Case 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
Case No. 09-16375J

INITIAL BRIEF FOR PLAINTIFFS-APPELLANTS

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STATEMENT OF THE CASE AND OF THE FACTS

In February 2006, Michelle McCall was a bright, beautiful, and healthy 20-year-old woman receiving pre-natal care and delivery services for her pregnancy at the Eglin Air Force Base clinic through the Air Force's family practice department. *Estate of McCall v. United States*, 663 F. Supp. 2d 1276, 1283 (N.D. Fla. 2009). Due to medical negligence, she tragically "bled to death in the presence of all medical staff who were attending her," later that month. *Id*. at 1291.

That tragic event was set in motion when, at a routine pre-natal checkup in mid-February 2006, Michelle's blood pressure was high. She was instructed to collect urine samples and return to the lab five days later. *Id*. at 1284. On February 21, 2006, tests revealed Michelle had severe preeclampsia, a serious condition characterized by elevated blood pressure and an abnormal amount of protein in the urine, requiring immediate hospitalization for the induction of labor. *Id*.

The Air Force hospital was temporarily unavailable for obstetric and delivery services, so Michelle was admitted to the Fort Walton Beach Medical Center, where the Air Force maintained its own nursing station, delivery rooms, and on-call room for its medical personnel. *Id*. at 1285 n.4. Michelle was admitted at 5:00 p.m. on February 21, 2006 and given Pitocin to induce labor. After almost 24 hours of labor, the doctors decided to perform a C-Section, but discovered the only doctor capable of cesarean delivery was occupied with another surgery. *Id*. at

1284-85. While awaiting that doctor and choosing not to call an alternate obstetrician, Michelle's labor resumed, and she was allowed to continue with vaginal rather than caesarean delivery, even after the obstetrician arrived. *Id*. at 1285.

Michelle's son, W.W., was born at 1:25 a.m. on February 23, 2006, by natural birth. Thirty-five minutes later, when the placenta still had not delivered, two doctors tried unsuccessfully to remove the placenta manually. *Id*. Michelle's blood pressure dropped precipitously and continued to drop rapidly. Her dangerously low blood pressure went unnoticed for hours. Michelle lost copious amounts of blood, which also went unnoticed by the doctors and unreported by the nurses attending her. *Id*. at 1285-86.

The obstetrician returned to the medical center more than an hour after delivery of W.W., manually removed the placenta, and then undertook repairs of the serious lacerations in Michelle's vaginal wall. *Id*. at 1285. After he finished these procedures at 3:50 a.m., he ordered a blood count and, if needed, a transfusion to compensate for the blood Michelle had lost during the procedures. The blood count was not scheduled for another forty minutes, and no one attempted to perform the blood count for yet another forty minutes after that. No one monitored Michelle's condition between 4:00 a.m. and 5:00 a.m. When the

nurse finally went to draw Michelle's blood to perform the blood count after 5:00 a.m., Michelle was unresponsive. *Id*. at 1286.

Michelle was intubated and a transfusion of blood was begun at 5:30 a.m., but it was too late. *Id*. She never regained consciousness and was removed from life support a few days later, dying on February 27, 2006. The death certificate identified the events leading to death: severe preeclampsia, vaginal delivery, hypovolemic shock, and anoxic enoephalopathy. *Id*.

Michelle McCall's estate, her parents, her son, and her son's father filed suit against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§1346(b), 2671-80, in November 2007, seeking damages for the medical negligence that resulted in her death.

After a bench trial, the federal district court held Defendant liable and determined that fair compensation would amount to nearly $3 million, which included $2 million in noneconomic damages. Of the noneconomic damages, $500,000 was designated as compensation for W.W.'s loss of parental companionship, instruction, and guidance and for his mental pain and suffering. 663 F. Supp. 2d at 1294. An additional $750,000 each was designated as compensation for each of Michelle's parents for their pain and suffering. *Id*.

The federal court then reduced Plaintiffs' noneconomic damages to $1 million total pursuant to §766.118, Florida Statutes. *Id*. at 1294-95, 1307-08. The

court rejected Plaintiffs' argument that both the practitioner and nonpractitioner caps should be applied to the case because the court said no "specific nonpractitioner" was "singled out" as negligent. *Id*. at 1294. The court also rejected Plaintiffs' constitutional arguments, after declaring that it "hesitate[d] to proceed" as this case presented "a novel question of state law that the Supreme Court of Florida has not yet addressed." *Id*. at 1296 n.34.

The court entered judgment limiting Plaintiffs to an aggregate award of $1 million in noneconomic damages, along with nearly $1 million in economic damages on September 30, 2009. The noneconomic damages were proportionally divided among the eligible survivors. *Id*. at 1307-08. On October 30, 2009, the district court denied Plaintiffs' motion to alter or amend the final judgment.

Plaintiffs appealed, challenging both the federal district court's ruling on the application and constitutionality of the cap. On April 6, 2010, Plaintiffs filed a Motion to Certify Questions of State Law to this Court under the procedure established in Rule 9.150, Florida Rules of Appellate Procedure. After a hearing on both the Motion to Certify and the merits of the appeal, the Eleventh Circuit issued an opinion, finding the application argument had not been fully raised below and rejecting Plaintiffs' federal constitutional arguments. The Eleventh Circuit then certified the following questions of Florida constitutional law to this Court:

(1) Does the statutory cap on noneconomic damages, §766.118, Florida Statutes violate the right to equal protection under Article I, Section 2 of the Florida Constitution?

(2) Does the statutory cap on noneconomic damages, §766.118, Florida Statutes violate the right of access to the courts under Article I, Section 21 of the Florida Constitution?

(3) Does the statutory cap on noneconomic damages, §766.118, Florida Statutes violate the right to trial by jury under Article I, Section 22 of the Florida Constitution?

(4) Does the statutory cap on noneconomic damages, §766.118, Florida Statutes violate the separation of powers guaranteed by Article II, Section 3 and Article V, Section 1 of the Florida Constitution?

SUMMARY OF ARGUMENT

Florida's cap on noneconomic damages irrationally treats cases with multiple claimants differently and less favorably than those with a single claimant, thereby exacting an irrational cost when, as here, the victim of medical malpractice has a large family adversely affected by the injury. In *St. Mary's Hospital, Inc. v. Phillipe*, 769 So. 2d 961 (Fla. 2000), this Court stated that such a cap bears no rational relationship to alleviating any financial crisis in the medical liability industry, "offends the fundamental notion of equal justice," and "can only be

described as purely arbitrary and unrelated to any state interest." *Id*. at 972. The equal protection violation is thus palpable.

Moreover, because the cap implicates a claimant's fundamental rights of access to the courts and trial by jury, the violation should be evaluated under strict scrutiny, a test it clearly fails. Section 766.118 treats medical malpractice plaintiffs with the most serious injuries, injuries that are sufficient to surmount the arbitrary and inflexible cap, less favorably than those whose injuries are less serious and who still qualify to receive the full value of their compensatory loss. A host of alternative means of addressing insurance costs and the availability of health care, including insurance regulation and tax incentives, were available to the Legislature without impinging on the rights of severely injured patients.

Even if the more deferential rational-basis standard were applied, there is no proper justification or fit to the Legislature's solution to its alleged health-care "crisis," as it was built on speculation when available facts rebutted its selected solution.

The cap also cannot be reconciled with the Florida Constitution's guarantees of access to the courts and the right to a jury trial. In *Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987), this Court struck down a prior indistinguishable noneconomic cap on the basis of those two guarantees. This Court reasoned that a plaintiff who receives a verdict of one amount "has not

received a constitutional redress of injuries if the Legislature statutorily, and arbitrarily, caps the recovery." *Id*. at 1088-89. It further held that the same plaintiff has not received the "constitutional benefit of a jury trial as we have heretofore understood that right" when a "jury verdict is being arbitrarily capped." *Id*.

The cap further violates separation of powers by taking the judiciary's inherent power of remittitur away and by requiring judges to issue a one-size-fits-all judgment that cannot be reconciled with the trial record. The Florida Constitution prohibits such legislative interference with judicial power in common-law civil actions.

ARGUMENT

I. THE CAP ON NONECONOMIC DAMAGES VIOLATES PLAINTIFFS' RIGHT TO EQUAL PROTECTION UNDER THE FLORIDA CONSTITUTION

The equal-protection guarantee, article I, section 2 of the Florida Constitution, assures that all similarly situated persons be treated alike. *De Ayala v. Florida Farm Bureau Cas. Ins. Co.*, 543 So. 2d 204 (Fla. 1989). Thus, everyone "stand[s] before the law on equal terms with, to enjoy the same rights as belong to, and to bear the same burden as are imposed upon others in a like situation." *Warren v. State Farm Mut. Auto. Ins. Co.*, 899 So. 2d 1090, 1105 (Fla. 2005)

(quotation and citation omitted). Section 766.118(2)[1] plainly violates this guarantee by imposing different and additional burdens on some injured parties when an act of medical negligence gives rise to multiple claims, as well when the negligent act causes particularly severe injuries. In both instances, medical-malpractice claimants do not enjoy the same rights to full compensation and do not bear the same burden by virtue of arbitrarily diminished compensation for their legally cognizable claims.

A. Section 766.118 Violates Equal Protection Because It Arbitrarily Burdens Multiple Claimants in Medical Negligence Cases Differently

In *St. Mary's Hospital, Inc. v. Phillipe*, 769 So. 2d 961 (Fla. 2000), this Court addressed a similar equal-protection problem to the one presented here. This Court declared that it would violate equal protection to cap noneconomic damages in the aggregate, regardless of the number of claimants, as §766.118 does here. *Id.* at 971-72. The Court stated that if noneconomic damages were limited in the aggregate,

> then the death of a wife who leaves only a surviving spouse to claim the [full amount of the cap] is not equal to the death of a wife who leaves a surviving spouse and

[1] Section 766.118(2) provides that noneconomic damages against a medical practitioner is limited to $500,000 per claimant, but that no practitioner shall be liable for more than $500,000, regardless of the number of claimants. Where the negligence results in a "permanent vegetative state or death," the cap is raised to $1 million.

> four minor children, resulting in five claimants to divide the [single capped amount]. *We fail 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.* Such a categorization offends the fundamental notion of equal justice under the law and *can only be described as purely arbitrary and unrelated to any state interest*.

Id. (emphasis added).

The equal-protection violation identified by *Phillipe* is plainly present here.[2] Three separate noneconomic damage awards were made by the federal district court based on the evidence presented. To Michelle McCall's grieving parents, the court awarded $750,000 apiece for their pain and suffering. To Michelle's surviving son, W.W., the court awarded $500,000 for his pain and suffering. Under Florida law, the "proceeds from a wrongful death action . . . are the property of the survivors and are compensation for their loss." *In re Estate of Barton*, 631 So. 2d 315, 316 (Fla. 2d DCA 1994). Children, such as W.W., may recover for future loss of support and services, for lost parental companionship, instruction, and guidance, and for mental pain and suffering. §768.21(1) & (3), Fla. Stat. Parents, such as Edward and Margarita McCall, each had separate claims

[2] This Court also has pending a case presenting a similar issue under a different Florida damage cap. In *Samples v. Florida Birth-Related Neurological*, No. SC10-1295 (submitted May 5, 2011), the certified question is "Does the limitation in section 766.31(1)(b)1, Florida Statutes, of a single award of $100,000 to both parents violate the Equal Protection Clause of the United States and Florida Constitutions?" *See* 40 So. 3d 18 (Fla. 5th DCA 2010).

for lost support and services and future lost support and services. §768.21(1), Fla. Stat.

The federal court assessed their damages as fair value based on the record evidence. Applying the cap, it then reduced its own determinations so each claimant receives exactly half of their respective awards. Yet, if Michelle were survived only by her son, he would recover the full amount of his noneconomic damages: $500,000.

The federal court rejected the equal-protection argument advanced by the *Phillipe* Court, as a matter of federal law, by ruling that the cap statute "draws no distinctions based on the size of a family," but only "on the basis of each occurrence of medical malpractice." 663 F. Supp. 2d at 1303. The fatal error in that analysis is that it operates at odds with traditional equal-protection analysis.

The test of equal protection, even under its most deferential standard, is whether it classifies *people* differently based on "some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis." *Gammon v. Cobb*, 335 So. 2d 261, 264 (Fla. 1976).

This Court spoke to the classification complained of here in *Phillipe* and stated that treating multiple claimants increasingly less favorably than single claimants is "purely arbitrary and unrelated to any state interest." *Phillipe*, 769 So.

2d at 972. The cap limits W.W.'s recovery for the loss of a relationship with his mother, simply because his grandparents also suffered a tremendous cognizable loss. Here, due to the number of survivors Michelle left behind, each of them is treated differently than plaintiffs in other cases where there are fewer survivors or the survivors were not as severely damaged as the plaintiffs in this case.

The statute ensures that even more arbitrary results will ensue in other cases. For example, if W.W. had a twin sister, or older siblings, his recovery and theirs would be yet more limited under an aggregate cap on noneconomic damages, even though their losses would not be ameliorated by the existence of other suffering claimants.

Under this statute, the greater the number of survivors and the more devastating their losses are, the less likely they are to be fully compensated for their losses. Scaling damages that way can only be considered capricious and makes little sense. Under Florida's equal protection clause and *Phillipe*, it is arbitrary and irrational, and it "offends the fundamental notion of equal justice under the law." *Phillipe*, 769 So. 2d at 972. As applied to this multiple-claimant case, the cap violates equal protection.

B. Section 766.118 Fails Strict Scrutiny

Equal protection requires strict-scrutiny analysis when a law impedes or burdens the exercise of a fundamental right. *See State v. J.P.*, 907 So. 2d 1101,

1109 (Fla. 2004); *Mitchell v. Moore*, 786 So. 2d 521, 527 (Fla. 2001). Strict scrutiny focuses on whether the law is supported by a "compelling governmental interest" *and* is "strictly tailored to remedy the problem in the most effective way" without "restrict[ing] a person's rights any more than absolutely necessary." *Moore*, 786 So. 2d at 527-28. The test this Court uses "corresponds" to the "overpowering public necessity" and "no alternative means" test employed in determining whether a violation occurs of the constitutional "access to courts" right as announced in *Kluger v. White*, 281 So. 2d 1 (Fla. 1973). *Id*. at 528.[3]

The Eleventh Circuit held that the cap did not violate Fourteenth Amendment equal protection, relying on a rational-basis analysis. That approach provides no guidance for this Court's strict-scrutiny task because the cap implicates fundamental rights under the Florida Constitution's access to courts and jury-trial provisions. *See Haag v. State*, 591 So. 2d 614, 618 (Fla. 1992) (access to courts is fundamental); *Fox v. City of Pompano Beach*, 984 So. 2d 664, 668 (Fla. 4th DCA 2008) (jury trial fundamental). To warrant strict scrutiny, an outright violation of the fundamental right is not necessary; the right merely must be burdened or implicated. *See, e.g.*, *State v. J.P.*, 907 So. 2d at 1109-16 (strict scrutiny applies when a law "impedes the exercise of," "implicates," "impinges," or "burdens" a "fundamental right"); *B.S. v. State*, 862 So. 2d 15, 18 (Fla. 2d DCA 2003) ("affects").

[3] *See infra* pp. 32-36 for discussion of *Kluger* test.

Statutes that interfere with fundamental rights do not come to court clothed with a presumption of constitutionality, but are "presumptively unconstitutional unless proved valid." *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 626 (Fla. 2003). That shifted burden requires those who would sustain the law to bear the "heavy burden" of showing the challenged statute accomplishes its goal through the least intrusive means. *Id*. at 646.

Here, the United States did not and cannot meet their burden, a burden that the federal courts did not consider in this case. Limiting all of Michelle McCall's survivors to a single aggregate amount of $1 million in noneconomic damages lacks compelling justification and is not narrowly tailored or the least restrictive means of addressing the purported problem. It fails strict scrutiny analysis, and this Court should likewise hold that it violates equal protection.

1. There is no compelling governmental interest.

The Legislature attempted to satisfy the requirement of overpowering public necessity with empty claims that "Florida is in the midst of a medical malpractice insurance crisis of unprecedented magnitude," resulting in doctors leaving the state or refusing to perform high-risk procedures and allegedly limiting the availability of health care. Fla. Sess. Law Serv. Ch. 2003-416, §1 (C.S.S.B. 2-D). These conclusory "findings" are unbolstered by facts and, even if accurate, are ultimately unavailing. Authoritative government reports belie the pretextual justifications that the Legislature imagined. *See* U.S. General Accounting Office, No. GAO-04-124,

Physician Workforce: Physician Supply Increased in Metropolitan and Nonmetropolitan Areas but Geographic Disparities Persisted (Oct. 2003), at 23, *available at* http://www.gao.gov/ new.items/d04124.pdf (finding that, from 1991 to 2001, Florida's physician supply per 100,000 residents grew from 214 to 237 in metropolitan areas and from 98 to 117 in nonmetropolitan areas, or percentage increases of 11 and 19, respectively); U.S. Dep't of Justice, Bureau of Justice Statistics, NCJ 216339, *Medical Malpractice Insurance Claims in Seven States 2000-2004* (Mar. 2007), at 1, *available at* http://bjs.ojp.usdoj.gov/ content/pub/pdf/mmicss04.pdf (finding that nearly 43 percent of Florida medical malpractice insurance claims were closed with a payout of combined economic and noneconomic damages of less than $100,000, two-thirds under $250,000, and only 5.5 percent had a payout of more than $1 million). The purported "crisis" in medical malpractice liability has been the rallying-cry to limit fundamental constitutional rights of those injured by medical negligence since the mid-1800s, yet lacks real substance. *Ferdon ex rel. Petrucelli v. Wisconsin Patients Comp. Fund*, 701 N.W.2d 440, 447 n.9 (Wis. 2005) (citing Catherine T. Struve, *Doctors, The Adversary System, and Procedural Reform in Medical Liability Litigation*, 72 Fordham L. Rev. 943, 952 (2004)).

A Task Force whose report informed the legislative process concluded that there really was no crisis, employing much more equivocal language when

describing the evidence supporting the cap. *See Governor's Select Task Force on Healthcare Professional Liability Insurance* (Jan. 29, 2003) [hereinafter *TFR*], at 211-12 ("Florida healthcare providers *fear* a bleak picture for Florida, but the Task Force *believes* it *could* get worse in the coming years . . . . Medical malpractice insurance premiums *may become* unaffordable, and/or coverage *may become* unavailable at any price to many physicians and hospitals.") (emphasis added).

The 2003 legislative debate exposed the fallacy of the claimed medical malpractice "crisis," revealing that, in retrospect, previous laws enacted in 1975 and 1986 to respond to similar "crises" were not related to insurance premiums or to the need for caps, but rather the result of simple economic downturns. Transcript of Florida Senate Judiciary Comm. Debate, Session D, at 85-86 (Aug. 13, 2003) (App. 22-23). Yet, the Legislature trod down the road of capping damages yet again.

Moreover, even if a "crisis" existed when §766.118 was enacted, a crisis is not a permanent condition. Changed conditions can remove the justification underlying the law, transforming a once reasonable law into an arbitrary and irrational one. It is "well settled" hornbook law that "[o]ver a period of time, social, political and economic changes may render a statute obsolete" and "that *the continued existence of facts upon which the constitutionality of legislation depends remains at all times open to judicial inquiry*." Norman J. Singer, 2 *Sutherland Stat. Construction* §34:5, at 38, 40 (6th ed. 2000) (emphasis added; citing cases). Even if §766.118's classification was rational when enacted based on information then

available, it loses its rationality if its factual premise changes. It is for precisely that reason that Florida's courts consider both pre- and post-enactment evidence in assessing a statute's continuing rationality. *See, e.g.*, *N. Fla. Women's Health*, 866 So. 2d at 616-17, 630. No crisis exists now to justify the cap.

2. The cap is not narrowly tailored nor necessary to serve the State's purported purpose.

Even if there were a compelling governmental interest supporting §766.118, the cap was not narrowly tailored, nor necessary, to serve the state's purported goal. An authoritative government report indicates that many factors contribute to insurance premium increases. *See* U.S. General Accounting Office, No. GAO-03-702, *Medical Malpractice Insurance: Multiple Factors Have Contributed to Increased Premium Rates* (Jun. 2003), *available at* http://www.gao.gov/new.items/d03702.pdf. The narrow tailoring or least restrictive means requirement obligates the Legislature to pursue other causes before burdening fundamental rights. *See, e.g.*, *Sable Commc'n of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (regulations that touch upon a fundamental right must employ "the least restrictive means to further the articulated [compelling] interest").

Here, the legislature did not utilize its enormous authority to regulate insurance and insurance premiums. *See, e.g., German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 413-18 (1914) (discussing both the authority and the public interest involved in insurance regulation); *Nationwide Mut. Ins. Co. v. Williams*, 188 So.

2d 368, 369 (Fla. 1st DCA 1966). The Legislature did not utilize tax incentives and financial grants to offset insurance premium increases and induce more physicians to make Florida their home. Instead, the Legislature chose to cap compensatory damages, which it acknowledged to be no more than an "experiment." Florida House Select Comm. on Medical Liability Ins., *Report*, Executive Summary (Mar. 2003), at 7.[4]

The Select Committee stated that although

> [t]he records of both the Governor's Task Force and the Select Committee are replete with anecdotal evidence of the possible changes in behavior by medical practitioners, including institutional service provisions changes; . . . there was only minimal information available about specific cumulative totals of changes in service availability or the direct impact on healthcare services in any county in Florida due specifically to the rise in premium costs for service providers.

Id. at 4.

Plainly, alternative means to achieve the Legislature's goal existed, which would have spread the cost among all Floridians, rather than impose those costs on the relatively few seriously injured victims of medical negligence who are most in need of compensation. The Task Force itself recognized that other measures were

[4] In fact, the Senate Judiciary Committee chair acknowledged that "[t]here is no guarantee that any cap on noneconomic damages would lower premium rates." Letter from J. Alex Villalobos, Chair of the Senate Judiciary Committee, to Senate President James E. "Jim" King, Journal of the Florida Senate, 2003 Special Session D, No. 2, at 21 (Aug. 13, 2003) (App. 28).

available to the Legislature. *TFR*, at 218-19. The existence of viable alternatives demonstrates that the law *cannot* meet strict scrutiny because there were less restrictive alternative means to serve the Legislature's purpose.

Additionally, the $1 million cap on damages here cannot meet strict scrutiny because it was not *necessary* to the legislature's purported purpose. Here, the statute contains a variety of caps on damages, one that applies to claims against "practitioners" and another that applies to "non-practitioners," allowing claimants to recover up to $2.5 million. The mere existence of multiple caps demonstrates that limiting the claimants here to $1 million is not *necessary* to the Legislature's purported purpose.

Because other means are available, §766.118 is neither narrowly tailored nor the least restrictive means and must be declared unconstitutional.

C. The Cap Cannot Even Meet the Rational-Basis Test

Even if the rational-basis test were applicable, §766.118 fails. The rational-basis test requires a court to "determine (1) whether the 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." *Hechtman v. Nations Title Ins. of New York*, 840 So. 2d 993, 996 (Fla. 2003) (citations omitted). Moreover, as demonstrated above, "without exception, all statutory classifications that treat one person or group differently than others . . . cannot be

discriminatory, arbitrary, or oppressive." *Phillipe*, 769 So. 2d at 971; *see also Vildibill v. Johnson*, 492 So. 2d 1047, 1050 (Fla. 1986) ("a statutory classification cannot be wholly arbitrary").

The Eleventh Circuit's ruling applying the Fourteenth Amendment is not binding on this Court's determination. The Eleventh Circuit's rational-basis analysis was severely flawed. First, the Court imposed an impossible and unreasonable burden on the Plaintiffs of disproving "every conceivable basis which might support" the statute. *See Estate of McCall v. United States*, 642 F.3d 944, 950 (11th Cir. 2011) (citing *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)). It is, however, clear that Florida precedent permits plaintiffs to disprove the "rational basis" for a law by demonstrating that it is arbitrary and oppressive, *see Phillipe*, 769 So. 2d at 971, and plaintiffs have done so.

Second, the Eleventh Circuit simply accepted the legislative purpose itself as legitimate, and then stretched that presumptively valid purpose into an assumption that the Legislature could have reasonably concluded that the cap on damages "would make medical malpractice insurance more affordable and healthcare more available." 642 F.3d at 951. This sort of bootstrapping completely defeats the purpose of an equal-protection analysis. By *assuming* both that the purpose is legitimate *and* that the means of serving that purpose is reasonable, the Eleventh Circuit failed to ensure that the Legislature does not irrationally burden the most

severely injured Floridians based on assumptions, guesses, and hyperbole. The Eleventh Circuit's toothless rational-basis inquiry is not the equal protection analysis that the Florida Constitution or this Court utilizes:

> While courts may defer to legislative statements of policy and fact, courts may do so only when those statements are based on actual findings of fact, and even then courts must conduct their own inquiry: The general rule is that findings of fact made by the legislature are presumptively correct. However, it is well-recognized that the findings of fact made by the legislature must actually be findings of fact. They are not entitled to the presumption of correctness if they are nothing more than recitations amounting only to conclusions and they are always subject to judicial inquiry.

N. Fla. Women's Health, 866 So. 2d at 627 (quoting *Moore v. Thompson*, 126 So. 2d 543, 549 (Fla. 1960)). *See also City of Tampa v. State ex rel. Evans*, 19 So. 2d 697, 697 (Fla. 1944) ("legislative findings of fact are not conclusive and may be contested in court"). This Court has, time and again, allowed the examination of the facts and evidence that undercut the Florida legislature's rationales for Florida laws. *See In re Matter of Adoption of X.X.G.*, 45 So. 3d 79 (Fla. 2010) (under a rational-basis inquiry, examining extensive expert evidence that disproved Florida's purported rationale for a law prohibiting homosexuals from adopting); *Cox v. Florida Dep't of Health & Rehabilitive Servs.*, 656 So. 2d 902 (Fla. 1995) (remanding to allow the parties to make a record to allow the court to determine whether a law was supported by a rational basis).

1. There was no factual basis to assume capping noneconomic damages will reduce malpractice insurance premiums.

The Legislature based its legislative findings on the Governor's Task Force, as well as other studies and experience in other states. Fla. Sess. Law Serv., *supra*, at ¶ 14. A fair review of those sources leads to the inescapable conclusion that the Legislature had no objective, factual basis for believing that a $1 million cap on noneconomic damages in medical malpractice actions involving death would significantly reduce liability insurance costs paid by Florida doctors.

The Task Force was heavily influenced by the purported "success" of California's noneconomic damage cap in mitigating the rising cost of malpractice insurance. The Task Force relied almost exclusively on the "success story" told by Californians Allied for Patient Protection, an interest group of physician organizations and insurance companies organized for the purpose of promoting California's damage caps. *See TFR*, at 193-97.

However, California's experience with its $250,000 noneconomic damages cap was a doubtful basis for anticipating that a $1 million cap on noneconomic damages, coupled with a $1.5 million cap for nonpractitioners, would lower malpractice premiums in Florida. Indeed, in November 1975, only a few months after the California cap was enacted, California's malpractice insurers levied huge premium increases of more than 400 percent. Note, Todd M. Kossow, *Fein v. Permanente Medical Group: Future Trends in Damage Limitation Adjudication*,

80 Nw. U. L. Rev. 1643, 1649 (1986). Premiums continued to rise sharply in California during the next *decade* after the cap was enacted. U.S. General Accounting Office, *Medical Malpractice: Six State Case Studies Show Claims and Insurance Costs Still Rise Despite Reforms*, "Case Study on California," at 12, 22 (Dec. 1986); Mark A. Finkelstein, *California Civil Section 3333.2 Revisited: Has It Done Its Job?*, 67 S. Cal. L. Rev. 1609, 1617-18 (1994). In fact, malpractice insurance rates only stabilized after the state enacted strict insurance regulation through a voter initiative in 1988. *See generally* Foundation for Taxpayer and Consumer Rights, *Insurance Regulation, Not Malpractice Caps, Stabilize Doctors' Premiums* (Jan. 16, 2003), *available at* http://www.consumerwatchdog.org/patients/articles/?storyId=15058.

The Legislature adopted the Task Force's findings that California's experience "is the strongest evidence that caps on non-economic damages . . . are the most effective tort reform," *TFR*, at 212, but did not question whether California's experience under their statutory cap was a reasonable basis for limiting damages *in Florida* almost three decades after California did. The Legislature's blind acceptance of the California story in light of the facts was unwarranted and clearly erroneous. It cannot provide a rational basis for §766.118.

Even if the Legislature's factual findings were not clearly erroneous, the statute still violates equal protection because the available evidence does not

demonstrate a rational relationship between the damage cap and the alleviation of the purported medical malpractice crisis. *See Lane v. Chiles*, 698 So. 2d 260, 264 (Fla. 1997) (means must "serve[] to accomplish a legitimate governmental objective").

For example, Weiss Ratings, which evaluates the performance of the malpractice insurance industry, concluded:

> In states with caps, the median annual premium went up by 48.2%, but, surprisingly, in states without caps, the median annual premium increased at a slower clip—by 35.9%.
>
> These counter-intuitive findings can lead to only one conclusion: There are other, far more important factors driving the rise in med mal premiums than caps or med mal payouts.

Martin D. Weiss, Melissa Gannon & Stephanie Eakins, *Medical Malpractice Caps: The Impact of Non-Economic Damage Caps on Physician Premiums, Claims Payout Levels, and Availability of Coverage*, at 3 (rev ed. June 3, 2003), *available at* http://www.moneyandmarkets.com/Images/public-service/MedicalMalpractice.pdf. Legislative testimony from insurers confirms that a cap of $500,000 or more would accomplish "virtually nothing." Hearing on Medical Malpractice Before Sen. Judiciary Comm., at 51 (July 14, 2003) (statement of Robert White, President, First Professional Insurance Co.) (App. 40). *See also Ferdon*, 701 N.W.2d at 471-72 (detailing studies demonstrating that "medical malpractice insurance premiums

are not affected by caps on noneconomic damages."); U.S. Dep't of Justice, Bureau of Justice Statistics, *supra*, at 1 (demonstrating that only a third of medical malpractice insurance payouts in Florida top $500,000 in combined economic and noneconomic damages).

In addition due to the extreme rate of medical inflation, medical expenses associated with remediating malpractice have climbed precipitously, expenses that are part of compensatory damages and measured in uncapped economic damages. *See, e.g.*, The Bureau of Labor Statistics, *Consumer Price Index for All Urban Consumers 1992-2002* (reporting that in 12-month period ending May 2002 the cost of medical care increased by 4.7% while the consumer price index rose only by 1.2%). Because the cap does not affect these costs, coupled with the admissions that the caps were an experiment and that insurers believed the cap would accomplish "virtually nothing," *see* pp. 17, 23 *supra*, there was no rational basis for the Legislature to assume that a noneconomic damage cap would address insurance premium increases.

2. There was no rational basis for the Florida Legislature to expect that insurers would pass savings to doctors.

Caps on damages limit the amount of money insurance companies pay injured victims of medical malpractice, but they do not require insurance companies to use those savings to lower insurance premiums for doctors. Under §766.118, insurance companies remain free to spend the money not paid to

medical malpractice victims in any manner they choose, including executive compensation, advertising, investments, political activities, or shareholder dividends.

As the Oklahoma Supreme Court observed, empirical studies have confirmed that without a statutory requirement that lower payments to plaintiffs result in lower premiums for doctors, savings resulting from caps simply swell the insurance company coffers:

> Insurance companies who benefit from tort reform but are not required to implement post-tort reform rates decreasing the cost of medical malpractice insurance to physicians . . . happily pay less out in tort-reform states while continuing to collect higher premiums from doctors and encouraging the public to blame the victim or attorney for bringing frivolous lawsuits.

Zeier v. Zimmer, Inc., 152 P.3d 861, 869-70 (Okla. 2006). *Cf. Department of Ins. v. Teachers Ins. Co.*, 404 So. 2d 735, 742 (Fla. 1981) (stating that the Legislature could not properly have intended that insurers enjoy excess profits in enacting tort and insurance reform acts).

In 1987, the year after Florida enacted its previous, $450,000 noneconomic damage cap, Florida's largest malpractice carriers sought a premium increase. St. Paul Fire and Marine Insurance Co. formally told the Insurance Commissioner that the $450,000 noneconomic damage cap would not result in any real savings. *See* Jay Angoff, *Insurance Against Competition: How the McCarran-Ferguson Act*

Raises Prices and Profits in the Property Casualty Insurance Industry, 5 Yale J. on Reg. 397, 400-01 (1988). There is no basis to assume imposing a noneconomic damage cap would lower malpractice premiums.

In fact, nothing has changed since the insurance issue was studied by a blue-ribbon American Bar Association commission that concluded that insurers' "violent cyclical swings of boom and bust, profitability and loss" were occasioned by economic downturns and low interest rates that forced insurance companies that had previously set premium rates "unrealistically low because of the hugely favorable investment climate" to "raise[] their rates dramatically, prompting startled protests from the health care services, particularly medical doctors," resulting in the adoption of "ill-conceived" legislation "designed to reduce the recoveries." Robert B. McKay, *Rethinking the Tort Liability System: A Report from the ABA Action Commission*, 32 Vill. L. Rev. 1219, 1219-21 (1987).

Contemporary studies reach the same conclusion. *See, e.g.*, Tom Baker, *Medical Malpractice and the Insurance Underwriting Cycle*, 54 DePaul L. Rev. 393, 394 (2005). The best available empirical data reveals that

> the two most recent medical liability insurance crises [mid-1980s and early 2000s] did not result from sudden or dramatic increases in medical malpractice settlements or jury verdicts. Instead . . . the crises resulted from dramatic increases in the amount of money that the insurance industry put in reserve for claims. Those reserves increases were so big because the insurance

> industry systematically under reserved in the years leading up to the crisis.

Tom Baker, *The Medical Malpractice Myth* 53-54 (2005). *Accord* Bernard Black, *et al*., *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002*, 2 J. Empirical Legal Stud. 207, 210 (July 2005). A study of Florida jury trials and settlements similarly found that jury verdicts constitute "only a small fraction of total payouts by medical liability insurers" cases with substantial verdicts and were subsequently settled at discounts averaging about 37 percent less than the verdict. Neil Vidmar, Kara MacKillop & Paul Lee, *Million Dollar Medical Malpractice Cases in Florida: Post-Verdict and Pre-Suit Settlements*, 59 Vand. L. Rev. 1343, 1380 (2006). These studies refute any assumption that medical malpractice cases, rather than broader, unrelated economic conditions, explain the volatility of insurance premium rates.

The optimistic hope of Florida's legislative majority cannot overcome the fatal absence of a reliable factual basis that §766.118 would achieve its objective. As the Texas Supreme Court observed, "[i]n the context of persons catastrophically injured by medical negligence, we believe it is unreasonable and arbitrary to limit their recovery in a speculative experiment to determine whether liability insurance rates will decrease." *Lucas v. United States*, 757 S.W.2d 687, 691 (Tex. 1988).

3. It is irrational and arbitrary to impose the cost of the purported public benefit on the most seriously injured victims of medical negligence.

Finally, §766.118(2) violates equal protection because it is discriminatory, arbitrary, and oppressive. *See Phillipe*, 769 So. 2d at 971; *Nationwide Mut. Fire Ins. Co. v. Pinnacle Med.*, 753 So. 2d 55, 59 (Fla. 2000); *Smith*, 507 So. 2d at 1089. Even if this Court accepts at face value the dubious notion that limiting jury awards in medical malpractice cases will significantly reduce doctors' liability premiums and ensure the availability of quality medical care for all Floridians, it is manifestly arbitrary and unfair to impose the cost of this public benefit on the relatively few most seriously harmed victims of medical malpractice.

Other state supreme courts have also condemned such legislative arbitrariness. For example, New Hampshire's Supreme Court held it "simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation." *Carson v. Maurer*, 424 A.2d 825, 837 (N.H. 1980), *overruled on other grounds by, Cmty. Res. for Justice, Inc. v. City of Manchester*, 917 A.2d 707 (N.H. 2007).[5] More recently, one judge wrote, "[i]t is difficult to

[5] The New Hampshire Supreme Court overruled *Carson* because the test used by the court in *Carson* did not go far enough in protecting against legislative "justifications that are hypothesized or 'invented post hoc in response to litigation,' [or] 'overbroad generalizations.'" *Cmty. Res. for Justice, Inc.*, 917 A.2d at 721.

conceive of the necessity of a health care policy that expressly relies on discrimination against the small number of unfortunate individuals who suffer the most debilitating, painful, lifelong disabilities as a result of medical negligence." *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 782 (Mo. 2010) (en banc) (Teitelman, J., concurring). *See also Best v. Taylor Machine Works*, 689 N.E.2d 1057, 1077 (Ill. 1997). Section 766.118 seeks to save a relatively modest amount for the many by imposing crippling costs on a few. The legislative record contains no justification for such an arbitrary rule, and the cap cannot pass constitutional muster under Florida's Equal Protection guarantee.

II. THE LIMIT ON NONECONOMIC DAMAGES VIOLATES THE FUNDAMENTAL RIGHT OF ACCESS TO THE COURTS

Article I, section 21 explicitly declares: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." It is a fundamental right, because it "has its source in and is explicitly guaranteed by the federal or Florida Constitution." *State v. J.P.*, 907 So. 2d at 1109. *See also Psychiatric Assocs. v. Siegel*, 610 So. 2d 419, 424 (Fla. 1992) (holding Art. I, §21 fundamental), *receded from on other grounds*, *Agency for*

New Hampshire would find the statute more grossly unconstitutional under the new standard.

Health Care Admin. v. Associated Indus. of Fla., Inc., 678 So. 2d 1239 (Fla. 1996).[6]

The provision derives from Chapter 40 of Magna Carta, which prohibits the sale, denial, or delay of justice and was understood to comprise "a promise of full and equal justice for all." David Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 Or. L. Rev. 35, 39 (1986). Upon Magna Carta's reissue in 1225, Chapter 40 was combined with Chapter 39, the antecedent of our due process guarantee, to form a new Chapter 29, a provision that indisputably had the most significant impact on later American constitutional thinking. Hon. William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. Mem. L. Rev. 333, 356, 350 (1997). As construed by Sir Edward Coke, Chapter 29 embraced "the entire body of the common law of the seventeenth century." William S. McKechnie, *Magna Carta, A Commentary on the Great Charter of King John* 178 (2d ed. 1914).

The seeds Coke planted in his writings found fertile soil in the American colonies. *See* A.E. Dick Howard, *The Road from Runnymede* 119-25 (1968). Coke

[6] The U.S. Constitution contains an implicit guarantee of access to justice. *See Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002) (holding that the right of access to the courts is "grounded in the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses."). The Supreme Court has also held the right to be fundamental. *See, e.g.*, *Lewis v. Casey*, 518 U.S. 343, 346 (1996).

was "widely recognized by the American colonists 'as the greatest authority of his time on the laws of England.'" *Payton v. New York*, 445 U.S. 573, 594 (1980). His gloss on Magna Carta "was widely accepted and imported by early American colonists who incorporated it into state constitutions." Jennifer Friesen, *State Constitutional Law* §6.2(a), at 349 n.16 (1996). *See also Gresham v. Smothers Transfer Co.*, 23 P.3d 333, 340 (Or. 2001) (footnote omitted) (noting that "phrasing of remedy clauses that now appear in the Bill of Rights of the Oregon Constitution and 38 other states traces to Edward Coke's commentary, first published in 1642, on the second sentence of Chapter 29 of the Magna Carta of 1225."). When America's constitution writers read Chapter 29 and adopted it in their state constitutions, "they almost certainly understood it as Coke did." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 29 (1991) (Scalia, J., concurring).

Of equal influence was Sir William Blackstone, who, emphasized that under the common law and consistent with Magna Carta, "every Englishman" has the right to "apply[] to the courts of justice for redress of injuries." 1 William Blackstone, *Commentaries on the Laws of England* 141 (1765). He added that, when the law recognized rights, such recognition would be "in vain" without "the remedial part of the law that provides methods for restoring those rights when they wrongfully are withheld or invaded." *Smothers*, 23 P.3d at 343 (characterizing 1 Blackstone, *Commentaries*, at 56). The remedial "part" in common-law negligence claims is found in compensatory damages, the objective of which is "to make the

injured party whole to the extent that it is possible to measure his injury in terms of money." *Mercury Motors Express, Inc. v. Smith*, 393 So. 2d 545, 547 (Fla. 1981).

This conception of open and accessible courts became an American birthright and an article of faith that found expression in the nation's seminal constitutional decision: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

From its first iteration, Florida's Constitution has guaranteed every person a "right to free access to the courts on claims or redress of injury free of unreasonable burdens and restrictions." *G.B.B. Inv., Inc. v. Hinterkopf*, 343 So. 2d 899, 901 (Fla. 3d DCA 1977). The seminal Florida case construing the access guarantee is *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), which held that "the Legislature is without power to abolish [a preexisting common-law] right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown." *Id*. at 4.

Section 766.118 plainly does not contain a reasonable alternative for the Plaintiffs, thus failing the first prong of the *Kluger* test. It also cannot satisfy the second prong of the test. The *Kluger* test is functionally equivalent to the strict

scrutiny test under equal protection. *Moore*, 786 So. 2d at 528. As it fails under strict scrutiny, it fails here. *See* pp. 12-16 *supra.*

This Court undertakes an independent analysis to determine whether the Legislature presented a sufficient case that overpowering public necessity exists *and* that no alternative means to meet that necessity was available. *Kluger*, 281 So. 2d at 5. Legislative "statements of policy and fact 'do not obviate the need for judicial scrutiny.'" *N. Fla. Women's Health*, 866 So. 2d at 628 (footnote omitted). *Cf. United States v. Morrison*, 529 U.S. 598, 614 (2000) ("[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so" and congressional findings are "not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.") (quotation and citation omitted).

In *Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987), this Court applied *Kluger* and struck a prior, indistinguishable statutory cap on noneconomic damages as violative of the right to access to the courts:

> Access to courts is granted for the purpose of redressing injuries. A plaintiff who receives a jury verdict for, e.g., $1,000,000.00, has not received a constitutional redress of injuries if the Legislature statutorily, and arbitrarily, caps the recovery at $450,000.00.

Id. at 1088-89.

As later explained in *University of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993), *cert. denied*, 510 U.S. 915 (1993), the damages cap in *Smith* failed to pass

constitutional muster because it did not provide victims with a commensurate benefit when it capped their damages. *Id.* at 193-94. Quoting *Smith*, *Echarte* proclaimed: "the law is clear that the Legislature cannot restrict damages by either enacting a minimum damage amount or a monetary damage cap without meeting the *Kluger* test." *Id.* at 194.[7]

Here, the Legislature prefaced §766.118 with "findings" that there was an overpowering public necessity in "making high-quality healthcare available to the citizens of this State" by "insuring the availability of affordable professional liability insurance for physicians," and thereby "insuring that physicians continue to practice in Florida." Florida Sess. Law Serv. Ch. 2003-416, §1 (C.S.S.B. 2-D). The determination of whether a statute is supported by overpowering public necessity is, however, a *judicial* conclusion as to whether the Legislature was acting within its constitutional authority. *See N. Fla. Women's Health*, 866 So. 2d at 628. Legislative

[7] Although this Court in *Echarte* upheld caps on noneconomic damages in medical malpractice claims in the discrete context of arbitration, the *Echarte* Court determined that the *Kluger* test was met because, in that instance, the Legislature had indeed provided a commensurate benefit, *Echarte*, 618 So. 2d at 194-95, and had found the requisite "overpowering public necessity," *id*. at 196, while developing a record that "support[ed] the conclusion that no alternative or less onerous method exist[ed]." *Id*. at 197. The statute in issue in *Echarte* substituted binding arbitration for the common-law means of adjudicating, wherein defendants waive their right to defend liability, and in exchange, victims agree to cap their noneconomic damages, offsetting benefits not present in §766.118. Here, however, there is no similar offsetting benefit or *quid pro quo* that inures to the Plaintiffs' advantage.

policy must be "based on actual findings of fact, and even then courts must conduct their own inquiries." *Id.* at 627.

Despite the Legislature's conclusory "crisis" language in support of §766.188, it did not find an immediate or widespread danger to the availability of health care to Floridians. Indeed, the number of doctors practicing in Florida had steadily increased over the decade preceding enactment of the statute, both in metropolitan and rural areas. U.S. General Accounting Office, *Physician Workforce*, at 23.

When compared to the factual findings the Legislature made *in 1986* for the damage cap struck in *Smith*, the 2003 "crisis" was both narrower and less severe financially. According to the Legislature, the 1986 crisis affected not only physicians, but many sectors of the economy. "[P]rofessionals, businesses, and governmental entities" faced not only escalating premiums, but the unavailability of liability insurance. *See Smith*, 507 So. 2d at 1084 & n.2; *see also id*. at 1083-84, 1086-87 (twice reciting the "detailed legislative findings" of a commercial insurance liability crisis with supportive evidence).

Just as it was told in 2003, the Legislature believed the 1986 cap was needed to respond to a crisis in which "physicians were severely limiting their practice in certain areas of medicine." *Id*. at 1086. That identical finding accompanying the 1986 cap was insufficient to meet the *Kluger* test in *Smith*, resulting in invalidation

of that cap. *Stare decisis* mandates that the 2003 cap be invalidated on the same grounds. *See Westgate Miami Beach, Ltd. v. Newport Operating Corp.*, 55 So. 3d 567, 574 (Fla. 2010) ("The doctrine of stare decisis counsels us to follow our precedents unless there has been 'a significant change in circumstances after the adoption of the legal rule, or . . . an error in legal analysis.'") (citations omitted).

Similarly, §766.118 provides no offsetting benefit or substantially equivalent remedy to plaintiffs when it reduces the available remedy and limits damages to an amount that is less than the evidence supports. Any sufficient offsetting benefit must be personal to the adversely affected party and may not be satisfied by some supposed good enjoyed by the public at large. *Kluger*, 281 So. 2d at 5 (requiring the "alternative protection [be] for the victim of the accident"). Without that alternative remedy or offsetting benefit, the cap must be supported by an "overpowering public necessity" and constitute the *only* means available in order to justify its invasion of constitutionally guaranteed rights. Satisfaction of these requirements is palpably absent.

It is not appropriate under these circumstances to defer to the Legislature. After all, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008). *See also Sable Commc'n*, 492 U.S. at 129 ("whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law"). If there are alternative means to accomplish its objectives that do not intrude on access to the courts, the Florida Constitution

requires that the Legislature choose those alternatives. *See Moore*, 786 So. 2d at 527-28. *Cf. Sable Commc'n*, 492 U.S. at 129 (invalidating statutory provision for failing to adopt the "constitutionally acceptable less restrictive means").

The Legislature has broad powers and an array of options to make Florida more financially attractive to physicians. If the Legislature's objective was to lower medical malpractice premiums, less restrictive means, such as regulating those premiums, which do not adversely affect anyone's constitutional rights, are readily available. *See Smith*, 507 So. 2d at 1093 (upholding law that required excess profits from insurance premiums be returned to policyholders who comply with risk management guidelines). Another alternative would have been the institution of tax incentives to offset premium increases. *See, e.g., Rosenshein v. Florida Dep't of Children & Families*, 971 So. 2d 837, 841 n.3 (Fla. 3d DCA 2007) (describing use of tax and economic policies by the federal and state governments to encourage or discourage certain behaviors). In the end, as Justice Holmes once stated, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

Moreover, as this Court held with respect to the Legislature's detailed findings of a crisis in 1986, the access-to-courts guarantee cannot be met "if the legislature statutorily, and arbitrarily, caps the recovery." *Smith*, 507 So. 2d at 1088. Not even assertion of a severe insurance affordability and availability crisis

is sufficient to justify plenary legislative authority over a component of proven compensatory damages. Much like the cap invalidated in *Smith*, §766.118 fails to connect the increased availability of health care that is its purported objective, in any significant manner, with a damage cap that, by definition, limits the damages that may be recovered by those most catastrophically injured by medical malpractice. Rather than constitute overpowering public necessity, the cap provides no legitimate justification for adding further injury to those most seriously harmed by medical negligence. *Cf. The Declaration of Independence* para. 30 (U.S. 1776) ("In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury."). In short, §766.118's cap is constitutionally indistinguishable from the cap invalidated in *Smith*. It should suffer the same fate.

III. THE CAP VIOLATES THE FUNDAMENTAL RIGHT TO TRIAL BY JURY

The Florida Constitution guarantees that "[t]he right of trial by jury shall be secure to all and remain inviolate." Art. I, §22, Fla. Const. Use of the word "inviolate" in Florida's successive constitutions comprises a choice of unique significance. It appears nowhere else in the Constitution.

As this Court explained early in its history, the word "inviolate" "does not merely imply that the right of jury trial shall not be abolished or wholly denied, but that it shall not be *impaired*." *Flint River Steamboat Co. v. Roberts*, 2 Fla. 102, 113

(1848) (emphasis in original). It then concluded that "the plain and obvious meaning" of the inviolate right to a jury trial is that "the General Assembly has no power to impair, abridge, or in any degree restrict the right of trial by jury as it existed when the Constitution went into operation." *Id*.

Thus, the jury-trial right preserved inviolate is the same as the right "'enjoyed at the time [Florida's] first constitution became effective in 1845.'" *Dep't of Revenue v. Printing House*, 644 So. 2d 498, 500 (Fla. 1994) (quoting *In re Forfeiture of 1978 Chevrolet Van*, 493 So. 2d 433, 434 (Fla. 1986)).

The conflict between the cap and the constitutional jury-trial right is palpable. Unlike constitutional rights that require courts to balance the claimed right against a countervailing governmental interest, the jury-trial right admits no abridgement or diminution of a jury's prerogatives extant at the common law. Florida's jury-trial guarantee, like its criminal-jury counterpart in the U.S. Constitution, "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004). Thus, "[j]ust as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Id*. at 306 (further describing the trust and authority we repose in American juries).

One of the jury's indisputable responsibilities is the determination of facts, *Perenic v. Castilli*, 353 So. 2d 1190, 1192 (Fla. 4th DCA 1977), including the assessment of compensatory damages. *Miller v. James*, 187 So. 2d 901, 902 (Fla.

2d DCA 1966) ("In a long line of cases, the appellate Courts of Florida have held that the amount of damages to be awarded plaintiff in a negligence action is peculiarly the province of the jury."). Compensatory damages consist of both economic and noneconomic damages. No distinction is made with respect to the jury's authority over these two components of total damages. The determination of noneconomic damages, such as pain and suffering compensation, "involves only a question of fact." *St. Louis, Iron Mountain & S. Ry. Co. v. Craft*, 237 U.S. 648, 661 (1915), *cited with approval in Cooper Indus., Inc. v. Leatherman Tool Group, Inc*., 532 U.S. 424, 437 (2001); *see also Braddock v. Seaboard Air Line R.R. Co.*, 80 So. 2d 662, 667 (Fla. 1955).

Although the Seventh Amendment's guarantee of a civil jury has no application to the States, the U.S. Supreme Court's description of the jury's role under that provision provides persuasive guidance in the application of Florida's cognate right. *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1270 n.13 (Fla. 2006). In its most relevant modern declaration of jury authority over damages, the U.S. Supreme Court declared, as it was under the common law, that juries have always served as the "judges of damages." *Feltner v. Columbia Pictures Television*, 523 U.S. 340, 353 (1998), quoting with approval, *Townsend v. Hughes*, 86 Eng. Rep. 994, 994-945 (C.P. 1677). *Feltner* did not enunciate anything new, as that Court has consistently held that a plaintiff "remain[s] entitled . . . to have a

jury properly determine the question of liability *and the extent of the injury by an assessment of damages*. Both are questions of fact." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) (emphasis added). *See also Kennon v. Gilmer*, 131 U.S. 22, 29-30 (1889) (a "court has no authority . . . in a case in which damages for a tort have been assessed by a jury at an entire sum, . . . to enter an absolute judgment for any other sum than that assessed by the jury [unless] the plaintiff elected to remit the rest of the damages"). For that reason, the U.S. Supreme Court has held that recalculating damages after the jury has awarded those damages constitutes a remittitur. *Hetzel v. Prince William County*, 523 U.S. 208, 211 (1998). The bottom line, the Court said, was that "requiring the District Court to enter judgment for a lesser amount than that determined by the jury without allowing petitioner the option of a new trial, cannot be squared with the Seventh Amendment['s jury-trial guarantee]." *Id*.

Florida follows the same constitutional tradition, relying on the common law to define the jury's constitutionally protected authority. *See 1978 Chevrolet Van*, 493 So. 2d at 434. By adopting the right as it was understood by English and American authorities, Florida's framers imported into the state's organic law an understanding that the jury's role in assessing damages was preeminent and replaceable only by consent.

More than a century ago, this Court struck a statute that purported to assign the assessment of damages to a court. In *Wiggins v. Williams*, 18 So. 859 (1896),

this Court held that a statute that allowed a "court of equity to assess damages for a trespass under the conditions prescribed by the statute" to be "unauthorized," because it "deprives a party of the right of trial by jury in a case according to the course of the common law when the constitution was adopted." *Id*. at 866. *Wiggins* added that the Legislature was without power to authorize any other body to "assess damages in a case clearly triable at law by a jury." *Id*.

Modern Florida case law marks no departure from the cases that condemn this type of legislative arrogation of the power the Constitution assigns to the jury. Article I, section 22 vests juries with the authority to determine the amount of damages for all common-law purposes, absent a waiver of that right by the parties.[8] The jury's preeminent role in the assessment of damages is especially critical with regard to noneconomic damages. It is precisely because pain and suffering are so difficult to quantify that such damages are "particularly within the province of the jury." *Daniels v. Weiss*, 385 So. 2d 661, 664 (Fla. 3d DCA 1980). *Accord General Foods Corp. v. Brown*, 419 So. 2d 393, 394 (Fla. 1st DCA 1982).

It is therefore not surprising that this Court struck down a constitutionally indistinguishable cap on noneconomic damages in *Smith*, 507 So. 2d at 1088-89, recognizing that it violated both the access to courts and jury-trial guarantees. The

[8] Section 766.118 further violates the jury-trial right by substituting the trial court for the jury in cases involving death or a permanent vegetative state the determination that "the special circumstances of the case" merit a higher noneconomic damage cap of $1 million against all practitioner defendants. §766.118(2)(b)(1), Fla. Stat. The evaluation of "special circumstances" is a factual determination within the jury's province, not the court's.

Court explicitly found that a plaintiff whose "jury verdict is being arbitrarily capped" is not "receiving the constitutional benefit of a jury trial as we have heretofore understood that right." *Id*. The ruling left no room for balancing a plaintiff's rights against other considerations such as claims of a "crisis," which was asserted without effect by the defendant and General Assembly in *Smith*.[9] *Id*. at 1084.

The ruling in *Smith* is completely in line with the jury-trial right's designation as "inviolate." *Cf. Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010) (striking down a noneconomic damage cap as inconsistent with the "inviolate" right to a jury trial); *Lakin v. Senco Products, Inc.*, 987 P.2d 463 (Or. 1999) (same); *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 158 (Ala. 1991) (same); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989) (same). *See also Klotz*, 311 S.W.3d at 773-80 (Wolff, J., concurring) (describing the cap's inconsistency with an "inviolate" jury-trial right); *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1, 12 (N.C. 2004) (distinguishing between a punitive damages cap as not inconsistent with the "inviolate" right to a jury trial and a cap affecting compensatory damages, which is).

[9] In *Echarte*, this Court upheld a noneconomic damage cap in medical malpractice cases submitted to arbitration. The decision is inapposite to the jury-trial issue. In *Echarte*, the parties' "agreement to participate in arbitration binds both parties to the arbitration panel's decision," 618 So. 2d at 193, and thus operates as consent to waive the right to a jury trial. *See Lopez v. Ernie Haire Ford, Inc.*, 974 So. 2d 517, 518 (Fla. 2d DCA 2008).

Two arguments sometimes made against invalidation of a cap on the basis of the jury-trial right are easily disposed of. One suggests, as the federal district court stated, that "the fact that this type of damages is speculative in nature and subject to widely varying awards makes it reasonable for the legislature to impose limits." *Estate of McCall*, 663 F. Supp. 2d at 1304, relying on *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325, 1332 (D. Md. 1989). The holding fails to give credit to Florida's established constitutional law and relies on a federal district court's views that are inconsistent with subsequent U.S. Supreme Court precedent. *See Feltner*, 523 U.S. at 355 ("[I]f a party so demands, a jury must determine the actual amount of . . . damages"); *id*. (any other approach to damages would fail "'to preserve the substance of the common-law right of trial by jury,'" as required by the Constitution). (citation omitted). *See also Cooper Indus.*, 532 U.S. at 437 & 437 n.11 (distinguishing noneconomic damages as a fact within the jury's province from punitive damages, which are merely an expression of the jury's moral outrage and thus only the latter may subject to judicial revision consistent with the Seventh Amendment).

Second is the argument that the jury's job is over at verdict and that the cap is merely the application of law by the judge to the jury's determination. *See*, *e.g.*, *Franklin*, 704 F. Supp. at 1331, 1334, relying on *Tull v. United States*, 481 U.S. 412, 426 n.9 (1987) (stating that "[n]othing in the [Seventh] Amendment's language suggests that the right to a jury trial extends to the remedy phase of a civil trial."). *Tull*, however, dealt with penalties under the Clean Water Act, not a

common-law cause of action. *Feltner* unanimously declared *Tull* "inapposite" in common-law actions under the jury-trial right's historic test. *Feltner*, 523 U.S. at 355.

Thus, *Feltner* held that juries must determine damages in common-law actions because any other approach to finalizing the award of damages would fail "'to preserve the substance of the common-law right of trial by jury,'" as required by the Constitution. *Id*. at 355 (citation omitted).

The noneconomic damages cap in issue here is constitutionally indistinguishable from the cap on noneconomic damages invalidated by the *Smith* Court as violative of the right to trial by jury. It deserves the same fate.

IV. THE LIMIT ON NONECONOMIC DAMAGES VIOLATES SEPARATION OF POWERS

Article II, section 3 of the Florida Constitution divides government power into distinct and separate spheres, consisting of the "legislative, executive and judicial branches" and further provides that "[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Judicial decisions pay respect to the importance of that constitutional injunction:

> The preservation of the inherent powers of the three branches of government—legislative, executive, and judicial—free from encroachment or infringement by one upon the other, is essential to the safekeeping of the American system of constitutional rule. . . . "Any legislation that hampers judicial action or interferes with the discharge of judicial functions is unconstitutional."

Simmons v. State, 36 So. 2d 207, 208 (Fla. 1948) (footnote omitted). Based on that understanding, this Court "has traditionally applied a strict separation of powers doctrine." *State v. Cotton*, 769 So. 2d 345, 353 (Fla. 2000). One "fundamental prohibition" of the doctrine is "that no branch may encroach upon the powers of another." *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla. 1991) (citation omitted).

Florida's constitutional framers rejected a regime, prevalent elsewhere, that permitted through legislation the "enacting for one or the other party litigants such provisions as would dictate to the judiciary their decision, and leaving everything which should be expounded by the judiciary to the variable and ever changing mind of the popular branch of the Government." *Trustees Internal Improvement Fund v. Bailey*, 10 Fla. 238, 250 (1863). Moreover, this Court has recognized that the same sentiment motivated the federal framers' "desire to prevent Congress from using its power to interfere with the judgments of the courts." *Bush v. Schiavo*, 885 So. 2d 321, 330 (Fla. 2004).

Florida's Constitution vests the judiciary "with the sole authority to exercise the judicial power," and "the legislature cannot, short of constitutional amendment, reallocate the balance of power expressly delineated in the constitution among the three coequal branches." *Children A, B, C, D, E, & F*, 589 So. 2d at 268-69. One indisputably judicial function is to render judgments in cases presented to the

courts. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995). *See also Bush*, 885 So. 2d at 330 (citing *Plaut*); *United States v. Sioux Nation of Indians*, 448 U.S. 371, 392 (1980) (legislature may not "control the . . . ultimate decision").

Another judicial function is the responsibility of the judiciary to assure that the judgment conforms to the evidence. *See Allred v. Chittenden Pool Supply, Inc.*, 298 So. 2d 361, 365 (Fla. 1974) ("if the record supports the award of damages, an abuse of discretion may exist in a trial judge's conclusion that his conscience was shocked," and he orders remittitur or a new trial not required by the record).

Section 766.118(2) attempts to control judicial decision-making by taking away the judicial power of remittitur, exercising that authority legislatively by imposing a one-size-fits-all mandated remittitur, and by requiring a judge to enter judgment for an amount of damages at odds with the credible evidence adduced at trial. By revising the jury's fair and proper verdict in this case and other cases, the Legislature has taken on the mantle of "super-judiciary" in contravention of our Constitution's carefully balanced system of separated powers. After all, our history "teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches." *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997). Under that division of powers, the legislature has no authority to hear, decide, or determine the outcome of a case cognizable under the common law.

Early on, the Florida Supreme Court recognized the essential nature of the separation principle, when it declared unconstitutional, as an exercise of judicial power by a legislative body, an act that granted a divorce to a couple. *Ponder v. Graham*, 4 Fla. 23 (1851). The Court eloquently described the importance of separation of powers in words that are important to the present matter:

> It is only by keeping these departments in their appropriate spheres, that the harmony of the whole can be preserved—blend them, and constitutional law no longer exists. The purity of our government, and a wise administration of its laws, depend upon a rigid adherence to this principle. It is one of fearful import, and a relaxation is but another step to its abandonment—for what authority can check the innovation, when the barriers so clearly defined by every constitutional writer, are once thrown down. Each department is a blank in government without the aid and cooperation of the others; and when one is encroached upon, its powers, to that extent, become paralyzed, and the whole system fails to carry out those high purposes for which it was designed. Under all circumstances, it is the imperative duty of the courts to stand by the constitution.

Id. at 42-43.

Limits on noneconomic damages interfere with judicial authority, in part, as two sister supreme courts have termed it, by constituting a form of legislative remittitur. *See Lebron v. Gottlieb Mem. Hosp.*, 930 N.E.2d 895, 908-09 (Ill. 2010); *Best*, 689 N.E.2d at 411-12; *Cf. Sofie*, 771 P.2d at 720-21.

A judge suggests a remittitur when the evidence does not support the jury's verdict. Even so, a plaintiff dissatisfied with the amount of damages suggested in

remittitur has the right to reject it and insist upon a new jury trial on the amount of damages. *See Wackenhut Corp. v. Canty*, 359 So. 2d 430, 437 (Fla. 1978) (also holding that a trial judge may not, consistent with the Constitution, act as an additional juror with "veto power"). In fact, when a court orders a remittitur, it must still preserve to the plaintiff the right to opt for a new jury trial. *Born v. Goldstein*, 450 So. 2d 262, 264 (Fla. 5th DCA 1984).

Section 766.118 operates as a legislative remittitur because it requires the court to remit any damage award above a pre-determined, arbitrary amount, regardless of the judge's determination that the verdict is supported by the evidence or that a smaller remittitur is warranted. As a result, the judge loses all authority over the judicial power of remittitur.

In addition to operating as an impermissible legislative remittitur, the cap also forces a judge to grant a judgment at odds with what the evidence and factual findings of the jury establish. A judge has a duty to assure that the verdict conforms to the evidence, and a judgment at variance from the evidence constitutes plain error. *See Heath v. First Nat'l Bank*, 213 So. 2d 883 (Fla. 1st DCA 1968) (holding it reversible error to order judgment different from the weight and competency of the evidence). *See also Kennon*, 131 U.S. at 29-30 (a "court has no authority . . . to enter an absolute judgment for any other sum than that assessed by the jury [unless] the plaintiff elected to remit the rest of the damages").

When a statute mandates otherwise in a cause of action cognizable at common law, the legislature impermissibly imposes a rule of decision, *see United States v. Klein*, 80 U.S. 128, 145-47 (1871), or otherwise encroaches on judicial authority, *see Bush*, 885 So. 2d at 337, thereby invading the judicial function. This, the Florida Legislature may not do. The Constitution bars any such arrogation of power in one branch, even to the smallest degree, because it, as Madison said, constitutes "the very definition of tyranny." *The Federalist No. 47*, at 301 (James Madison) (Clinton Rossiter ed., 1961).

The cap thus violates separation of powers.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request that this Court declare §766.118 unconstitutional.

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CERTIFICATE OF COMPLIANCE

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 Times New Roman 14-point font and does not exceed 50 pages.

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