No. 2025-0386

# In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS,
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NOS. 113867, 114019

John Paganini,
*Plaintiff-Appellee*,

v.

The Cataract Eye Center of Cleveland,
*Defendant-Appellant*.

## MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICUS CURIAE OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS

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## I. Interest of Amicus Curiae

The Ohio Association of Civil Trial Attorneys' (OACTA) wide array of members includes attorneys, corporate executives, and claims professionals dedicated to the defense of tort litigation and other civil actions throughout Ohio. For over 50 years, OACTA has provided a forum where professionals work together to improve the administration of justice in Ohio. OACTA promotes fairness, predictability, stability, and consistency in Ohio's civil justice system. The medical claim tort reform measures in Amended Substitute Senate Bill 281 (S.B. No. 281), including the limits on noneconomic damages in R.C. 2323.43, align with OACTA's mission by making Ohio's civil justice system fairer and more predictable.

## II. This case raises substantial constitutional questions and is of public and great general interest

The Court should take this opportunity to clarify the constitutional principles for tort reform. R.C. 2323.43 creates a "two-tiered" cap on damages for noneconomic loss in civil actions for medical claims. *See Paganini v. Cataract Eye Ctr. of Cleveland*, 2025-Ohio-275, ¶ 60 ["App. Op."]. The Eighth District held the $500,0000 "second tier" of this cap violates Article I, Section 16's "due course of law" provision, giving reasons that apply to all "hard limits" on noneconomic loss for "catastrophic injuries." *See id.* at ¶ 64, 66. Embedded in this decision are several substantial constitutional questions meriting review, including:

- Does a decision strike down a statute "as-applied" when the reasons given cover all possible applications?
- Should Article I, Section 16's "due course of law" provision be interpreted in lockstep with the United States Constitution's Due Process Clause?
- If so, whether and when can changed circumstances make a rational statute irrational under rational basis review?

- Relatedly, did *Morris v. Savoy*, 61 Ohio St.3d 684 (1991), establish a rule of law that any "hard limit" on noneconomic loss resulting from "catastrophic injuries" is irrational?

The Eighth District struck down R.C. 2323.43(A)(3) because: (i) the General Assembly did not show a "real and substantial relationship" between this cap and medical malpractice insurance rates; and (ii) it is "arbitrary and unreasonable." App. Op. ¶ 60, 64, 66. As to the first reason, the Eighth District relied on 2019 Ohio Department of Insurance (ODI) data to find no real and substantial means-ends relationship. *Id*. at ¶ 64. As for the second, the court distilled from *Morris* a rule of law that any "hard limit" on noneconomic loss for "catastrophic injuries" is arbitrary and unreasonable. *Id.* at ¶ 66. While the Eighth District insists this ruling is "as-applied," App. Op. ¶ 2, 50, the reasons for it defy that description. This Court should accept review for several reasons.

*First*, the Court should clarify what counts as an "as-applied" constitutional challenge. This appeal illustrates the conundrum: John Paganini insists his challenge is "as-applied," but the reasons given for striking down the cap make it altogether unenforceable. For instance, the asserted lack of a real and substantial means-ends relationship stems from the panel's appraisal of an ODI 2019 closed claim report. App. Op. ¶ 62-64. Whatever the merits of that appraisal, it is not tied to the facts of Paganini's case. Rather, the Eighth District broadly concluded that this ODI data meant the General Assembly did not show the real and substantial means-ends relationship needed to apply the cap to anyone. *Id*. at ¶ 64. Because that finding applies to all applications of the statute, it effectively results in facial invalidity. *E.g.,* Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1327-1328 (2000) (even "when holding that a statue cannot be enforced against a

particular litigant, a court . . . may engage in reasoning that . . . produce[s] what are effectively facial" rulings).

The same is true of the finding that R.C. 2323.43(A)(3) is unreasonable and arbitrary. That finding rests on the premise that the lack of a "hard limit" on noneconomic losses for catastrophic injuries in another cap (R.C. 2315.18) underpinned the holding in *Arbino v. Johnson & Johnson*, 2007-Ohio-6948, that R.C. 2315.18 was not governed by *Morris* and is thus constitutional. From that flawed premise, the Eighth District found it "not reasonable" that such a hard limit would apply if the tortfeasor acted as a doctor, but not if he acted in another capacity. The court below reasoned that "the exact same injury inflicted by the exact same person should yield the exact same damages"—no matter the type of claim. *Id.* at ¶ 66 (internal quotation omitted). Again, whatever its merits, this reasoning is not tied to the facts of Paganini's case: the Eighth District broadly found that R.C. 2323.43(A)(3) "is arbitrary and unreasonable according to the reasoning provided in *Morris*." App. Op. ¶ 66. Because that finding applies to all applications of the statute, it effectively voids the statute across the board. This Court should clarify what an "as-applied" constitutional ruling is.

*Second*, the Court should accept review to address doctrinal incoherence underlying its Article I, Section 16 jurisprudence. This jurisprudence developed two doctrines from one clause: "every person. . . shall have remedy by due course of law . . . ." Ohio Const., art. I, § 16. Currently, this clause both: (i) creates a "right to a remedy," *Antoon v. Cleveland Clinic Found.*, 2016-Ohio-7432, ¶ 27; and (ii) imports federal substantive-due-process principles, based on the perceived equivalence of "due course of law" and "due process of law," *State v. Aalim*, 2017-Ohio-2956, ¶ 15-21. Tort reform measures that modify remedies thus must clear two hurdles: (i) they cannot "eliminate the ability to receive a meaningful remedy," *Arbino* at ¶

96; and (ii) they must satisfy a two-pronged test requiring both a "real and substantial" means-ends relationship and a finding that they are reasonable in the minds of judges. *Id*. at ¶ 49, 59-62, 103-104. The Court, however, has never explained why one clause imposes two hurdles. *E.g., Groch v. Gen. Motors Corp.*, 2008-Ohio-546, ¶ 108-109.

Also lacking is an explanation for why the Ohio "due course of law" standard is stricter than the federal "due process of law" standard, despite their professed equivalence. Federal rational basis review requires a "party challenging a legislative enactment" to "negative every conceivable basis which might support it." *Am. Exp. Travel Related Serv. Co. v. Kentucky*, 641 F.3d 685, 690 (6th Cir. 2011) (internal quotation omitted). This test is satisfied by "the government's 'rational speculation' linking the regulation to a legitimate purpose, even 'unsupported by evidence or empirical data.'" *Id.* at 690. State review, on the other hand, requires a court to "examine the record to determine whether there is evidence to support" a real and substantial means-ends relationship. *Arbino* at ¶ 49.

In short, the Court should accept review and either limit the due course of law clause to legal procedure (its original office) or reconcile these divergent standards by aligning state rational basis review with federal rational basis review.

*Third*, the Court should accept review to clarify whether, and if so, when changed circumstances make a statute irrational under rational basis review. *If* the Court were to align state and federal review, then it should tackle an unresolved issue of federal law: whether changed circumstances can make a law irrational. *E.g., Jones v. Schneiderman*, 888 F.Supp.2d 421, 425-427 (S.D.N.Y. 2012) (acknowledging but not resolving whether changed circumstances are relevant in rational basis review). The Eighth District did not strike down R.C. 2323.43(A)(3) because the General Assembly lacked a rational basis for it in 2003. App.

Op. ¶ 62-63. Rather, the Eighth District found a real and substantial means-ends relationship lacking based on data from a 2019 report. *Id*. at ¶ 64. Missing, though, is any explanation for why these years of experience are constitutionally relevant. *Compare id. with Jones* at 426 (citing United States Supreme Court decisions that "lend support to the proposition that the relevant question is whether a statute was rational at the time of enactment").

To be sure, an "emerging awareness" may heighten the importance of a liberty interest in some circumstances. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003). But that is different in kind from reappraising a means-ends relationship based on new but limited data. At a minimum, the civil defense bar should receive an explanation for why extensive legislative findings based on testimony and reports the General Assembly received can be overcome by a judicial reappraisal of a statute on limited data generated by the executive branch years later.

*Finally*, this Court should accept review to address whether *Morris* imposes a constitutional straitjacket requiring any damages cap to include an unlimited exception for catastrophic injuries. The Eighth District ruled that it does, making any "hard limit" on noneconomic loss for "catastrophic injuries" arbitrary and unreasonable. App. Op. ¶ 66. The Eighth District believed this ruling aligns with *Arbino*, which noted the General Assembly's finding that the benefits of R.C. 2315.18's cap on noneconomic loss "could be obtained without limiting the recovery of individuals whose pain and suffering is traumatic, extensive, and chronic[.]" *Id*., quoting *Arbino*, 2007-Ohio-6948, ¶ 61. But *Arbino* could not have intended for this summary of findings to support a constitutional straitjacket.

Rather, *Arbino* cautioned that the "blanket of stare decisis" applies only to legislation "phrased in language that is substantially the same as that which we have previously

invalidated." *Id.* at ¶ 22. On that point, *Morris* considered a flat cap of $200,000—not a tiered cap like R.C. 2323.43 that allows awards of more than double that amount for "catastrophic injuries." *Compare Morris*, 61 Ohio St.3d at 686 *with* App. Op. ¶ 60. *Arbino* thus requires that R.C. 2323.43(A)(3) receive a "fresh review of [its] individual merits." *Arbino*, 2007-Ohio-6948, ¶ 24. The Court should defer to and adopt, after this fresh review, the General Assembly's finding that the second-tier cap "strikes a reasonable balance between potential plaintiffs and defendants in consideration of the intent of an award for noneconomic loss, while treating similar plaintiffs equally." S.B. No. 281, § 3(A)(4)(a).

## III. Statement of the Case and Facts

OACTA defers to the Statement of the Case and Facts in Appellant The Cataract Eye Center of Cleveland's Memorandum in Support of Jurisdiction.

## IV. Argument

### Proposition of Law No. 1

> **The "hard limit" on recoverable noneconomic loss in R.C. 2323.43(A)(3) that applies to "catastrophic injuries" does not violate the "due course of law" provision in Article I, Section 16 of the Ohio Constitution and is therefore constitutional.**

#### A. The Eighth District declared this "hard limit" unconstitutional on its face.

The Eighth District started off on the wrong foot by insisting that it held R.C. 2323.43(A)(3) unconstitutional "as-applied." App. Op., ¶ 2, 50. To recap, constitutional challenges are either as-applied or facial. *Arbino*, 2007-Ohio-6948, ¶ 26. Different burdens of proof apply to each. *Wymsylo v. Bartec, Inc.*, 2012-Ohio-2187, ¶ 20. The consequences of a successful challenge also differ: facial unconstitutionality bars all enforcement of the statute, *id.* at ¶ 21, while an as-applied challenge "prevent[s] its future application in a similar

context, *but [does] not . . . render it utterly inoperative*." (Emphasis added.) *Wymsylo* at ¶ 22, quoting *Yajnik v. Akron Dept. of Health, Hous. Div.*, 2004-Ohio-357, ¶ 14 (cleaned up).

Distinguishing between the two does not turn on the challenger's label. What matters is the challenger's claim and the relief that follows. *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). As to the claim, if a plaintiff seeks to prevent a law's application in all instances, it is a facial challenge. *See id.*; *Libertarian Party of Erie Cnty. v. Cuomo*, 300 F.Supp.3d 424, 439 (W.D.N.Y. 2018), *aff'd in part*, *appeal dismissed in part*, 970 F.3d 106 (2d Cir. 2020); *Platt v. Bd. of Commr. on Grievances*, 2017 WL 1177576, at *5 (S.D. Ohio Mar. 30, 2017).

That is true here. Paganini claims R.C. 2323.43(A)'s limit on noneconomic damages for catastrophic injuries is unconstitutional—full stop. *See, e.g.*, Pl. Mot. to Include in any Judgment the Full Amount Awarded for Noneconomic Damages at 4 (Feb. 6, 2024) ("Paganini asks this Court to . . . [conclude] that R.C. §2323.43 is unconstitutional on . . . due process grounds."); *id.* at 11 ("The statute is . . . unconstitutional under due process as applied to non-economic damage caps in medical claims."). The courts below thus erred by deferring to how Paganini labeled his challenge. *E.g.*, 04/16/23 JE at 3 ("The Court does not need to impose a higher burden on him simply because the logic of declaring the cap as-applied to his verdict *likely means it is unconstitutional in all circumstances*.") (Emphasis added); App. Op. ¶ 50.[1]

As for the relief granted, the Eighth District found a lack of a real and substantial relationship between R.C. 2323.43(A)(3)'s cap and medical malpractice insurance rates based on ODI 2019 closed claim report data. App. Op. ¶ 64. And the court below declared the

[1] While the Eighth District suggested Paganini's contentions were "specific to his unusual circumstances," *id*. at ¶ 50, nothing in his argument or the Eighth District's decision relied on case-specific facts.

cap's "hard limit" on noneconomic losses for catastrophic injuries "arbitrary and unreasonable according to the reasoning provided in *Morris*." *Id*. at ¶ 66. That reasoning makes R.C. 2323.43(A)(3) "utterly inoperative," *Wymsylo* at ¶ 21, confirming that Paganini's challenge is a facial challenge. *See United States v. Idaho*, 623 F.Supp.3d 1096, 1108 (D. Idaho 2022) ("the distinction between the two types of challenges mainly goes to the breadth of the remedy").

### B. This "hard limit" does not violate the "due course of law" provision in Article I, Section 16 of the Ohio Constitution.

As to this facial ruling, the rational basis test as applied by the Eighth District is ripe for reexamination. App. Op. ¶ 64-67. While seemingly rooted in "the 'due process of law' protections in the United States Constitution," *Arbino*, 2007-Ohio-6948, ¶ 48, this test neither follows federal law nor aligns with the original meaning of "due course of law." The result is two intrusive inquiries under the same clause into tort reform measures affecting remedies. The Court should either collapse the two inquiries into one as to remedial statutes or adopt true "lockstepping" by applying the deferential federal rational-basis test to legislation restricting no fundamental rights.

#### 1. No textual or historical support for a searching inquiry into the substance of a statute under this provision.

To begin with, Ohio's "due course of law" provision and the Fourteenth Amendment's "due process of law" clause are "textually and historically distinct." *Cf. State ex rel. Cincinnati Enquirer v. Bloom*, 2024-Ohio-5029, ¶ 21, 24 (ending "lockstepping" in the open courts provision context for these reasons). The former, adopted in 1861, says "every person . . . shall have remedy by due course of law," dispensed "without denial or delay." Ohio Const., art. 1 § 16; *see Aalim*, 2017-Ohio-2956, ¶ 17. The latter, ratified seven years later, forbids a

"State" from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1. The "blind lockstepping," *Bloom* at ¶ 29, of these two provisions dates to 1887 without "any extended discussion of this important constitutional guarantee." *Adler v. Whitbeck*, 44 Ohio St. 539, 569 (1887).

By the 1980s and 1990s, lockstepping became the unquestioned mode for interpreting Ohio's "due course of law" provision. *E.g.*, *Mominee v. Scherbarth*, 28 Ohio St.3d 270, 274 (1986) (treating "due course of law" as analytically identical to "due process"). That trend continues to this day. *E.g.*, *Arbino*, 2007-Ohio-6948, ¶ 48 (applying "due course of law" provision as "the equivalent of the [federal] 'due process of law' protections"); *Aalim*, 2017-Ohio-2956, ¶ 15 (due course and due process clauses "equated" for substantive due process purposes). Yet at all events, this line of authority "didn't provide any analysis," "didn't examine the history of the Ohio provision," and "didn't analyze its text[.]" *Bloom* at ¶ 25.

As to statutes affecting remedies, this lockstepping is on shaky ground. Textually, "due course of law" is the means—that is, the *procedure*—by which "every person . . . shall have remedy." Ohio Const., art. 1 § 16. Historically, "due course of law" meant "legal procedure, covering the entirety of a legal proceeding from initiation through to judgment and execution." Crema & Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 Va.L.Rev. 447, 464 (2022). In other words, "'due course of law' parallels our own modern understanding of procedural due process." *Id.* Given this text and history, there is little justification for a two-pronged test analyzing a tort reform measure's substance when the preceding phrase in Article I, Section 16—"shall have remedy"—has substance covered. *See Arbino*, 2007-Ohio-6948, ¶ 44 ("When the Constitution speaks of remedy and injury to person, property, or reputation, it requires as to remedies 'an opportunity granted at a

meaningful time and in a meaningful manner.'"), quoting *Hardy v. VerMeulen*, 32 Ohio St.3d 45, 47 (1987).

### 2. The rationale for rational basis review under this provision requires a highly deferential standard.

At the very least, however, Ohio's rational basis test under its "due course of law" provision should be clarified and aligned with the deferential federal due process standard it purportedly follows. Currently, as discussed, a statute passes rational basis review if it "(1) bears a real and substantial relation to the public health, safety, morals, or general welfare of the public, and (2) is not unreasonable or arbitrary." *Arbino* at ¶ 49, quoting *Mominee*, 28 Ohio St.3d at 274. The first prong asks courts to "examine the record to determine whether there is evidence to support such a relationship," *Id.* at ¶ 49, while the second allows judges to declare legislation "unreasonable." As applied by the Eighth District, App. Op. ¶ 64, 66, this test essentially flips the burden of proof and requires the defendant, or government, to prove constitutionality. That deviates from the purpose of rational basis review, a deferential standard of review that leaves to "the legislature, not the courts, [the task of] balanc[ing] the advantages and disadvantages of the new requirement." *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487 (1955).

It was not always this way. *City of Xenia v. Schmidt*, 101 Ohio St. 442 (1920), conducted a historical analysis of the standard for declaring a statute unconstitutional, requiring "clear incompatibility between the Constitution and the law" before "the judicial power can refuse to execute it." *Id.* at 445, quoting *Cincinnati, W. & Z.R. Co. v. Clinton Cnty. Comm'rs*, 1 Ohio St. 77, 82 (1852). Many authorities supported this deferential standard. *Id.* at 443 (collecting cases). And for several decades, the General Assembly received this deference, as the Court stressed that it is not enough for a statute to create a "conflict of serious opinion" or cause

"hardships or inconvenience[.]" *City of Cleveland v. Terrill*, 149 Ohio St. 532, 536 (1948). This meant the General Assembly had "wide discretion in determining not only what the public interest requires, but also what measures are necessary to protect such interest." *Id*.

By the 1980s, though, this Court began to require evidence supporting a real and substantial means-ends relationship before it would find tort reform measures constitutional under due course of law. *E.g.*, *Mominee*, 28 Ohio St.3d at 275 (criticizing defendants' failure to "proffer any evidence" on tort reform's effect on insurance premiums); *Morris*, 61 Ohio St.3d at 690 (same). Notably, the Court cited no authority supporting this evidentiary gloss on rational basis review under due course of law. Nor did the Court explain why a due course of law analysis requires supporting evidence when rational basis review under the equal protection clause does not. *See Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.*, 87 Ohio St.3d 55, 60 ("the state has no obligation to produce evidence to sustain the rationality of a statutory classification under Ohio's standard of rational-basis review."). That failure is glaring, given that this evidentiary hurdle conflicts with the Court's guidance that rational basis review under the two clauses "is essentially equivalent." *Grevious*, 2022-Ohio-4361, ¶ 39 (internal quotation omitted), quoting *Cook v. Bennett*, 792 F.3d 1294, 1301 (11th Cir. 2015).

What is more, the evidentiary gloss on rational basis review under due course of law also conflicts with federal rational basis review, which requires no evidence:

> As the Supreme Court often has reiterated, the party challenging a legislative enactment subject to rational basis review must negat[e] every conceivable basis which might support it. Under rational basis review, it is constitutionally irrelevant [what] reasoning in fact underlay the legislative decision. [W]e will be satisfied with the government's rational speculation linking the regulation to a legitimate purpose, even unsupported by evidence or empirical data. Thus, if a statute can be upheld under any plausible justification offered by the state, or even hypothesized by the court, it survives rational-basis scrutiny.

*Am. Exp. Travel Related Servs. Co. v. Kentucky*, 641 F.3d 685, 690 (6th Cir.) (internal citations omitted) (cleaned up); *Sherman v. Ohio Pub. Emps. Ret. Sys.*, 2020-Ohio-4960 (DeWine, J. dissenting) (discussing the federal rational basis standard under equal protection).

The Court should end this unexplained departure from the deferential rational basis review applied under federal law and Ohio's equal protection clause. The *challenger* "bears the burden to negate every conceivable basis that might support the [action]." *Columbia Gas Transm. Corp. v. Levin*, 2008-Ohio-511, ¶ 20. That means neither the defendant nor the State must "produce evidence to sustain the rationality of a statutory classification." *Columbia Gas Transm. Corp.* at ¶ 91, citing *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter*, 87 Ohio St.3d at 58, 60. Thus, legislation is constitutional if based on "rational speculation unsupported by evidence or empirical data." *State v. Thompson*, 2002-Ohio-2124, ¶ 27 (internal quotation omitted). At the end of the day, "all that is needed is a rationale that *seems plausible*." (Emphasis added.) *Sherman*, 2020-Ohio-4960 at ¶ 47.

### 3. R.C. 2323.43 is constitutional under this highly deferential standard.

R.C. 2323.43 easily clears this low bar. Uncodified law explains that the General Assembly passed the two-tiered damages cap because:

- Medical malpractice litigation endangered quality health care in Ohio.
- The average award to plaintiffs had soared, with million-dollar payments doubling in years before the cap was passed.
- The State has a rational and legitimate interest in stabilizing healthcare costs, which large noneconomic damage awards increased.
- Caps on noneconomic loss would mitigate litigation risks causing medical malpractice insurers and doctors to flee Ohio.

S.B. No. 281, §3(A)(3). The General Assembly cited testimony, reports, and other evidence supporting the real and substantial relationship between stabilizing healthcare delivery (and insurance costs) and capping noneconomic loss. *Id.* § 3(A)(3)(a)-(e), 4(a)-(d).

The Eighth District instead focused on a 2019 ODI report that it thought showed that capping noneconomic loss for catastrophic injuries would not affect medical malpractice insurance rates. App. Op. ¶ 64. But when "there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). To be sure, when applying a hybrid rational-basis test in a different context, this Court once expressed the view that a "law's constitutionality is not cast in stone", giving policy reasons for revisiting the evidence supporting a statute's means-ends relationship. *Caruso v. Aluminum Co. of Am.*, 15 Ohio St.3d 306, 309-310 (1984). That approach is mistaken: rational basis review is "a paradigm of judicial restraint." *Jones*, 888 F.Supp.3d at 425 (internal quotation omitted). Revisiting the supporting evidence is thus a job for the legislature, not courts. The Eighth District erred by crediting a 2019 ODI report rather than the evidence before the General Assembly.

Still, the Eighth District's analysis fails on its own terms. The panel inferred the lack of a relationship between capping noneconomic loss and malpractice insurance rates from a 2019 ODI chart that, the Eighth District said, showed only 30 cases between 2005 and 2019 with a verdict exceeding the statutory caps. App. Op. ¶ 64. This inference conflicts with the report's caution that it "is *not intended to be used* to evaluate past or current medical professional liability insurance rates." ODI, *Ohio 2019 Medical Professional Liability Closed*

*Claim Report*, § V (emphasis added). But beyond misusing the report's data, the decision below also ignores data on pre-S.B. No. 281 claims that show the caps work.

On that subject, a comparison of charts on pages 10-11 shows average indemnity payments during this 15-year period were far higher for pre-S.B. No. 281 claims. *See id*. at pp. 10-11. For example, 2018 closed claims led to average indemnity payments of $2,670,061 for pre-S.B. No. 281 claims, while post-S.B. No. 281 claims that year had average indemnity payments of $286,360. *Id*. That uncapped claims led to indemnity payments over 800% higher than capped claims confirms a real and substantial relationship between stabilizing healthcare delivery and insurance costs and capping noneconomic loss exists.

### C. There is no rule that "hard limits" on noneconomic damages for "catastrophic injuries" are unconstitutional.

Finally, the Eighth District deemed R.C. 2323.43(A)(3) "arbitrary and unreasonable according to the reasoning provided in *Morris*," which it concluded bars any "hard limit" on noneconomic loss for "catastrophic injuries." App. Op. ¶ 66. That is incorrect. *Morris* was and is limited to its facts.

In *Morris*, this Court found a $200,000 medical malpractice cap on "*general damages*" unconstitutional. (Emphasis added.) *Morris*, 61 Ohio St.3d 684, 686. This statute was part of 1975 tort reform responding to a "health care crisis prompted by escalating medical malpractice insurance premiums." *Morris* at 686–687. The Court held this cap unconstitutional on due process grounds due to a lack of *evidence* establishing "a rational connection between awards over $200,000 and malpractice insurances rates." *Id.* at 690. Key to that finding was the omission of the cap from a list of statutes the General Assembly "believed would have an impact on insurance premiums." *Id.* Absent evidence showing a rational relationship between the cap and insurance rates, this Court found it "irrational and

arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice." *Id*. at 691. *Morris* thus turned on the language of the statute at issue and the record in that case.

What is more, this Court clarified after *Morris* that the "blanket of stare decisis" does not apply unless the statute is "phrased in language that is substantially the same as that which we have previously invalidated." *Arbino,* 2007-Ohio-6948, ¶ 23. Unlike the flat cap of $200,000 in *Morris*, R.C. 2323.43 has a tiered cap that allows awards of more than double that amount for "catastrophic injuries." *Compare Morris*, 61 Ohio St.3d at 686 *with* App. Op. ¶ 60. *Arbino* thus requires a "fresh review of [R.C. 2323.43(A)(3)'s] individual merits." *Arbino*, ¶ 24. That review should lead to a finding that the statute does not violate Article I, Section 16's "due course of law" provision.

## V. Conclusion

This Court should accept review, reverse the Eighth District's decision, and remand with instructions to enter a judgment that complies with the cap in R.C. 2323.43(A)(3).

Respectfully submitted,

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