IN THE SUPREME COURT OF OHIO

Melissa Arbino,	)	On Questions Certified by
	)	the United States District Court
Petitioner,	)	for the Northern District
	)	of Ohio, Western Division
v.	)	
	)	Case No. 06-1212
Johnson & Johnson, *et al.*,	)	
	)	U.S. District Court Case
Respondents.	)	No. 3:06 CV 40010

AMICI CURIAE BRIEF OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN TORT REFORM ASSOCIATION, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AND AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF RESPONDENTS

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The National Federation of Independent Business Legal Foundation, Chamber of Commerce of the United States of America, National Association of Manufacturers, American Tort Reform Association, National Association of Mutual Insurance Companies, Property Casualty Insurers Association of America, and American Chemistry Council — collectively "*amici*" — respectfully request that this Court declare Ohio Rev. Code §§ 2315.18-.21 to be constitutional.

STATEMENT OF INTEREST

As organizations that represent Ohio companies and their insurers, *amici* have a significant interest in ensuring that the civil litigation environment in Ohio is just and balanced. *Amici* believe there is a vital need to preserve the appropriate balance of power between the Ohio legislature and the Ohio courts in formulating tort law. This Court should respect efforts by the General Assembly to declare the public policy of the State

and, where necessary, to enact civil justice reform legislation to meet the needs of Ohio's citizens.

The National Federation of Independent Business Legal Foundation ("NFIB"), a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business. NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. The 600,000 members of NFIB own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. The U.S. Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the U.S. Chamber has filed more than 1,000 *amicus curiae* briefs in state and federal courts.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

Founded in 1895, National Association of Mutual Insurance Companies ("NAMIC") is a full-service national trade association with more than 1,400 member companies that underwrite more than forty percent of the property/casualty insurance premium in the United States. NAMIC members account for forty-seven percent of the homeowners market, thirty-nine percent of the automobile market, thirty-nine percent of the workers' compensation market, and thirty-four percent of the commercial property and liability market. NAMIC benefits its member companies through public policy development, advocacy, and member services.

The Property Casualty Insurers Association of America ("PCI") is a trade group representing more than 1,000 property and casualty insurance companies. PCI members are domiciled in and transact business in all fifty states, plus the District of Columbia and Puerto Rico. Its member companies account for $184 billion in direct written premiums. They account for 52% of all personal auto premiums written in the United States, and 39.6% of all homeowners' premiums, with personal lines writers of commercial and miscellaneous property/casualty lines. In addition to the diversified product lines they write, PCI members include all types of insurance companies, including stocks, mutuals, and companies that write on a non-admitted basis. The PCI membership is literally a

cross-section of the United States property and casualty insurance industry. In light of its involvement in Ohio, the PCI is particularly interested in the resolution of the issue before the Court on behalf of its members and their interests.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. The business of chemistry is a key element of the nation's economy, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

STATEMENT OF FACTS

Amici adopt the Statement of Facts of Respondents.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Increasingly, one of the most frequently raised questions in the public dialogue about civil justice reform is whether courts or legislatures should make tort law. Tort law affects people's lives every day. It can discourage misconduct and help remove truly defective products from the marketplace. On the other hand, unchecked and unbalanced liability can discourage innovation, limit the availability of affordable health care, slow economic growth, result in loss of jobs, and unduly raise costs for consumers. It is, thus, very appropriate to ask, who should decide tort law – courts or legislatures?

The vast majority of tort law has been, and should continue to be, decided by state courts. *See generally* Victor E. Schwartz *et al.*, *Prosser, Wade and Schwartz's Cases and Materials on Torts* (11th ed. 2005). But, state legislatures also have an important, overlapping role to play in the development of tort law. As a matter of history and sound public policy, neither branch of government should have a tort law "monopoly." *See*

Hon. Richard H. Finan & April M. Williams, *Government Is a Three-Legged Stool*, 32 U. Tol. L. Rev. 517 (2001). If that were true — if only "one voice" could be heard to the exclusion of all others — the public would lose out in the long run. The balanced development of tort law would suffer, and so would the public's perception of the judiciary. *See generally* Comment, *State Tort Reform - Ohio Supreme Court Strikes Down State General Assembly's Tort Reform Initiative, State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999), 113 Harv. L. Rev. 804, 809 (2000).

This brief will demonstrate that the prerogative of the General Assembly to decide broad public policy is deeply rooted in Ohio history and law. The brief will then discuss the balance of power between the General Assembly and the courts in developing Ohio law. The brief concludes that, as a matter of both legal history and sound public policy, this Court should declare Ohio Rev. Code §§ 2315.18-.21 to be constitutional.

ARGUMENT

I. THE ROLE OF THE LEGISLATURE IN SETTING LIABILITY LAW

A. The "Reception Statutes"

A fundamental part of legal history has been largely overlooked in the debate about whether courts or legislatures should develop state tort law. State legislatures, not courts, were the first to create state tort law. When colonies and territories became states, one of the first acts of state legislatures was to "receive" the common and statutory law of England as of a certain date and have that provide a basis for state tort law. *See* Charles A. Bane, *From Holt and Mansfield to Story to Llewellyn and Mentschikoff: The Progressive Development of Commercial Law*, 37 U. Miami L. Rev. 351, 363 (1983). These "reception statutes" *delegated* to state courts the authority to develop the common

law in accordance with the public policy of the state. These laws were the basic vehicles through which legislative power was vested in state judiciaries. *See* Kent Greenwalt, *The Rule of Recognition and the Constitution*, 85 Mich. L. Rev. 621, 649 (1987).

Early state legislatures delegated the task of developing tort law to state judiciaries because the legislatures did not have the time (or perhaps the inclination) to formulate an extensive "tort code." They faced more extensive and pressing tasks, such as formulating a criminal code and other basic needs for the "new society." Most "reception statutes" made clear, however, that the power delegated to the courts could be retrieved by the legislature at any time, and the legislature has done so in contract and property law, among other topics. Tort law, however, has generally remained part of the common law except in a few areas, such as those at issue here, where the law has been developed by the General Assembly.

B. Ohio's Reception Statute and Constitution

In Ohio, the legislature historically has had a preeminent role in developing public policy. The Northwest Ordinance, which created the Ohio territory, provided:

> *The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original States, criminal and civil*, as may be necessary, and best suited to the circumstances of the district, and report them to Congress from time to time, which laws shall be in force in the district *until the organization of the general assembly therein*, unless disapproved of by Congress; but *afterwards the legislature shall have authority to alter them as they shall think fit.*

Ordinance of 1787: Northwest Territorial Government, § 5 (adopted July 13, 1787 (emphasis added)).

Shortly thereafter, the territorial legislature adopted a "reception statute" from Virginia which declared the common law of England to be the law within the territory

until repealed by the legislature.[1] This legislation confirmed the legislature's authority to decide the law of the territory, and later the state.

Because of the respect shown by Ohio courts for the General Assembly's policymaking authority, the General Assembly apparently saw little need to maintain the "reception statute," and it was repealed in 1806. *See* Act of January 2, 1806, ch. 122 (cited in *Drake v. Rogers*, 13 Ohio St. 21, 28 (1861)). By repealing the statute, however, the General Assembly was not abdicating its position as the chief policymaking branch of state government. Rather, the General Assembly was exercising its authority to *delegate* to the Ohio courts the task of developing the common law until such time that the General Assembly would choose to alter the common law by statute, as it has done in Ohio Rev. Code §§ 2315.18-.21. *See Strock v. Pressnell*, 38 Ohio St. 3d 207, 214, 527 N.E.2d 1235, 1241 (Ohio 1988) (declaring statute abolishing common law amatory actions to be constitutional and stating, "there is no property or vested right in any of the rules of the common law, as guides of conduct, and they may be added to or repealed by legislative authority."); *Morris v. Savoy*, 61 Ohio St. 3d 684, 698, 576 N.E.2d 765, 775 ((Ohio 1991) ("[T]he General Assembly may limit, modify, or abolish common law causes of action. . . . 'Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.'") (citations omitted) (Homes, J., concurring and dissenting in part).

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[1] Citations to declaratory "reception" laws in the early period of the State are found in *Drake v. Rogers*, 13 Ohio St. 21, 28 (1861); *Lessee of James P. Merritt v. Horne*, 5 Ohio St. 307, 313 (1855); *Crawford v. Chapman*, 17 Ohio 449, 452 (1848); *Trustees of the McIntire Poor School v. Zanesville Canal & Mfg. Co.*, 9 Ohio 203, 255 (1839).

Decisions from the Supreme Court of Ohio show that, historically, this Court recognized and respected the prerogative of the General Assembly to develop rules governing conduct, property, and other key policy issues for the state. For example, in *Drake v. Rogers*, 13 Ohio St. 21, 29-30 (1861), the Court stated:

> *[W]herever the legislature has by statutory law assumed to establish either rules of property or conduct, it has always been the policy of the law in this state, or at least such is the generally received understanding, that the common law can neither add to nor take from the statutory rules so established.* The office of the common law in such cases, is only to minister aid, and facilitate the application of the statutory rule and remedy; not to supply any other or different one. *** *The same remark holds equally true in relation to the application of the common law in civil cases wherever the legislature has assumed to establish a statutory rule.* (Emphasis added.)[2]

In *State ex rel. Yaple v. Creamer*, 85 Ohio St. 349, 397, 97 N.E. 602, 606 (1912), this Court recognized the General Assembly's power to modify Ohio tort law in the context of worker compensation, holding that a "person has no property, no vested interest, in any rule of the common law." In reaching this conclusion, the Court emphasized the General Assembly's authority to develop public policy:

> It is suggested that this legislation marks a radical step in our governmental policy not contemplated by the Constitution, and which it is the duty of the court to condemn. But it creates no new right, or new remedy for wrong done. It is an effort to in some degree answer the requirements of conditions which have come in

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[2] *See also Kerwhaker v. Cleveland, Columbus & Cincinnati R.R. Co.*, 3 Ohio St. 172 (1854) ("[H]aving been adopted in the original States of the Union, and introduced into Ohio, at an early period, the common law has continued to be recognized as the rule of decision in our courts, in the absence of legislative enactments."); *Probasco v. Raine*, 50 Ohio St. 378, 391, 34 N.E. 536, 538 (1893) ("[W]hen the legislature has spoken, within the powers conferred by the Constitution, its duly enacted statutes form the public policy and prescribe the rights of the people, and such statutes must be enforced, and not nullified, by the judicial and executive departments of the state.").

> an age of invention and momentous change. *The courts of the country, while firmly resisting encroachment on the Constitutions in the past, have yet found in their ample limits sufficient to enable us to meet the emergencies and needs of our development, and we do not find that this statute goes beyond the bounds put upon the legislative will.*

85 Ohio St. at 405-406, 97 N.E. at 608 (emphasis added).

The legislature's role in establishing public policy for the state is reinforced by the Ohio Constitution art. II, § 1 (1912), which provides that "[t]he Legislative power of the state shall be vested in a General Assembly. . . ." A decision by this Court to trump the legislature's overlapping authority to set liability policy would violate this basic principle.

Ohio Rev. Code §§ 2315.18-.21 represent the most recent example of the General Assembly exercising its historic right to declare the public policy of the State through legislation. It should be respected by the Court.

II. THE LEGISLATURE AND COURTS HAVE DIFFERENT STRENGTHS

The Court's long-standing recognition of the separation of powers derives logical and factual support from the inherent strengths of the legislative process. This is particularly true with respect to tort law, because the impacts on Ohio's citizens go far beyond who should win a particular case. The General Assembly can focus more broadly on how tort law impacts the availability and cost of goods and services. It has the unique ability to weigh and balance the many competing societal, economic, and policy considerations involved.

Legislatures are uniquely well equipped to reach fully informed decisions about the need for broad public policy changes in the law. Through the hearing process, the General Assembly is "the best body equipped" to hold a "full discussion of the competing

principles and controversial issues," *Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assoc., Inc.*, 108 Ohio St. 3d 494, 514, 844 N.E.2d 1160, 1178 (2006) (Lanzinger, J., dissenting), of tort liability, because it has access to broad information, including the ability to receive comments from persons representing a multiplicity of perspectives and to use the legislative process to obtain new information. If a point needs further elaboration, an additional witness can be called to testify or a prior witness can be recalled. This process allows legislatures to engage in broad policy deliberations and to formulate policy carefully. As we have explained:

> The legislature has the ability to hear from everybody — plaintiffs' lawyers, health care professionals, defense lawyers, consumers groups, unions, and large and small businesses. * * * [U]ltimately, legislators make a judgment. If the people who elected the legislators do not like the solution, the voters have a good remedy every two years: retire those who supported laws the voters disfavor. These are a few reasons why, over the years, legislators have received some due deference from the courts.

Victor E. Schwartz, *Judicial Nullifications of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law*, 31 Seton Hall L. Rev. 688, 689 (2001).

A similar point was made by United States Supreme Court Justice Harland Stone, who cautioned that "the only check upon [the Court's] exercise of power is [the Court's] own sense of self-restraint. For the removal of unwise laws from the statute books *appeal lies, not to the courts, but to the ballot and to the processes of democratic government.*" *United States v. Butler*, 297 U.S. 1, 79 (1936) (quoted in *Holeton v. Crouse Cartage Co.*, 92 Ohio St. 3d 115, 136, 748 N.E.2d 1111, 1129 (Moyer, C.J., dissenting) (emphasis added), *reconsideration denied*, 93 Ohio St.3d 1434, 755 N.E.2d 356 (Ohio 2001)).

With respect to the subject legislation, for example, numerous witnesses testified both for and against the law's passage. The General Assembly enacted the law with the benefit of these various perspectives, in addition to considering a multitude of studies. This broad information gathering led the General Assembly to conclude that the subject law was needed to make Ohio's civil litigation environment fairer, more efficient and predictable, and to promote Ohio's economic climate, enhancing job growth and innovation, among other reasons to enact the law.[3]

Furthermore, legislative development of tort law gives the public advance notice of significant changes affecting rights and duties, and the time to comport behavior accordingly. As the United States Supreme Court noted in a landmark decision regarding punitive damages, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive *fair notice* . . . of the conduct that will subject him to [liability]. . . ." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) (emphasis added). The Court's statement is particularly applicable here.

Courts, on the other hand, are uniquely and best suited to adjudicate individual disputes concerning discrete issues and parties. This is an essential part of the tripartite structure of our system of government. The Founding Fathers recognized this when they drafted the United States Constitution to give the judiciary jurisdiction to decide "cases and controversies." This advantage also has its limitations: the focus on individual cases

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[3] *Cf. Galayda v. Lake Hosp. Sys., Inc.*, 71 Ohio St. 3d 421, 436, 644 N.E.2d 298, 309 (Ohio 1994) (Moyer, C.J., dissenting) ("Certainly, a statute designed to respond to the growing concerns regarding the continued delivery of health care to the citizens of Ohio at affordable costs . . . is simply an economic regulation and is entitled to wide deference."), *cert. denied*, 516 U.S. 810 (1995).

does not provide comprehensive access to broad scale information, and judicial changes in tort law may not provide prospective "fair notice" to everyone potentially affected.

III. THIS COURT SHOULD RESPECT THE ROLE OF THE LEGISLATURE IN THE DEVELOPMENT OF TORT LAW

A. Most State Legislative Tort Policy Decisions Have Been Upheld

Petitioner's attack on Ohio Rev. Code §§ 2315.18-.21 is not an isolated filing, but is part of a nationwide effort to have courts nullify legislatures' overlapping authority to develop state tort law. The effort has been successful in some, but not most, states. *See* Victor E. Schwartz *et al.*, *Fostering Mutual Respect and Cooperation Between State Courts and State Legislatures: A Sound Alternative to a Tort Tug of War*, 103 W. Va. L. Rev. 1 (2000). Numerous courts have upheld state laws similar to those at issue here.[4]

1. Caps on Noneconomic Damages Upheld

For instance, many courts have upheld limits on noneconomic damages and even aggregate limits on compensatory damages. *See Morris v. Savoy*, 61 Ohio St. 3d 684, 699, 576 N.E.2d 765, 777 (Ohio 1991) ("[S]tate supreme courts from several jurisdictions have found caps upon either noneconomic or econonic damages in medical malpractice to be constitutional.") (Homes, J., concurring and dissenting in part). Examples include:

- **Alaska:** *Evans v. State*, 56 P.3d 1046 (Alaska 2002) (noneconomic damages cap did not violate the right to a jury trial, equal protection, due process, separation of powers doctrine, access to courts, or prohibition against special legislation).
- **California:** *Fein v. Permanente Med. Group*, 695 P.2d 665 (Cal.) ($250,000 noneconomic damages cap in medical malpractice actions did not violate equal protection or due process), *appeal dismissed*, 474 U.S. 892 (1985).
- **Colorado:** *Garhart v. Columbia/Healthone, L.L.C.*, 95 P.3d 571 (Colo. 2004) ($1 million aggregate limit on damages recoverable in health care liability actions did not

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[4] *See Mayer v. Bristow*, 91 Ohio St. 3d 3, 740 N.E.2d 656 (2000) (vexatious litigator statute did not violate open courts or separation of powers), *reconsideration denied*, 91 Ohio St. 3d 1433, 741 N.E.2d 896 (Ohio 2001).

violate equal protection, right to jury trial, or separation of powers); *Scharrel v. Wal-Mart Stores, Inc.*, 949 P.2d 89 (Colo. Ct. App. 1998) ($250,000 noneconomic damages cap with alternate $500,000 cap did not violate equal protection, due process, or access to courts); *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993) (cap law did not violate due process or equal protection).

- **Florida:** *Mizrahi v. North Miami Med. Center, Ltd.*, 761 So. 2d 1040 (Fla. 2000) (wrongful death statute precluding adult children from recovering nonpecuniary damages in action for a parent's death due to medical malpractice did not violate equal protection); *Univ. of Miami v. Echarte*, 618 So. 2d 189 (Fla.) (statute providing for recovery of 80% of lost wages and earning capacity and capping noneconomic damages at $250,000 in medical malpractice claims when party submits to a binding medical arbitration panel did not violate equal protection, due process, takings, right to jury trial, single subject requirement, or nondelegation doctrine), *cert. denied*, 510 U.S. 915 (1993).

- **Idaho:** *Kirkland v. Blaine County Med. Center*, 4 P.3d 1115 (Idaho 2000) ($400,000 noneconomic damages cap did not violate right to jury trial, prohibition against special legislation, or separation of powers).

- **Indiana:** *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585 (Ind. 1980) ($500,000 aggregate limit on medical malpractice claims did not violate equal protection, due process, or right to jury trial).

- ***Kansas:*** *Samsel v. Wheeler Transp. Servs., Inc.*, 789 P.2d 541 (Kan. 1990) ($250,000 noneconomic damages cap in health care liability actions did not violate right to jury trial or due process); *Leiker v. Gafford*, 778 P.2d 823 (Kan. 1989) ($100,000 limit on noneconomic damages for wrongful death did not violate equal protection, due process, or right to jury trial); *Adams v. Via Christi Reg'l Med. Center*, 19 P.3d 132 (Kan. 2001) (same).

- **Maine:** *Peters v. Saft*, 597 A.2d 50 (Me. 1991) ($250,000 limit on nonmedical damages recoverable against servers of liquor did not violate equal protection, due process, right to jury trial, or right to remedy).

- **Maryland:** *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992) ($350,000 noneconomic damages cap did not violate equal protection or right to jury trial).

- **Massachusetts:** *English v. New England Med. Center, Inc.*, 541 N.E.2d 329 (Mass. 1989) ($20,000 limit on charitable institution liability did not violate right to jury trial, equal protection, or due process), *cert. denied*, 493 U.S. 1056 (1990).

- **Minnesota:** *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722 (Minn. 1990) ($400,000 limit on damages for embarrassment, emotional distress, and loss of consortium did not violate right to remedy).

- **Missouri:** *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo.) ($350,000 noneconomic damages cap in health care liability actions did not violate equal protection, open courts, or right to remedy), *cert. denied*, 506 U.S. 991 (1992).

- **Montana:** *Meech v. Hillhaven West, Inc.*, 776 P.2d 488 (Mont. 1989) (Wrongful Discharge From Employment Act's noneconomic damages prohibition did not violate access to courts, right to remedy, or equal protection).

- **Nebraska:** *Gourley v. Neb. Methodist Health System, Inc.*, 663 N.W.2d 43 (Neb. 2003) ($1.25 million aggregate damages limit in medical liability actions did not violate prohibition against special legislation, equal protection, open courts, right to remedy, right to jury trial, takings, or separation of powers).

- **New Mexico:** *Federal Express Corp. v. United States*, 228 F. Supp. 2d 1267 (D. N.M. 2002) (medical liability cap not unconstitutional); *Lawson v. Hoke*, 119 P.3d 210 (Or. 2005) (statute precluding award of noneconomic damages to uninsured motorists in actions arising from automobile accidents did not violate right to jury trial or right to remedy).

- **Oregon:** *Greist v. Phillips*, 906 P.2d 789 (Or. 1995) ($500,000 noneconomic damages cap did not violate remedies provision, privileges and immunities, right to jury trial, due process or equal protection).

- **South Carolina:** *Wright v. Colleton County School Dist.*, 391 S.E.2d 564 (S.C. 1990) ($250,000 aggregate damages cap in Tort Claims Act did not violate right to jury trial, right to remedy, equal protection, or separation of powers).

- **Texas:** *Rose v. Doctors Hosp.*, 801 S.W.2d 841 (Tex. 1990) ($500,000 general damages limit for health care providers did not violate open courts, right to redress, or equal protection).

- **Utah:** *Judd v. Drezga*, 103 P.3d 135 (Utah 2004) ($250,000 noneconomic damages cap in medical malpractice actions did not violate open courts, uniform operation of laws, due process, right to jury trial, or separation of powers).

- **Virginia:** *Pulliam v. Coastal Emer. Servs. of Richmond, Inc.*, 509 S.E.2d 307 (Va. 1999) ($1 million limit on medical malpractice recoveries did not violate right to jury trial, prohibition against special legislation, separation of powers, takings, due process, or equal protection); *Etheridge v. Med. Center Hosp.*, 376 S.E.2d 525 (Va. 1989) (limit on recoveries in medical malpractice actions did not violate due process, right to jury trial, separation of powers, prohibition against special legislation, or equal protection).

- **West Virginia:** *Robinson v. Charleston Area Med. Center, Inc.*, 414 S.E.2d 877 (W.Va. 1991) ($1 million cap on noneconomic damage awards in medical malpractice actions did not violate equal protection, due process, or right to remedy); *Estate of Verba v. Ghaphery*, 552 S.E.2d 406 (W. Va. 2001) (reaffirming *Robinson*).

2. Collateral Source Reforms Upheld

Likewise, many courts have upheld collateral source reforms.

- **Alabama:** *Marsh v. Green*, 782 So. 2d 223 (Ala. 2000) (collateral source rule reform did not violate right to trial by jury, due process, equal protection, access to courts, right to remedy, or separation of powers).

- **Alaska:** *Reid v. Williams*, 964 P.2d 453 (Alaska 1998) (statute precluding medical malpractice patient's recovery of medical expenses paid by insurer did not violate due process or equal protection).

- **California:** *Fein v. Permanente Med. Group*, 695 P.2d 665 (Cal.) (collateral source reform in medical malpractice actions did not violate equal protection or due process), *appeal dismissed*, 474 U.S. 892 (1985).

- **Florida:** *Blue Cross and Blue Shield of Fla., Inc. v. Matthews*, 498 So. 2d 421 (Fla. 1986) (statute preventing double recovery by plaintiffs in personal injury suits arising from automobile accidents did not violate equal protection).

- **Iowa:** *Lambert v. Sisters of Mercy Health Corp.*, 369 N.W.2d 417 (Iowa 1985) (statute abrogating collateral source rule for certain health care liability claims did not violate equal protection).

- **Michigan:** *Heinz v. Chicago Road Inv. Co.*, 549 N.W.2d 47 (Mich. App. 1996) (admissibility of collateral source payments in personal injury actions did not constitute taking of property or violate equal protection or right to jury trial), *appeal denied*, 567 N.W.2d 250 (Mich. 1997).

- **Minnesota:** *Johnson v. Farmers Union Cent. Exch., Inc.*, 414 N.W.2d 425 (Minn. App. 1987) (collateral source off-set did not violate due process, equal protection, or right to remedy).

- **Pennsylvania:** *Germantown Savings Bank v. City of Philadelphia*, 512 A.2d 756 (Pa. Commw. Ct. 1986) (deduction of compensation received from insurance companies in municipal liability actions did not violate equal protection), *aff'd*, 535 A.2d 1052 (Pa.), *appeal dismissed*, 486 U.S. 1049 (1988).

3. Punitive Damages Reforms Upheld

Punitive damages reforms have now been enacted in a majority of states. *See* Victor E. Schwartz et al., *Reining In Punitive Damages "Run Wild": Proposals For Reform By Courts And Legislatures*, 65 Brook. L. Rev. 1003 (2000); *see also Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 39 (1991) (Scalia, J., concurring) ("State legislatures and courts have the power to restrict or abolish . . . punitive damages."). These laws have been upheld repeatedly in other states.

- **Alabama:** *Ex Parte Apicella*, 809 So. 2d 865 (Ala. 2001), *cert. denied*, 534 U.S. 1086 (2002) (right to jury trial does not restrict legislature from removing from the jury the unbridled right to punish).

- **Alaska:** *Reust v. Alaska Petroleum Contactors, Inc.*, 127 P.3d 807 (Alaska 2005) (requiring plaintiffs to pay 50% of any punitive damages award to the State did not

violate due process, equal protection, takings, or right to jury trial); *Evans v. State*, 56 P.3d 1046 (Alaska 2002) (cap on punitive damages and requirement that 50% of punitive damages awards be paid to the state did not violate right to jury trial, equal protection, due process, separation of power, access to courts, or prohibition against special legislation).

- **Florida:** *Gordon v. State of Florida*, 608 So. 2d 800 (Fla. 1992) (requiring plaintiffs to pay 60% of any punitive damages award to the state did not violate right to jury trial, equal protection, or due process, and was not special legislation), *cert. denied*, 507 U.S. 1005 (1993).

- **Georgia:** *Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635 (Ga. 1993) (statute providing for one award of punitive damages award against a products liability defendant for any single act or omission did not violate equal protection); *State of Georgia v. Moseley*, 436 S.E.2d 632 (Ga. 1993) (requiring 75% of punitive damages awards in products liability actions to be paid to state did not violate takings, right to jury trial, or access to courts), *cert. denied*, 511 U.S. 1107 (1994).

- **Indiana:** *Cheatham v. Pohle*, 789 N.E.2d 467 (Ind. 2003) (requiring 75% of punitive damages awards to be paid to the state did not violate takings, requirement of uniform and equal taxation, or prohibition against a person's services from being demanded without just compensation).

- **Iowa:** *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.*, 473 N.W.2d 612 (Iowa 1991) (requiring 75% of punitive damages awards to civil reparation trust fund did not violate equal protection or due process).

- **Kansas:** *Smith v. Printup*, 866 P.2d 985 (Kan. 1993) (requiring court to determine amount of punitive damages did not violate right to jury trial).

- **Missouri:** *Hoskins v. Business Men's Assurance*, 79 S.W.3d 901 (Mo. 2002) (authorizing state to assert a lien of 50% of any final judgment for punitive damages was not an excessive fine); *Furst v. Missouri*, 947 S.W.2d 424 (Mo. 1997) (statute did not violate single subject, "clear title," due process, equal protection, special law, separation of powers, or represent an unconstitutional attempt to grant money to private persons).

- **Montana:** *Meech v. Hillhaven West, Inc.*, 776 P.2d 488 (Mont. 1989) (Wrongful Discharge From Employment Act limiting recovery of punitive damages did not violate access to courts, right to remedy, or equal protection).

- **North Carolina:** *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1 (N.C. 2004) (capping punitive damages at the greater of three times a plaintiff's compensatory damages or $250,000 did not violate separation of powers, right to jury trial, due process, equal protection, or open courts).

- **Oregon:** *DeMendoza v. Huffman*, 51 P.3d 1232 (Or. 2002) (requiring 60% of punitive damages to be paid to the state did not violate right to remedy, right to jury trial, takings or tax provisions, or separation of powers).

B. The Mistake of *Lochner* Should Not Be Repeated

Courts that have nullified legislative policy decisions about tort law have done so under the false assumption that state courts have the preeminent right to make state tort law. These decisions are reminiscent of a highly discredited period in the United States Supreme Court's history that began around the turn of the century and ended in the mid-1930s. During this period, known as the "*Lochner* era" (after the unsound decision, *Lochner v. New York*, 198 U.S. 45 (1905)), the Court nullified Acts of Congress that it disagreed with as a matter of public policy, using the United States Constitution as a cloak to cover its highly personalized decisions.[5]

Just as plaintiffs during the *Lochner* era implored the United States Supreme Court to use an expansive view of the United States Constitution to override the Congress and impose their own economic policy views upon the nation, Petitioner seeks to convince this Court to use an expansive view of the Ohio Constitution to sit as a "super legislature." *See* Jonathan Tracy, Note, *Ohio ex rel. Ohio Academy of Trial Lawyers v.*

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[5] In *Lochner*, the Supreme Court invalidated a New York law that limited the number of hours bakers could work. Justice Holmes argued that, unless legislation violates a fundamental right, the Court should respect legislation that is rationally related to a legitimate goal. Justice Holmes wrote:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because *I strongly believe that my agreement or disagreement has nothing to do with the right of the majority to embody their opinions in law.*

198 U.S. at 75 (Holmes, J., dissenting) (emphasis added).

Sheward: The End Must Justify the Means, 27 N. Ky. L. Rev. 883 (2000). This Court should reject Petitioner's invitation.[6]

Lochner-like decisions by state courts ignore both legal history and sound public policy. Such decisions also create unnecessary tension between the legislative and judicial branches, undermine public confidence in the courts, and may raise potential problems under the United States Constitution. *See* Comment, *State Tort Reform - Ohio Supreme Court Strikes Down State General Assembly's Tort Reform Initiative, State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999), 113 Harv. L. Rev. 804, 809 (2000) (concluding that decision by Ohio Supreme Court to strike down prior tort reform law drove "a deeper wedge between the Ohio judiciary and its legislature" and "may have undermined the Ohio Supreme Court's valued position as a defender of the constitution."); Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 Rutgers L.J. 907 (2001).[7]

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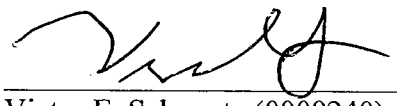
6 *See* M. Margaret Branham Kimmel, *The Constitutional Attack on Virginia's Medical Malpractice Cap: Equal Protection and the Right to Jury Trial*, 22 U. Rich. L. Rev. 95, 118, 118 n.161 (1987) ("Whether these measures are advisable as a policy matter is not the issue properly before the courts, for in a democracy it is vitally important that the judiciary separate questions of social wisdom from questions about constitutionality. Questions of wisdom are more appropriately retained for decision by the more representative legislative organs of government.").

7 *See also* Stephen B. Presser, *Separation of Powers and Civil Justice Reform: A Crisis of Legitimacy for Law and Legal Institutions*, 31 Seton Hall L. Rev. 649, 664 (2001) ("If too many state courts insist on preserving an ahistorical, illegitimate law-making power to frustrate civil justice reform, perhaps it is not too far-fetched to imagine a federal court solution to the problem.").

CONCLUSION

For the reasons stated, *amici* request that this Court declare Ohio Rev. Code §§ 2315.18-.21 to be constitutional.

Respectfully submitted,



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I hereby certify that I served a copy of the *Amici Curiae* Brief of the National Federation of Independent Business Legal Foundation, Chamber of Commerce of the United States of America, National Association of Manufacturers, American Tort Reform Association, National Association of Mutual Insurance Companies, Property Casualty Insurers Association of America, and American Chemistry Council in Support of Respondents upon counsel by depositing a copy in a first-class postage-prepaid envelope into a depository under the exclusive care and custody of the United States Postal Service this 15th day of December, 2006, addressed as follows:

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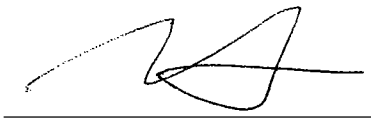

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