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

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ARGUMENT

I. THE DAMAGE CAPS VIOLATE EQUAL PROTECTION.

Plaintiffs' equal-protection challenge to §766.118, Florida Statutes, asserts the cap discriminates against multiple claimants whose injuries derive from the same instance of malpractice and against the most seriously harmed. The responding briefs do not deny those discriminations.

A. No Justification Can Rationalize Discrimination against Multiple Claimants.

The United States calls Plaintiffs' claim that the cap's aggregate per-incident approach violates the equal protection rights of multiple claimants "meritless," U.S. Br. 20, and dismisses this Court's contrary analysis in *St. Mary's Hospital v. Phillipe*, 769 So. 2d 961 (Fla. 2000), as *dicta*. *Id*. at 22. Remarkably, *Amicus* State of Florida avoids confronting the precedent altogether.

The *Phillipe* analysis of aggregate caps as violative of equal protection was in fact necessary to the decision and not a casual observation. *Phillipe* found the per-incident statute ambiguous and employed the "fundamental rule of statutory construction that, if at all possible, a statute should be construed to be constitutional." *Id.* at 972. The determination that a per-incident approach violated equal protection was an integral part of this Court's construction of the law, after full briefing, argument, and analysis; it cannot be *dicta*. *Parsons v. Fed. Realty Corp.*, 143 So. 912, 920 (Fla. 1932) (alternate grounds are not *dicta*). Even if it

were *dicta*, it was judicial *dicta* and remains authoritative. *See Frost v. State*, 53 So. 3d 1119, 1123-24 (Fla. 4th DCA 2011).

Nor may *Mizrahi v. North Miami Medical Center, Ltd.*, 761 So. 2d 1040 (Fla. 2000), a case decided five months earlier than *Phillipe*, be regarded as overriding *Phillipe*. *Mizrahi* considered a limited equal-protection question about the complete exclusion of adult children from recovery when a parent dies of medical malpractice and found no violation when compared to adult children whose parent dies of another cause. *See* 761 So. 2d at 1042, 1043. Here, a very different question is presented. All claimants are eligible for compensation, but some receive more than others merely because of the number of other injured and eligible relatives.[1]

Regardless of the level of scrutiny employed, the cap's discriminatory treatment of families based on size does not comport with equal protection.

[1] The United States also inexplicably argues this Court must follow the Eleventh Circuit's federal equal-protection analysis in this case, despite that court's certification of the state constitutional issue to this Court. U.S. Br. 22. It suggests this Court's jurisprudence requires lock-step construction, citing *Schreiner v. McKenzie Tank Lines*, 432 So. 2d 567, 568 (Fla. 1983). U.S. Br. 23. However, *Schreiner* merely indicates that both the federal and Florida Constitutions have a state-action requirement. The decision actually says that federal construction of the Fourteenth Amendment is "not controlling" but mere "advice" on Florida's similar provision. *Id*. at 569.

B. Strict-Scrutiny Analysis Is Warranted.

The United States denies it must meet strict scrutiny because that level of analysis "is only triggered when a statute *violates* a fundamental right." U.S. Br. 25 (citing *Renee B. v. Fla. Agency for Health Care Admin.*, 790 So. 2d 1036, 1040 (Fla. 2001)). This novel approach renders fundamental-rights analysis under equal protection an empty redundancy. It would employ strict scrutiny only *after* finding a law invalid, rendering any equal-protection inquiry entirely superfluous.

The U.S. Supreme Court explicitly rejected this argument and "has applied strict scrutiny to state or federal legislation *touching* upon constitutionally protected rights." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37-38 (1972) (emphasis added). This Court's precedents are no different. *See* Pls.' Br. 12.

Amicus State of Florida asserts that §766.118, Florida Statutes, is a mere "economic regulation" to which rational-basis scrutiny applies. State *Amicus* Br. 5. Even if true, courts utilize the rational-basis test when "reviewing economic legislation under due process and equal protection principles *where no fundamental right is impaired." Agency for Health Care Admin. v. Hameroff*, 816 So. 2d 1145, 1149 (Fla. 1st DCA 2002) (emphasis added). As argued below, the impairment of fundamental rights is palpable.

The United States makes no attempt to meet its burden of demonstrating a compelling state interest effectuated by the least restrictive means.[2] Plaintiffs' argument thus goes unanswered.

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

The United States and its *amici* ignore holdings that the rational-basis test is not "toothless," *Mathews v. Lucas*, 427 U.S. 495, 510 (1976), and oversimplify the test.

They contend that if the government's purpose is to save money for a favored industry, any means chosen that could theoretically save money for that industry is valid. If that were so, Florida could then cap *all* civil damages at $1, exempting any subclass it chose without violating equal protection. Or, it could cap awards to brunettes, and that cap, no doubt, would result in great savings without affecting a suspect class. Yet, these legislative responses would obviously be unconstitutional.

Certainly, the savings justification benefits insurers who pay out judgments. The cap's defenders hope it will benefit doctors in the form of lower malpractice

[2] *Amicus* Florida Medical Association (FMA) argues that the damage cap qualifies as the "least restrictive means" because it does not limit economic damages. FMA *Amicus* Br. 3. That argument merely observes that more egregious deprivations of patients' rights were available, but does not demonstrate that capping noneconomic damages is the least restrictive means.

premiums and, after that, patients.[3] *See, e.g.*, U.S. Br. 19. The hope is utterly without foundation. Florida's financial responsibility law, §458.320, Florida Statutes, requires no more than $250,000 per claim coverage by medical licensees. Most physicians only carry that amount, which is significantly lower than the standard throughout the rest of the country, which is $1,000,000. *See* EQuotMD.com, *Florida Medical Malpractice Insurance*, *available at* http://www.equotemd.com/state-resource-center/florida-medical-malpracticeinsurance.php (last visited Nov. 2, 2011). The cap has no impact on that coverage.

Even if it had impact, the justification is inadequate. To cap damages at an arbitrary figure for any subclass of medical malpractice victims, the rational justification must explain why the "challenged classification would promote [the Legislature's] purpose." *Hechman v. Nations Title Ins. of New York*, 840 So. 2d

[3] As the U.S. notes in its brief, the law that required insurers to reflect any cap-induced savings in premiums was repealed. *See* U.S. Br. 7 n.2. Insurers have traditionally denied caps effectuate savings. In 1987, after Florida enacted the noneconomic damage cap struck in *Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987), the state's largest malpractice carriers asked for a premium increase, and St. Paul Fire and Marine Insurance Co. told the Insurance Commissioner that the cap would not result in any real savings. *See* Young, *No Florida Savings Seen From Tort Law Reform*, J. of Com., at IA (Oct. 21, 1986); Jay Angoff, *Insurance v. Competition: How the McCarran-Ferguson Act Raises Prices and Profits in the Property Casualty Insurance Industry*, 5 Yale J. on Reg. 397, 400-01 & n.20 (1988). *See also Zeier v. Zimmer, Inc.*, 152 P.3d 861, 870 (Okla. 2006) (insurance companies "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.") (footnote omitted).

993, 996 (Fla. 2003). Thus, in striking that state's cap on equal protection grounds, the Wisconsin Supreme Court stated that a statute fails the rational basis test "if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." *Ferdon v. Wis. Patients Comp. Fund*, 701 N.W.2d 440, 458 (Wis. 2005).

In other words, the proper question is this how does limiting compensation for noneconomic injuries for those most catastrophically injured by medical malpractice promote the availability and affordability of health care? Neither the United States or its *amici* make any attempt to connect the discriminated against class to a legitimate reason for the discrimination. It is not that the above-cap noneconomic compensation is not merited, proven, or justified; it is simply because it is a potential source of insurer savings. This could be called bank robber Willie Sutton's theory of constitutional justification: that's where the money is.

The United States cites *Mizrahi*, 761 So. 2d at 1043, to say that limiting some claims would limit claims overall and likely affect the cost of health care. U.S. Br. 17. Although that sentiment is so highly attenuated it passes the breaking point, a court will not uphold a statute "simply because there is a speculative benefit to the public." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 451-52 (1985) (striking law using rational-basis test). Still, §766.118 does not limit

claims outright as the *Mizrahi* law did, but rather limits noneconomic damages that may be recovered in valid claims. *Mizrahi* is not on point.

Nor is *University of Miami v. Echarte*, 618 So. 2d 189 (Fla.), *cert. denied*, 510 U.S. 915 (1993) dispositive on equal protection. U.S. Br. 24. In a laundry list rejection of other grounds, without any reasoning, *Echarte* finds no equal-protection violation. 618 So. 2d at 191. The decision itself states the only issue decided was whether the statute violated access to the courts and so limits its discussion. *Id*. at 190, 191. *Echarte's* treatment of equal protection is, at best, *obiter dicta* and has no precedential value. *See Frost*, 53 So. 3d at 1123-24; *District of Columbia v. Heller*, 554 U.S. 570, 625 n.25 (2008) (*dictum* unsupported by argument, reasoning or analysis is stripped of any predictive or persuasive value).

Thus, the rational-basis argument made by the United States and its *amici* comes down to a claim that any possible savings is a good savings, however effectuated. The New Hampshire Supreme Court rejected that view, holding, "It is 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), *rev'd on other grounds for applying only rational basis review when a stricter scrutiny was warranted*, *Cmty. Res. for Justice, Inc. v. Manchester*, 917

A.2d 707 (N.H. 2007). *See also Ferdon*, 701 N.W.2d at 466 ("No rational basis exists for forcing the most severely injured patients to provide monetary relief to health care providers and their insurers.") (footnote omitted); *Morris v. Savoy*, 576 N.E.2d 765, 691 (Ohio 1991); *Lucas v. United States*, 757 S.W.2d 687, 691 (Tex. 1988) ("In 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."); *Wright v. Central Du Page Hosp. Ass'n*, 347 N.E.2d 736, 743 (Ill. 1976). This Court should adopt the reasoning of these courts.

The cap also does not further the Legislature's objectives. A "cap does nothing to eliminate nonmeritorious claims," *Arneson v. Olson*, 270 N.W.2d 125, 135-36 (N.D. 1978), because it applies only to cases with valid verdicts. It does nothing to change preexisting favorable trends in physician population across specialties and geographic regions of the state, as federal government and American Medical Association figures demonstrate.[4] It does nothing to make

[4] *See* Pls.' Br. 13-14; Professor *Amicus* Br. 10-14. Fla. Surgeon Gen. *Amicus* Br. App. A. An *amicus* brief from a Texas tort-reform group also touts the impact of that state's $250,000 cap in expanding the physician population. *See* Tex. Civil Justice *Amicus* Br. 12-14. While the impact is much disputed in Texas, critically, Texas amended its Constitution to authorize the cap because the prior cap was declared unconstitutional in *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988). *See* Art. III, §66, Tex. Const.. Florida has no such cap-authorizing constitutional provision.

verdicts more predictable, *see* U.S. Br. 17, because lost wages, additional medical care needs, and even the consequences of medical error vary so much from person to person.

Perhaps most significantly, the proffered rationale for targeting noneconomic damages fails. While noneconomic compensation can be significant, it comprises proven compensation determined by the factfinder no less than economic compensation does.[5] It is undeniable that economic damages can be immense, vary for the same injury, and continue to grow, reflecting higher lost wages and high medical inflation rates.[6] Empirical studies demonstrate that "caps on noneconomic damages in medical malpractice cases have little to no effect on the size of overall compensatory damages verdicts or judgments." Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damage Caps*, 80 N.Y.U. L. Rev. 391, 472 (2005).

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[5] The assessment of noneconomic damages, like that of economic damages, "involves only a question of fact." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 447 (2001) (citation omitted).

[6] Medical inflation has significantly outpaced the consumer price index. $100,000 in medical expenses in 2003 now costs $135,929.70; while consumers saw a comparable jump to only $121,635.23. Inflation Calculator, *available at* http://www.halfhill.com/inflation.html. *See also* U.S. Dep't of Justice, Bureau of Justice Statistics, *Spotlight on Statistics: Health Care* (Nov. 2009), *available at* http://www.bls.gov/spotlight/2009/health_care/.

Because caps arbitrarily impose limits on a class of valid medical malpractice claims without logical connection to increasing the availability and affordability of healthcare, they lack a rational basis to justify the discrimination effected.

II. THE CAPS VIOLATE THE FUNDAMENTAL RIGHT OF ACCESS TO THE COURTS.

The United States relies entirely upon *Echarte* in arguing that Plaintiffs' access claim lacks merit, while dismissing *Smith* as inapplicable. However, *Echarte* was plainly decided in the unique context of arbitration law, wholly inapplicable here, and *Smith* is directly on point.

The United States and its *amici* insist that this Court upheld damage caps *generally* against an access challenge in *Echarte*, but the decision plainly stated that the "issue here is whether [statutes] which provide a monetary cap on noneconomic damages in medical malpractice claims *when a party requests arbitration*, violate a claimant's right of access to the courts." 618 So. 2d at 190 (emphasis added; footnote omitted).

To support its claim, the United States singles out a provision of the arbitration statute that limited noneconomic damages to $350,000 when only the defendant opts for arbitration and the case still proceeds to trial. U.S. Br. 29. *Echarte* itself rebuts this claim, as this Court emphasized the provision's

relationship to arbitration as providing significant offsetting benefits even to the plaintiff who rejects arbitration:

> The defendant's offer to have damages determined by an arbitration panel provides the claimant with the opportunity to receive prompt recovery without the risk and uncertainty of *litigation or having to prove fault in a civil trial.*

618 So. 2d at 194 (emphasis added). Thus, the *Echarte* caps "only limit a claimant's right to recover non-economic damages after a defendant agrees to submit a claimant's action to arbitration" and provides a commensurate benefit even when the case goes to trial. *Id*. The decision confirms *Echarte* was about arbitration and has no application here, where the current cap provides no personal commensurate benefit to these plaintiffs.

The cap's defenders do proffer a variety of public benefits, patently insufficient to meet the *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), test. For example, the purported wider availability of health care services, *see* Fla. Hosp. Ass'n *Amicus* Br. 8, or the availability of up to one million dollars in noneconomic damages, *see id.* at 6, suggested by opposing *amici*, do not flow to the injured plaintiff but society as a whole. Here, "the benefits of a [] cap on noneconomic damages run in only one direction." *Smith*, 507 So. 2d at 1088. A benefit to the particular claimants here must be provided in lieu of the constitutionally protected right to receive their full, proven damages. *See id*. at 1089; *Kluger*, 281 So. 2d at 5.

Nor does the overwhelming public necessity found sufficient in *Echarte* demonstrate similar necessity for this cap. The United States argues that the Florida Legislature's findings underlying §766.118 are "materially indistinguishable" from the legislative findings underlying the cap in issue in *Echarte*, and thus no court need determine for itself whether an overwhelming public necessity supports *this law*. U.S. Br. 36. Yet, each law must stand on its own factual predicate and the pretextual recitation of an earlier law's findings cannot insulate a new law from judicial scrutiny.

Contrary to the assertions of the United States and its *amici*, this part of the *Kluger* test, overpowering public necessity, is not "highly deferential." *See* FMA *Amicus* Br. 11; *see also* U.S. Br. 31; *see generally* Coral Gables Hosp. *Amicus* Br. As this Court made clear in *Smith*, "we are dealing with a constitutional right which may not be restricted simply because the legislature deems it rational to do so." 507 So. 2d at 1089. Thus, as observed in *Mitchell v. Moore*, 786 So. 2d 521, 527-28 (Fla. 2001), the second part of the *Kluger* analysis "*is reminiscent of* the goal-method test used in both substantive due process and equal protection analysis for cases in which a fundamental right is taken." The Court concluded that the *Kluger* test is a strict-scrutiny test. *Id.* at 528.

Such a test cannot be met by merely rubber-stamping the Legislature's "findings." Instead, the court inquires to ensure that the Legislature acted within

constitutional bounds when it deemed it necessary to restrict the Plaintiffs' right of access to the courts severely.

While the United States criticizes the lack of an evidentiary hearing at the federal district court, there was no opportunity to present evidence separate from the briefing materials. The district court directed the parties to file briefs before trial and then, without warning, demanded argument the moment the verdict was rendered. Still, Plaintiffs have provided neutral, credible scholarship, specific to Florida, including significant evidence subject to judicial notice from U.S. and Florida government sources that establish that establish the irrationality of the cap. Pls.' Br. 13-17, 23-24, 26-27, 35. The U.S. Department of Justice also found that only 5.5 percent of medical malpractice claims in Florida were above $1 million, with two-thirds below $250,000 and nearly 43 percent below $100,000. U.S. Dep't of Justice, Bureau of Justice Statistics, NCJ 216449, *Medical Malpractice Insurance Claims in Seven States 2000-2004* (Mar. 2007), *available at* http://www.bjs.gov/content/pub/pdf/mmicss04.pdf. These judicial cognizable reports undermine the claim of overpowering public necessity.

In contrast, the United States points to the Task Force's reliance on the American Medical Association's (AMA) self-serving designation of Florida as a crisis state. U.S. Br. 6, 32. That unreliable source found in 2004 that a medical liability crisis exists "in 19 states, with another 35 states on the brink of crisis."

Donald J. Palmisano, M.D., J.D., President, AMA, *Health Care in Crisis*, AHA Journal, vol. 109 (Jun. 22, 2004), *available at* http://circ.ahajournals.org/content/109/24/2933.full. Thus, according to the AMA, an unexplained *54 states* were in crisis or near crisis, including those with caps. The AMA continues to list Florida as a state in crisis in its most recent assessment, while noting that Arkansas, which has no cap, has moved out of crisis. AMA, *State of Liability* (Mar. 5, 2007), http://www.ama-assn.org/amednews/2007/03/05/prca0305.htm (last visited Nov. 1, 2011). The AMA figures lack credibility, but also make plain that caps are not the answer, let alone the *only* answer.

Smith remains most analogous to this case because it examined a similar cap defended with similar assertions of "detailed legislative findings" supported by "substantial legislative history." 507 So. 2d at 1084 & n.1. This Court nonetheless found the cap unconstitutional.

Here, the Legislature attempted to meet *Kluger* by *stating* that there was an "overpowering public necessity" for the abolition of the claimants' rights. That the Legislature "*debated*" the issue does not make the issue, in itself, debatable. If the Legislature makes "findings" contrary to the *facts*, this Court has not hesitated to deem such "findings" insufficient. The Legislature may not ignore the countervailing evidence or give great weight to assertions unsupported by facts when it wishes to abolish or restrict the constitutional right of access to the courts.

See Echarte, 618 So. 2d at 196. As demonstrated in the Plaintiffs' opening brief, and those of its *amici*, there was no such "overpowering public *necessity*." Pls.' Br. 13-18, 21-27, 33-35.

Even if this Court accepted the Legislature's determination of necessity, it cannot ignore the fact that the Legislature had other means available to meet that need. This Court has declared statutes unconstitutional even where there was an "overpowering public necessity" when the Legislature failed to show that restricting the right of access to courts was *the only solution*. *See Psychiatric Assocs. v. Siegel*, 610 So. 2d 419, 425 (Fla. 1992), *overruled in part on other grounds, Agency for Health Care Admin. v. Associated Indus.*, 678 So. 2d 1239 (Fla. 1996).

The Legislature cannot meet the constitutional requirements for severely restricting the Plaintiffs' constitutional right of access to the courts by simply stating that there is "no alternative." The federal government has concluded that differences in premiums and claims payments are affected by state premium rate regulations, competition among insurers, interest rates, and income returns on investments. U.S. Government Accountability Office, No. 03-836, *Medical Malpractice: Implications for Rising Premiums on Access to Health Care*, 30 (Aug. 29, 2003), *available at* http://www.gao.gov/new.items/d03836.pdf. The report notes that Minnesota, a state without caps, has low premium growth rates

and claims payments. *Id*. Moreover, it is axiomatic that "constitutional protections are not suspended in time of even the most legitimate crises. [They] exist for litigants regardless of market conditions for insurance companies and the medical industry." *Waggoner v. Gibson*, 647 F. Supp. 1102, 1107 (N.D. Tex. 1986).

Regardless of whether there was overpowering public necessity, the *Kluger* test requires that "no alternative method of meeting such public necessity *can be shown*." *Kluger*, 281 So. 2d at 4 (emphasis added). But alternative methods *were shown* in this Court and to the Legislature. *See* Floridians for Patient Protection *Amicus* Br. 16. The test does not require that challengers prove that the alternatives would "actually work in practice," as the United States contends, U.S. Br. 33, which would seem to require Plaintiffs to commandeer a state, implement their alternative, and use it as proof. It is enough that states that never enacted medical malpractice caps or that have declared them unconstitutional provide affordable health care.

Instead, the burden must be on the Legislature to establish that there was no alternative to severely restricting the Plaintiffs' fundamental constitutional right of access to the courts. *See Smith*, 507 So. 2d at 1088. The Task Force itself recognized alternatives were available. *Governor's Select Task Force on Healthcare Professional Liability Insurance*, at 18 (Jan. 29, 2003). No credit can

be given the Legislature's *conclusion* that there are no alternative means, while it acknowledged that viable alternatives were presented to it.

III. THE CAPS VIOLATE THE RIGHT TO TRIAL BY JURY.

Before the Eleventh Circuit, the United States argued against certifying the jury-trial question to this Court by focusing solely on the fact that Federal Tort Claims Act cases, like this one, are tried before a judge rather than a jury. *Estate of McCall v. United States*, 642 F.3d 944, 952 n.6 (11th Cir. 2011). The Eleventh Circuit rejected that argument, agreeing that "if the statutory cap violates the right to jury trial in state suits against private parties, the cap is void in the state courts, therefore, it is void in the FTCA context as well." *Id*. It thus certified the following question to this Court:

> Does the statutory cap on noneconomic damages, Fla. Stat. § 766.118, violate the right to trial by jury under Article I, Section 22 of the Florida Constitution?

Id. at 952.

Now, the United States asks this Court not to answer that question because, for the first time, it argues that there was no right to non-economic damages in wrongful death cases before 1845. U.S. Br. 39. This Court should not entertain this argument; it was waived for failure to raise it below. *See Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982) ("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection,

exception, or motion below.") (citations omitted). The same rule obtains in federal appeals. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Even if the government's new argument asserts the Estate's lack of standing to raise the jury-trial issue, it was waived. *See Schuster v. Blue Cross & Blue Shield of Fla., Inc.*, 843 So. 2d 909, 912 (Fla. 4th DCA), *rev. denied*, 852 So. 2d 862 (Fla. 2003) ("lack of standing is an affirmative defense that must be raised by the defendant and that the failure to raise it generally results in waiver").

If not waived, the fact that this is a wrongful-death case should not prevent this Court from answering the certified question and finding that the jury-trial right bars this cap. The United States argues that because wrongful death as a cause of action did not exist or include noneconomic damages in 1845, it is not within the jury-trial right. U.S. Br. 39. While that is the date of the first Florida Constitution, and conforms to this Court's ruling in *In re 1978 Chevrolet Van*, 493 So. 2d 433, 434 (Fla. 1986), there are three problems with a rigid adherence to that measurement. First, this Court's approach to the historical test for jury-trial rights is similar to that under the Seventh Amendment. The federal test asks two questions: 1) "whether we are dealing with a cause of action that either was tried at law at the time of the founding *or is at least analogous to one that was*"; and 2) "whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed [at ratification]." *Markman v.*

Westview Instruments, Inc., 517 U.S. 370, 376 (1996) (citations omitted; emphasis added).

Under this test, medical malpractice cases fully qualify as within the jury-trial right. The "professional liability of the medical practitioner is almost as old as personal injury actions" and that the first reported American case dates back to 1794. Allan H. McCoid, *The Care Required of Medical Practitioners*, 12 Vand. L. Rev. 549, 550 (1959) (citing *Cross v. Guthery*, 2 Root 90 (Conn. 1794)). It is also beyond dispute that pain and suffering damages are facts peculiarly within the province of the jury to assess. *See Daniels v. Weiss*, 385 So. 2d 661, 664 (Fla. 3d DCA 1980). Thus, this case, involving a medical malpractice case in which non-economic damages were awarded by the trier of fact, is sufficiently "analogous" to qualify for treatment as within the jury-trial right.[7] It is not the loss of life, but the act of medical malpractice that gives rise to the cause of action.[8]

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[7] The broad *amicus* participation in this case and the difficulty that other medical malpractice cases challenging the cap has had in reaching this Court for a determination of the constitutionality of the 2003 cap further supports determining all the constitutional issues raised, rather than allow the constitutional rights of medical malpractice victims to remain in limbo. *Cf. Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("loss of [constitutional rights], for even minimal periods of time, unquestionably constitutes irreparable injury" [referring to free-speech rights]).

[8] *See, e.g.*, *Kling v. Torello*, 87 A. 987, 989 (Conn. 1913) (Under the survival statute, the death is to be viewed not as an event which creates a cause of action but instead as "one of the harmful results of the wrongful act.").

Scholarship establishes that the wrong turn taken on wrongful death in the English case of *Baker v. Bolton*, 170 Eng. Rep. 1033 (1808), is responsible for the assumption that a cause of action for wrongful death did not exist at common law. As the *Restatement* makes plain, the

> prevalence of the wrongful death statutes, which are to be found in all jurisdictions, and their existence for substantially more than a hundred years have given rise to some decisions holding that the principle of a right of action for wrongful death has now become a part of the common law itself. In view of the 'lack of any discernible basis' for the 1808 holding in *Baker v. Bolton* and its 'harsh result' and of the scholarly criticism of the holding, it has been concluded that 'there is no present public policy against allowing recovery for wrongful death,' so that the right of action can now be regarded as arising under the common law. . . . When recognized, this common law right has been utilized to fill in unintended gaps in present statutes or to allow ameliorating common law principles to apply.

Restatement (Second) of Torts §925, cmt. k (1979).[9] Legal historian William Holdsworth described *Baker* as not only "obviously unjust" but also inaccurate and "technically unsound . . . based upon a misreading of legal history." 3 William Holdsworth, *A History of English Law* 336 (5th ed. 1956). It was legislatively

[9] None of this is to say that the common law never recognized wrongful death actions, as there are a number of cases in the annals of American law. For example, in *Cross v. Guthery*, 2 Root 90 (Conn. Super. Ct. 1794), the court recognized that a husband has a cause of action against a surgeon for an unskillful operation on his wife when she dies of the operation. *See also Foster's Case*, 1 Court of Assistants 54 (Mass. Super. Ct. 1674); *Ford v. Monroe*, 20 Wend. 210 (N.Y. Sup. Ct. 1838).

overturned by Lord Campbell's Act, 1846, 9 & 10 Vict., c. 93. Florida has long recognized the relevance of pain and suffering damages in wrongful death. *See Martin v. United Sec. Servs., Inc.*, 314 So. 2d 765, 767-68, 770 (Fla. 1975) (explaining history and describing the modern statute as the "transfer of pain and suffering damage from the decedent to the survivors.").

Thus, the fact that this medical malpractice resulted in death should not change an analysis that, Plaintiffs submit, make this cap statute unconstitutional, premised as it is on limiting compensatory damages for all victims of medical malpractice, regardless of the nature of the injury.[10]

Similarly, as Florida law makes plain, the statute of limitations for wrongful death actions where the basis for the action is medical malpractice is the statute of limitations for medical malpractice. *Ash v. Stella*, 457 So. 2d 1377, 1379 (Fla. 1984). Thus, a wrongful death resulting from medical malpractice is still an instance of medical malpractice, subject to the same rights and limitations. If a medical-malpractice cap is invalid for a surviving patient, it must be invalid for one who died. It would be perverse to hold otherwise when the Legislature actually found death to be deserving of greater compensation by enacting a higher cap applicable to instances of wrongful death. §766.118, Fla. Stat.

[10] The analysis might be different if, as part of the Florida Wrongful Death Act, a cap on all wrongful death actions was instituted. Here, however, the cap is applicable only to medical malpractice.

Second, this Court has examined Florida's access to courts right, Fla. Const. art. I, sec. 21, in reference to the common or statutory law extant in 1968, when the current Constitution was adopted. *Eller v. Shova*, 630 So. 2d 537, 542 n.4 (Fla. 1993). As a right, like the jury-trial right, derivative of Magna Carta,[11] logic suggests the same historical reference point should be applied to these two venerable and fundamental rights. This Court usually reads these rights together. *Smith*, 507 So. 2d at 1088.

Finally, because, even in wrongful death cases, the trier of fact remains the jury in Florida unless waived, the medical malpractice action over the death of a patient is both "analogous" to all other medical malpractice actions and sufficiently tied to the access-to-courts guarantee that either analysis strongly supports applying the constitutional jury-trial right here.

Confronting the substance of Plaintiffs' argument, the United States first erroneously argues this Court has rejected Plaintiffs' jury-trial argument in *Cauley v. City of Jacksonville*, 403 So. 2d 379 (Fla. 1981), a case about a statute that waived sovereign immunity to a maximum of $100,000. Sovereign immunity existed at common law, *id*. at 381, and may be waived to the extent the sovereign

[11] *Compare Henderson v. Crosby*, 883 So. 2d 847, 851 (Fla. 1st DCA 2004) (access to courts provision has its roots in Magna Carta), *with Broward Cnty. v. La Rosa*, 484 So. 2d 1374, 1378 (Fla. 4th DCA 1986) (trial by jury dates back to Magna Carta).

deems. Under the FTCA, the United States waived sovereign immunity to the extent that state law provides. As the Eleventh Circuit held in this case, if the cap is unconstitutional as to any private party, it is unconstitutional as to the Untied States. *Estate of McCall*, 642 F.3d at 952 n.6.

The United States also asserts the jury-trial analysis in *Smith* is nonexistent, mere *dicta,* or overruled by *Echarte. See* U.S. Br. 44. *Smith* clearly addressed the jury-trial right, stating that the constitutional right of access to the courts "must be read in conjunction with [Article I,] section 22, 'Trial by jury,'" 507 So. 2d at 1088, and holding that where "the jury verdict is being arbitrarily capped," the plaintiff is not "receiving the constitutional benefit of a jury trial as we have heretofore understood that right." *Id*. at 1088-89. Moreover, *Echarte* did not overrule *Smith.* It upheld a scheme anchored in arbitration that conferred commensurate benefits upon plaintiffs. It did not evaluate caps without commensurate benefits, as *Smith* did.

The United States also dismisses the usefulness of *Feltner v. Columbia Pictures Television*, 523 U.S. 340 (1998), because the case did not involve caps. The *Feltner* analysis, however, is compelling and fully applicable as it involved statutory damages analogous to those existing at common law. *Feltner* unanimously held that the jury-trial right includes the assessment of compensatory damages and that any other approach to finalizing the award of damages fails "'to

preserve the substance of the common-law right of trial by jury,'" as required by the Constitution. *Id*. at 355 (citation omitted). While the United States twice cites a dissent by Justice Stevens in *Gasperini v. Center for Humanities*, 518 U.S. 415 (1996) (Stevens, J., dissenting), inapposite to this case, a 2001 Stevens majority opinion, *Cooper*, is far more relevant. *Cooper* recognizes that punitive damages had evolved and were no longer a question for the jury, but that pain and suffering damages remain a fact question for the jury protected against subsequent revision. 532 U.S. at 437 & 437 n.11.

The United States cites several federal post-*Feltner* decisions to counter *Feltner's* clear holding, but these cases only found *no Seventh Amendment violation* in a state damage cap. *See, e.g.*, *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513 (6th Cir. 2005). *Botsford*, and similar cases, provide no useful guidance to this Court. The decision cryptically addressed the jury-trial issue, adopted reasoning rejected by *Feltner*, failed to mention or consider the import of *Feltner*, and mistakenly attempted to apply the Seventh Amendment to its review of a state cap, even though that amendment does not apply to the States. *See Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211 (1916).

Significantly, in *Feltner*, the defendant argued that the jury's job was completed when they reached their verdict and that the constitutional jury-trial guarantee "does not provide a right to a jury determination of the amount of the

award." *Id*. at 354. The United States echoes that argument, U.S. Br. 43, but *Feltner* emphatically rejected it. *See* 523 U.S. at 355.

The approach to the jury-trial right urged by the United States and its *amici* would render this inviolate, fundamental right an empty charade and little more than a right to have an audience, in an advisory capacity, at trial.

IV. THE CAPS VIOLATE SEPARATION OF POWERS.

In replying to Plaintiffs' argument that the cap improperly interferes with the judge's obligation to render a judgment based on a valid verdict and reflecting the evidence adduced at trial by overriding it with the Legislature's one-size-fits-all assessment, the United States simply relies on the substantive/procedural dichotomy that addresses some divisions of authority between the Legislature and Judiciary. However, Florida follows a powerful form of separation of powers, *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004), not limited to separating substance from procedure. *See id*. at 330-31. Plaintiffs' arguments thus go unanswered.

CONCLUSION

For the foregoing reasons, §766.188's cap on noneconomic damages violates the Florida Constitution and should be declared void.

Date: November 4, 2011

Respectfully submitted,

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