Filing # 35528136 E-Filed 12/14/2015 06:56:00 PM

RECEIVED, 12/14/2015 06:58:32 PM, Clerk, Supreme Court

SC15-1858

IN THE SUPREME COURT OF FLORIDA

NORTH BROWARD HOSPITAL DISTRICT, *et al.*,
Appellants,

v.

SUSAN KALITAN,
Appellee.

ON REVIEW OF A DECISION
OF THE FOURTH DISTRICT COURT OF APPEAL
Case Nos. 4D11-4806, 4D11-4833, 4D11-4834

AMICUS BRIEF OF THE STATE OF FLORIDA IN SUPPORT OF APPELLANTS

PAMELA JO BONDI
Attorney General

ALLEN WINSOR (FBN 016295)
Solicitor General

OSVALDO VAZQUEZ (FBN 070995)
Deputy Solicitor General

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300
(850) 410-2672 (fax)
allen.winsor@myfloridalegal.com
osvaldo.vazquez@myfloridalegal.com

Counsel for the State of Florida

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IDENTITY OF AMICUS AND STATEMENT OF INTEREST

The Attorney General submits this brief on behalf of the State of Florida as amicus curiae in support of the Appellants. The Attorney General is authorized by law to appear in any suit in which the State has an interest. § 16.01(4), Fla. Stat. (2015).

Appellee Susan Kalitan challenges Florida's statutory cap on noneconomic damages to medical malpractice claimants, *see* § 766.118, Fla. Stat., as unconstitutional. The State has a strong interest in preserving its duly enacted statutes. Moreover, the statutory damages cap in particular was part of a comprehensive legislative solution to a medical malpractice crisis that the Legislature determined was threatening the health and wellbeing of Floridians. The Legislature enacted the law, including the statutory damages cap, after extensive research and deliberation, and the cap has proven to be effective in reducing insurance costs, increasing the efficiency of the medical system, and promoting the Legislature's goals of ensuring access to affordable care.

SUMMARY OF THE ARGUMENT

Appellee Susan Kalitan has failed to satisfy her heavy burden of establishing that the noneconomic damages cap of Section 766.118 is unconstitutional in the context of her single-claimant medical negligence action. The Fourth District wrongly concluded that this Court's splintered decision in *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014) compels *any* outcome in this case, let alone "mandates a finding" that the damages cap is unconstitutional when applied "vertically to a single claimant" like Kalitan. Op. at 2, 10.

Because the Legislature's enactments enjoy a strong presumption of constitutionality, a challenger like Kalitan must satisfy a heavy burden and establish that the law's "invalidity . . . appear[s] beyond a reasonable doubt." *Franklin v. State*, 887 So. 2d 1063, 1074 (Fla. 2004). Kalitan's burden includes, under the applicable rational basis standard, a requirement that she negate every possible conceivable basis for the legislation, which would include a showing that the Legislature's factual findings were clearly erroneous. The record on appeal contains no basis for any such finding. Moreover, the background to the Legislature's enactment of Section 766.118 shows why Kalitan could not overcome the presumption of constitutionality in any case.

The Fourth District's ruling turned entirely on its misreading of the multiple opinions in *McCall*, but *McCall* does not dictate the result here. That case was

expressly limited to wrongful death actions with multiple claimants and, in any case, there was no majority for the proposition that a court can second-guess the Legislature's factual findings to invalidate a law under the rational basis standard.

Once the Fourth District's flawed reading of *McCall* is properly set aside, it is clear Kalitan's equal protection arguments cannot succeed. The Legislature had more than a rational basis to conclude there was a linkage between noneconomic damages verdicts, medical malpractice premiums, and doctor availability. Importantly, Justice Lewis's views to the contrary garnered the agreement of only one other Justice. Justice Pariente's concurring-in-result opinion found the law unconstitutional only because of what that opinion viewed as an arbitrary approach of limiting recovery in multi-claimant situations. That factor, which was a necessary element to Justice Pariente's conclusion, is entirely missing here. Kalitan's case involves one claimant, with one recovery, and one reduction.

This Court need not address Kalitan's remaining constitutional arguments, none of which were considered or passed on below. Nevertheless, she fails to satisfy her burden as to any of these arguments, and they suffer from the same flaws as her principal claim. Kalitan provides no basis for this Court to overturn a statute that has worked to address the medical malpractice crisis the Legislature identified, studied, and sought to address through Section 766.118.

ARGUMENT

The issue in this case is, essentially, whether the Legislature's exhaustively considered medical malpractice noneconomic damages cap can survive in any context. Plaintiff Susan Kalitan's case presents a straightforward application of this cap, since there is one claimant and little dispute over the details of the cap reduction. The Fourth District erred in concluding that *McCall*, which dealt with a multi-claimant, wrongful death suit, and which led to a splintered Court with no clear majority, compelled an outcome finding the cap unconstitutional here. Once this misreading is set aside, it is clear that Kalitan has failed to satisfy her heavy burden of establishing that the damages cap is unconstitutional in her case.

I. STANDARD OF REVIEW AND PRESUMPTION OF CONSTITUTIONALITY

This Court reviews the District Court's decision regarding the constitutionality of Section 766.118 de novo. *Samples v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 114 So. 3d 912, 916 (Fla. 2013).

That this case implicates the constitutionality of Section 766.118 also means Kalitan must satisfy a demanding burden. Florida courts presume legislative acts are constitutional and "construe challenged legislation to effect a constitutional outcome whenever possible." *Crist v. Ervin*, 56 So. 3d 745, 747 (Fla. 2010) (citation omitted); *see also supra* at 2; *Franklin*, 887 So. 2d at 1074. And where, as here, the Legislature has supported its act with factual findings, those findings are

presumed correct and must be shown to be *clearly erroneous* before a court may disregard them. *Univ. of Miami v. Echarte*, 618 So. 2d 189, 196 (Fla. 1993); *see also id.* ("The Legislature has the final word on declarations on public policy, and the courts are bound to give great weight to legislative determinations of facts."); *McCall*, 134 So. 3d at 916 (Pariente, J., concurring in result).

In addition, there can be no dispute that the rational basis standard of review applies. *See generally Lane v. Chiles*, 698 So. 2d 260, 263 (Fla. 1997) (holding that this standard applies in most cases unless a suspect class is at issue or a statute has abridged a fundamental right); *see also Samples*, 114 So. 3d at 917 (equal protection); *Crist*, 56 So. 3d at 747, 749-50 (access to courts and jury trial claims). As such, Kalitan must establish that the law does not "bear some rational relationship to legitimate state purposes." *Westerheide v. State*, 831 So. 2d 93, 110 (Fla. 2002); *see also generally Samples*, 114 So. 3d at 917. To do so, she bears the burden of "show[ing] that there is no conceivable factual predicate which would rationally support" the law. *The Fla. High Sch. Activities Ass'n v. Thomas ex rel. Thomas*, 434 So. 2d 306, 308 (Fla. 1983). If the Legislature's judgment is based on debatable evidence, *even if there is substantial expert testimony to the contrary*, a Court must uphold the law. *See Haire v. Fla. Dep't of Agric. & Consumer Servs.*,

870 So. 2d 774, 787 (Fla. 2004) (Pariente, J.); *Gallagher v. Motors Ins. Corp.*, 605 So. 2d 62, 69-70 (Fla. 1992); *Hamilton v. State*, 366 So. 2d 8, 10-11 (Fla. 1978).[1]

II. THIS COURT'S SPLINTERED DECISION IN *MCCALL* DOES NOT DICTATE THE OUTCOME HERE.

The Fourth District erred in concluding that *McCall* required a holding that the noneconomic damages cap is unconstitutional. As Appellants persuasively show, the combination of votes in *McCall*—a two-Justice plurality accompanied by a three-Justice concurrence-in-result only,[2] followed by a two-Justice dissent—results in an opinion that is not precedential outside of the facts of that case. *See* IB at 19-23. But even aside from these issues, the logic of the plurality and concurrence-in-result opinions would not, even if they were precedential, require a court to hold unconstitutional the noneconomic damages cap outside of the multi-claimant, wrongful death context in which *McCall* was decided.

Both the *McCall* plurality and concurrence-in-result were careful to cabin their reasoning to the multi-claimant context at issue in that case. Indeed, the concurrence-in-result carefully noted that the Justices agreed with the plurality's

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[1] *McCall* does nothing to change either the rational basis standard or the fact that it applies with full force to Kalitan's claim. The lead opinion acknowledged the standard applied, *see McCall*, 134 So. 3d at 901, as did the concurrence-in-result and dissent, *see id.* at 918, 927. To the extent the lead opinion misapplied the standard, as the latter two opinions concluded, s*ee id.* at 922, 931, this did not work a change in the standard as it represented the views of only two Justices.

[2] The Court referred to the two-Justice opinion as the plurality and the three-Justice opinion as the concurrence-in-result. This brief follows the same practice.

outcome, and *expressly* disagreed with the plurality's weighing of the factual record to determine whether a medical malpractice crisis truly existed when the law was passed. As the opinion expressly stated, "[a]lthough I agree with many aspects of the plurality opinion . . ., I cannot join in all of the plurality's legal analysis. In particular, my disagreement stems from my view that our precedent does not allow this Court to engage in the type of expansive review of the Legislature's factual and policy findings that the plurality engages in when undertaking a constitutional rational basis analysis." *McCall*, 134 So. 3d at 921.

Justice Pariente, and two other Justices, concurred in the result based solely on a conclusion that limiting recoveries due to the number of claimants is an arbitrary solution to the medical malpractice crisis. *See id.* at 922 ("[T]he arbitrary reduction of survivors' noneconomic damages in wrongful death cases based on the number of survivors lacks a rational relationship to the goal of reducing medical malpractice premiums."). As the opinion pointed out, the rational basis test involves two basic questions: i) whether the Legislature addressed a legitimate objective; and ii) whether its chosen solution was rationally related to the objective. *Id.* at 918. The perceived arbitrariness of limiting multi-claimant recoveries went to element two, and that critical aspect of *McCall* is, of course, entirely missing in the single-claimant, "vertical[]" claim Kalitan presents. While the concurrence-in-result concluded that "the arbitrary reduction of survivors'

noneconomic damages in wrongful death cases *based on the number of survivors* lacks a reasonable relationship to the [Legislature's] goal," 134 So. 3d at 916 (emphasis added), it said nothing about a single-claimant case.

Not only did the *McCall* opinions *not* address the single-claimant context, their logic compels a conclusion that a cap in such a context is fully constitutional. Both the plurality and the concurrence-in-result opinions accepted as good law this Court's earlier decisions in *Echarte* and *St. Mary's Hospital, Inc. v. Phillipe*, 769 So. 2d 961 (Fla. 2000), each of which upheld a cap on damages. Indeed, Justice Pariente's concurrence-in-result found *Phillipe* controlling as to the question in *McCall*. 134 So. 3d at 919. As Appellants note, *Phillipe* construed a law as applying a per-claimant cap *in order to find the statute constitutional*. *See* IB at 13. In other words, Kalitan asks this Court to find unconstitutional a statute where it does precisely what this Court previously found was *necessary* to save a statute.

The Fourth District concluded otherwise because it wrongly viewed *McCall*'s plurality and concurrence-in-result as agreeing on the first prong of the rational basis test—the lack of a legitimate state objective—but that conclusion is wrong. The key language is the District Court's conclusion that "[b]ecause addressing the medical malpractice crisis was the Legislature's stated objective . . ., if the objective no longer exists, then there is no longer a 'legitimate state objective to which the caps could 'rational[ly] and reasonabl[y] relat[e]." Op.

at 10. *McCall*'s concurrence-in-result was careful to point out, however, that its decision turned on the second element—the lack of a reasonable relationship. It found *Phillipe* "clearly announced . . . that aggregate caps or limitations on noneconomic damages violate equal protection guarantees . . . when applied without regard to the number of claimants entitled to recovery," in its view dictating a conclusion that the per-incident cap lacked a reasonable relationship to *any* legitimate state objective. 134 So. 3d at 919 (quoting plurality). The opinion went on to critique the 2003 reform as lacking a mechanism "to assure that savings are actually passed on from the insurance companies to the doctors." *Id.* None of these factors go to the legitimate state objective element.

To be sure, the concurrence-in-result expressed agreement with the view that the cap would not be constitutional if it were shown that the medical malpractice cap had ceased to exist. *See McCall*, 134 So. 3d at 920-21. However, the opinion did not cite this view as a basis for agreeing with the plurality's result; the opinion turned solely on element two. *See id.* at 921 ("There is no evidence of a continuing medical malpractice crisis *that would justify the arbitrary reduction of survivors noneconomic damages in wrongful death cases based on the number of survivors.*") (emphasis added). Reading this portion of the concurrence-in-result to address the lack of a legitimate objective element would be contrary to the opinion's later recognition that rational basis bars second-guessing of legislative

factual findings. The Legislature found that the overwhelming public necessities it identified "*cannot be met* unless a cap on noneconomic damages is imposed," 2003-416, § 1, Laws of Fla. (emphasis added). Concluding that the malpractice crisis abated for reasons unrelated to the cap—that the Legislature's goals *could be* met without such a cap—would fail to give appropriate deference to this finding. *See also McCall*, 134 So. 2d at 932 n.14 (Polston, C.J., dissenting) (noting that facts such as increased retention of Florida-trained medical students "support[] the argument that the cap has had its intended effect and that, if the cap is eliminated, the medical malpractice crisis would return in full force);[3] *see also infra* at 13 (noting that the Legislature noted that efforts to address similar crises without a cap had failed for over twenty-five years).

In short, Kalitan's claim relies on either an argument that the Court should disregard the Legislature's findings that a malpractice insurance crisis required a damages cap—an argument that garnered only two votes in *McCall*—or an argument that any noneconomic damages cap is unconstitutional—a view that no Justice espoused and that conflicts with *Echarte* and *Phillipe*. Her claim finds no support from *McCall* and, under a proper application of rational basis, it must fail.

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[3] It bears emphasizing that, in *this* case, there is no record evidence to establish that the crisis would not return if the cap were entirely eliminated.

III. KALITAN HAS NOT SATISFIED HER BURDEN OF ESTABLISHING THAT SECTION 766.118'S NONECONOMIC DAMAGES CAP IS UNCONSTITUTIONAL.

Kalitan's equal protection claims cannot survive the rational basis standard. These claims must fail unless she shows the law does not "bear some rational relationship to legitimate state purposes," *Westerheide*, 831 So. 2d at 110, and this inquiry does not require that the Legislature's determinations be supported by record evidence, *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993) ("A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."); *see also Fla. High Sch. Activities Ass'n*, 434 So. 2d at 308. While the State has no burden to establish the correctness of the Legislature's findings, Kalitan *does* bear the burden of showing that they are clearly erroneous. *See supra* at 5-6.

A. The Legislative Fact-Finding Supporting Section 766.118 Shows Why Kalitan's Equal Protection Claim Cannot Succeed.

Kalitan introduced no record evidence whatsoever from which any Court could conclude that the Legislature's findings were clearly erroneous.[4] But even if

[4] Before trial, Kalitan filed a motion challenging Section 766.118's constitutionality, relying on materials from the 2003 legislative debates—that is, evidence the Legislature had *already* considered. (R.33.6133-72). After the four-week trial, having had the chance to make a record showing the Legislature's findings were clearly erroneous, Kalitan supplemented this motion only with the briefs filed with this Court in *McCall*. (R.43.7397-7404; R.44.7414-17).

she had, the history behind the Legislature's enactment of Section 766.118 shows why Kalitan cannot establish that the statute is unconstitutional.

The history begins with then-Governor Jeb Bush creating a Select Task Force on Healthcare Professional Liability Insurance ("Task Force") in August 2002. *See* Report of the Task Force at iii, *available at* http://bit.ly/1dHvaaU. The Task Force was made up of: Jon Hitt, Ph.D., President of the University of Central Florida; Richard Beard, Trustee of the University of South Florida; Marshall Criser, Jr., President Emeritus of the University of Florida; Fred Gainous, Ph.D., President of Florida A&M University; and, Donna Shalala, Ph.D., President of the University of Miami and former Secretary of the U.S. Department of Health and Human Services. The American Medical Association had issued a report in April of 2002 declaring Florida one of twelve states in the midst of a medical liability insurance crisis. *Id.* The Task Force, in turn, found "an overwhelming public necessity for the reform measures" it proposed, which included a cap on noneconomic damages, *id.* at 217-18, and found that "no legislative reform plan can be successful in achieving the goal of controlling increases in healthcare costs" without such a cap, *id.* at 221. In reaching this conclusion, the Task Force cited Florida's attempts, over the preceding *twenty-seven years*, to alleviate malpractice insurance issues without a cap. *Id.* at 218.

The Legislature also acted, convening a House Select Committee on Medical Liability Insurance ("House Committee"), which issued its own report on March 5, 2003. *Available at* http://bit.ly/1EEEAJq. The House Committee, like the Task Force, found that Florida was in the midst of a crisis, *see id.* at 14-15, and that past efforts to address similar issues had been unsuccessful, *id.* at 12.

Both the Task Force and the House Committee took extensive evidence in reaching their determinations. The Task Force's report included 13 volumes of reports, presentations, letters, and testimony, while the House Committee held meetings in Tallahassee and four hearings throughout Florida, receiving testimony from affected stakeholders and experts. *See* House Committee Report at 3-4, 9.

The legislation that created Section 766.118 was extensively debated and the Legislature relied on the work performed by the Task Force. Indeed, the findings accompanying the final legislation provide, among other things:

> (10) The Legislature finds that [the Task Force] has established that a medical malpractice crisis exists in the State of Florida which can be alleviated by the adoption of comprehensive legislatively enacted reforms.
> (11) The Legislature finds that making high-quality health care available to the citizens of this state is an overwhelming public necessity.
> (12) The Legislature finds that ensuring that physicians continue to practice in Florida is an overwhelming public necessity.
> (13) The Legislature finds that ensuring the availability of affordable professional liability insurance for physicians is an overwhelming public necessity.
> (14) The Legislature finds, based upon the findings and recommendations of [the Task Force], the findings and

> recommendations of various study groups throughout the nation, and the experience of other states, that the overwhelming public necessities of making quality health care available to the citizens of this state, of ensuring that physicians continue to practice in Florida, and of ensuring that those physicians have the opportunity to purchase affordable professional liability insurance *cannot be met unless a cap on noneconomic damages is imposed*.

Ch. 2003-416, § 1, Laws of Fla. (emphasis added). The Legislature also expressly found that "the high cost of medical malpractice claims can be substantially alleviated by imposing a limitation on noneconomic damages in medical malpractice actions," and that "there is no alternative measure of accomplishing such result without imposing even greater limits upon the ability of persons to recover damages for medical malpractice." *Id.*[5]

B. The Post-Enactment Effect of Section 766.118 Supports the Legislature's Conclusion that a Damages Cap Was Necessary.

While the pre-enactment record is more than sufficient to satisfy the rational basis standard, evidence from after the 2003 reform demonstrates that the Legislature's judgment was correct.[6] A 2007 report from the Florida Office of

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[5] The cap on noneconomic damages is part of a comprehensive legislative framework that included new regulation of medical providers and new obligations for state agencies. *See, e.g.*, Ch. 2003-416, §§ 6, 34, Laws of Fla.

[6] Again, it is not the State's burden to provide evidence that a rational basis existed for the law, and a legislative judgment is not subject to courtroom factfinding. *See supra* at 11. This section, like the preceding section, merely demonstrates that Kalitan could not possibly satisfy her own burden of showing that the factfindings the Legislature did make were clearly erroneous, a necessary prerequisite to a finding that the law fails the rational basis standard.

Insurance Regulation ("FLOIR"), for example, surveyed the medical malpractice insurance industry and concluded that the 2003 law had worked as intended:

> The medical malpractice industry rebounded following the 2003 reforms. From January 1, 2004 to October 1, 2005, eighteen (18) new companies entered the marketplace. All economic indicators including net liability to surplus ratios, net written premium to surplus ratios and gross premium to surplus ratios showed dramatic improvement since these reforms.

Report of Comm'r Kevin M. McCarty, FLOIR, Medical Malpractice Rates in Florida (Apr. 2007) at 3, *available at* http://bit.ly/1TAXsSX. As the Legislature had intended, the addition of these new entrants—eighteen in less than two years when, in pre-reform years, insurers were *exiting* the market—helped to arrest the growth of premiums. As FLOIR's most recent annual report concluded:

> Prior to the 2003 legislative changes, the market experienced double-digit annual rate increases, an availability crisis, and had one of the highest defense and cost containment expense ratios in the country General conclusion – Based on the trends found in this report, it would appear that the 2003 changes to the law have benefited policyholders and the industry, assisted with the solvency of medical malpractice carriers, and directly contributed to a long-term lowering of the defense and cost containment ratios in the State of Florida.

FLOIR, *Medical Malpractice Financial Information Closed Claim Database and Rate Filings Annual Report* (Oct. 2015) at 10, *available at* http://bit.ly/1NisDyG. In contrast to the "double-digit annual rate increases," that regularly occurred prior to the 2003 legislation, the average rate change in 2014 was a decrease of 0.2%,

though some specialized areas saw premiums increase by 3.4% (dentists) or 7.1% (podiatrists and similar professionals). *Id.*[7]

C. In Light of the Available Facts, Kalitan's Claim Cannot Survive the Rational Basis Standard.

Simply put, the available evidence—to the limited extent this Court can consider it—demonstrates that the noneconomic damages cap bears a rational relationship to a legitimate state interest in a case involving a single-claimant recovery. There can be no question that there is a "legitimate state interest of protecting the public health by ensuring the availability of adequate medical care for the citizens of this state." *Pinillos v. Cedars of Lebanon Hosp. Corp.*, 403 So. 2d 365, 368 (Fla. 1981) (upholding statute imposing collateral source rule in malpractice actions). The Legislature, after the extensive study detailed above, found that there are "certain elements of damage . . . that have no monetary value, except on a purely arbitrary basis," Ch. 2003-416, § 1, Laws of Fla., and that a reasonable limit on such damages was essential to reining in medical malpractice insurance costs. At minimum, the Legislature could have rationally believed that

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[7] That premiums have stopped rising as dramatically or, often, have dropped outright helps to answer the criticisms of some of the *McCall* opinions that the 2003 law did not have a formal mechanism to require insurers to pass on savings. Again, the question under rational basis is only whether it was conceivable that the cap would lead to savings and, in turn, increased access to quality medical care. Surely it was plausible for the Legislature to believe, based on experience and on widely accepted economic theory, that lower costs and more entrants to the market would lead to increased competition and a corresponding reduction in premiums.

reducing the largest noneconomic damages awards were those most likely to have "no monetary value, except on a purely arbitrary basis," since they are not connected to an objectively measurable harm as are economic damages. *See* Ch. 2003-416, § 1, Laws of Fla. Kalitan has failed to rebut this reality, nor did the Fourth District cite any record evidence on which to base its conclusion.

IV. THE COURT SHOULD NOT CONSIDER ANY CONSTITUTIONAL ARGUMENTS ASIDE FROM EQUAL PROTECTION AND, IF IT DOES, SHOULD REJECT THOSE ARGUMENTS.

For similar reasons, Kalitan fails to establish that Section 766.118 violates her access to courts or jury trial rights. This Court should not even rule on these issues as they were neither considered nor passed on below. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008); *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 538 (1992) (noting that allowing lower courts to address legal arguments in the first instance provides "the benefit of developed arguments on both sides and lower court opinions squarely addressing the question"); *see also* Op. at 10 ("[W]e need not address Plaintiff's additional claims regarding access to courts or right to jury trial.").[8] The proper course would be to remand these claims for the District

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[8] Appellants' initial brief also discusses a separation of powers claim. *See* IB at 39-41. As Appellants show, any such argument must fail. *See id.*; *see also Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1092 (Fla. 1987) (rejecting separation of challenges challenge to damages cap); *Cauley v. City of Jacksonville*, 403 So. 2d 379, 387 (Fla. 1981) (same); *see also generally McCall*, 134 So. 3d at 937 (Polston, C.J., dissenting).

Court to consider them. If the Court does consider the claims, however, it should hold that Section 766.118 is fully constitutional.

1. Kalitan's Access to Courts Challenge Fails Under* Kluger*'s Second Prong. The rule that Florida courts presume that legislative acts are constitutional and "construe challenged legislation to effect a constitutional outcome whenever possible," applies with equal force to access to courts and jury trial challenges. *Crist*, 56 So. 3d at 747 (quotation and citation omitted). Kalitan has failed to satisfy her burden. Again, as this Court emphasized in *Echarte*, a legislature's factual findings are presumed correct and must be shown to be clearly erroneous before they may be disregarded. *Echarte*, 618 So. 2d at196; *see also supra* at 7.

The *Kluger* test that applies to Kalitan's access to courts challenge consists of two independent prongs, and the law need only satisfy one; here, because the law so clearly satisfies the second prong, the Court can uphold it on that ground.[9] *See Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973). The Legislature that enacted Section 766.118 made express findings that satisfy *Kluger*'s second prong, which requires that the law be supported by a "legislative showing of overpowering public necessity for the abolishment of the right and no alternative of meeting such public necessity." *Samples*, 114 So. 3d at 920 (internal quotation marks omitted).

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[9] Section 766.118, which ensures accessible medical care for all Floridians provides a commensurate benefit for individuals such as Kalitan, and would satisfy *Kluger*'s first prong if this Court were to address that issue.

The Legislature expressly found both that there was an overwhelming public necessity in "making high-quality health care available to the citizens of this state," and that there was "no alternative measure of accomplishing such result" without imposing greater limits. Ch. 2003-416, § 1, Laws of Fla. Again, this Court must accept the Legislature's findings unless Kalitan satisfies her burden of showing that they are clearly erroneous. *See supra* at 5*, see also Echarte*, 618 So. 2d at 196-97 (applying presumption in determining access to courts claim).

Kalitan failed to rebut any of the exhaustive research, testimony, or data supporting the conclusion that a noneconomic damages cap is a critical, necessary method of addressing a medical malpractice crisis that was undermining the Legislature's goal of making high-quality healthcare accessible. Nor can she show that there was an alternative available to the Legislature for addressing the crisis. This failure is unsurprising given that, as the Task Force found, legislative efforts to tackle similar crisis had failed over the prior quarter century. *See supra* at 13.

2. Kalitan Fails to Present a Plausible Jury Trial Argument. Kalitan's jury trial argument fails for the same reasons. The Legislature's findings regarding the overwhelming need arising from the medical malpractice insurance crisis and the lack of adequate alternatives should also lead this Court to uphold the statute against the jury trial right challenge. *See, e.g., Echarte*, 618 So. 2d at 191 (rejecting

jury trial right argument, among others, without additional analysis after resolving access to courts claim);[10] *see also Crist*, 56 So. 3d at 752 (same).

As with Kalitan's equal protection challenge, her failure to carry her heavy burden as to her other constitutional arguments leads to the same result—Section 766.118 is constitutional in the single-claimant context.

CONCLUSION

Because state law and public policy support upholding the constitutionality of Section 766.118's noneconomic damages cap, this Court should reverse.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Osvaldo Vazquez
ALLEN WINSOR (FBN 016295)
Solicitor General
OSVALDO VAZQUEZ (FBN 070995)
Deputy Solicitor General
Office of the Attorney General
The Capitol - PL-01
Tallahassee, Florida 32399-1050

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[10] This Court, in *Smith*, 507 So. 2d at 1088, stated in dicta that a plaintiff's jury trial right might be affected if a law "arbitrarily, cap[s] a recovery." As later cases such as *Echarte* make clear, *Smith*'s conclusion turned on the fact that it found the cap an *arbitrary* one. Section 766.0118's cap, supported by volumes and volumes of factual material and decades of experience, is far from arbitrary.

allen.winsor@myfloridalegal.com
osvaldo.vazquez@myfloridalegal.com
(850) 414-3300
(850) 410-2672 (fax)

Counsel for the State of Florida

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by electronic service through the Florida Courts E-Filing Portal on December 14, 2015 to the following counsel of record for the parties:

Thomas C. Heath
Aline O. Marcantonio
Heath & Carcioppolo, Chartered
888 S.E. Third Avenue, Ste. 202
Ft. Lauderdale, FL 33316
pleadings@heathcarcioppolo.com

Thomas A. Valdez
Jeffrey R. Creasman
Quintairos, Prieto, Wodd & Boyer, P.A.
4905 W. Laurel Street, Suite 200
Tampa, FL 33607
rcousins.pleadings@qpwblaw.com

Dinah Stein
Mark Hicks
Hicks, Porter, Ebenfield & Stein, P.A.
799 Brickell Plaza, Suite 900
Miami, FL 33129
mhicks@mhickslaw.com
dstein@mhickslaw.com
eclerk@mhickslaw.com

Counsel for Appellants

Crane A. Johnstone
Sheldon J. Schlesinger, P.A.
1212 S.E. Third Avenue
Ft. Lauderdale, FL 33316
rhoehn@schlesingerlaw.com
SLOPA.Service@schlesingerlawoffices.com

Philip M. Burlington
Nichole J. Segal
Burlington & Rockenbach, P.A.
444 West Railroad Avenue, Suite 430
West Palm Beach, FL 33401
pmb@FLAppellateLaw.com
njs@FLAppellateLaw.com

Counsel for Appellee

/s/ Osvaldo Vazquez
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Osvaldo Vazquez
Attorney