Roman Font and does not exceed 50 pages in length.

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