IN THE SUPREME COURT OF ARKANSAS

CASE NO. 08-1009

DARRELL JOHNSON AND A. JAN THOMAS, JR., BANKRUPTCY TRUSTEE IN THE MATTER OF DARRELL W. JOHNSON AND JANET K. JOHNSON, DEBTORS,

PETITIONERS,

V.

ROCKWELL AUTOMATION, INC., CONSOLIDATED ELECTRICAL DISTRIBUTORS, INC. D/B/A KEATHLEY-PATTERSON ELECTRIC, AND JOHN DOES 1-5,

RESPONDENTS.

***AMICI CURIAE* BRIEF OF AMERICAN TORT REFORM ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN INSURANCE ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AMERICAN CHEMISTRY COUNCIL, AMERICAN PETROLEUM INSTITUTE, AMERICAN HEALTH CARE ASSOCIATION AND THE NATIONAL CENTER FOR ASSISTED LIVING, PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, AMERICAN TRUCKING ASSOCIATIONS, AND ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF DEFENDANTS-RESPONDENTS**

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Baldwin v. City of Waterloo, 372 N.W.2d 486 (Iowa 1985) 23

Bartlett v. New Mexico Welding Supply, Inc., 646 P.2d 579 (N.M. App.), *cert. denied*, 648 P.2d 794 (N.M. 1982) 7, 18

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Bernier v. Burris, 497 N.E.2d 763 (Ill. 1986)....................................13, 20

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Blue Cross and Blue Shield of Fla., Inc. v. Matthews, 498 So. 2d 421 (Fla. 1986) 20

Bohannon v. Johnson Equip. Co., Inc., 2008 WL 2685719 (E.D. Ark. June 16, 2008)....................................13

Brown v. Keill, 580 P.2d 867 (Kan. 1978)....................................7, 17

Caman v. City of Stamford, 746 F. Supp. 248 (D. Conn. 1990)....................................23

Carter v. Hartenstein, 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed*, 401 U.S. 901 (1971) 4, 15

Church v. Rawson Drug & Sundry Co., 842 P.2d 1355 (Ariz. App. 1992)....................................22

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Eady v. Lansford, 351 Ark. 249, 92 S.W.3d 57 (2002) 5, 15

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Evangelatos v. Superior Ct., 753 P.2d 585 (Cal. 1988) 22

Evans ex rel. Kutch v. State, 56 P.3d 1046 (Alaska 2002) 22

Fein v. Permanente Med. Group, 695 P.2d 665 (Cal.),
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Heinz v. Chicago Road Inv. Co., 549 N.W.2d 47 (Mich. App. 1996),
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Imlay v. City of Lake Crystal, 453 N.W.2d 326 (Minn. 1990) 16, 21, 24

*In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo.,
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Jimenez v. Sears, Roebuck & Co., 904 P.2d 861 (Ariz. 1995) 12, 22

Johnson v. Farmers Union Cent. Exch., Inc., 414 N.W.2d 425 (Minn. App. 1987) ... 21

Kavadas v. Lorenzen, 448 N.W.2d 219 (N.D. 1989) 24

L.D. Delaney v. Mize, 269 Ark. 194, 599 S.W.2d 710 (1980) 3, 4

Lambert v. Sisters of Mercy Health Corp., 369 N.W.2d 417 (Iowa 1985) 21

Little Rock and Fort Smith Ry. Co. v. Barker and Wife, 39 Ark. 491 (1882) 10

Lochner v. New York, 198 U.S. 45 (1905) 24

Marsh v. Green, 782 So. 2d 223 (Ala. 2000) .... *passim*

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Owen v. Wilson, 260 Ark. 21, 537 S.W.2d 543 (1976) 5, 15

Pinillos v. Cedars of Lebanon Hosp. Corp., 403 So. 2d 365 (Fla. 1981) .... *passim*

Prendergast v. Nelson, 256 N.W.2d 657 (Neb. 1977)..21

Raley v. Wagner, 346 Ark. 234, 57 S.W.3d 683 (2001) 5, 15

Reid v. Williams, 964 P.2d 453 (Alaska 1998) 19

Richards v. Michelin Tire Corp., 786 F. Supp. 964 (S.D. Ala. 1992) 19

Roberson v. Roberson, 193 Ark. 669, 101 S.W.2d 961 (1937) 3

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Salazar v. American Sterilizer Co., 5 P.3d 357 (Colo. App. 2000) 23

Savage v. Correlated Health Servs., Ltd., 591 N.E.2d 1216 (Ohio 1992)...................21

Shipp v. Franklin, 370 Ark. 262, 258 S.W.3d 744 (2007)...................................11, 15

Smiley v. Corrigan, 638 N.W.2d 151 (Mich. App. 2001)..23

Smith v. Dept. of Ins., 507 So. 2d 1080 (Fla. 1987)..23

State v. Sypult, 304 Ark. 5, 800 S.W.2d 402 (1990)..13

State Farm Inc. Cos. v. Premier Manufactured Sys., Inc.,
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Witherell v. Weimer, 515 N.E.2d 68 (Ill. 1987) 20

Yoder v. Ferguson, 885 N.E.2d 1060 (Ill. App. 2008) 23

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Ark. Const. Art. II, § 8 15

Ark. Const. Art. II, § 13 .... *passim*

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Ark. Code Ann. §16-61-201 (2008) .... *passim*

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Colo. Rev. Stat. § 13-21-111.6 (2008)..6

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Conn. Gen. Stat. Ann. § 52-572h (2008) 7

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Haw. Rev. Stat. Ann. § 633-10.9 (2008) 7

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Mich. Comp. Laws § 600.6304 (2008)........7

Mich. Comp. Laws § 600.6312 (2008)........7

Minn. Stat. Ann. § 548.36 (2008)........6

Minn. Stat. Ann. § 604.02 (2008)........7

Miss. Code Ann. § 85-5-7 (2008)........7

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Mont. Code Ann. § 27-1-308 (2008)........6

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Neb. Rev. Stat. § 44-2819 (2008)........6

Nev. Rev. Stat. Ann § 41.141 (2008)........6

Nev. Rev. Stat. Ann § 41A.045 (2008)........6

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N.J. Stat. Ann. § 2A:15-5.3 (2008)........7

N.J. Stat. Ann. § 2A: 15-97 (2008)........6

N.M. Stat. Ann. § 41-3A-1 (2008)........7

N.Y. Civ. Prac. L. & R. § 4545 (2008)........6

N.Y. Civ. Prac. L. & R. §§ 1601-1602 (2008)........7

N.D. Cent Code § 32-03.2-02 (2008)........7

N.D. Cent Code § 32-03.2-06 (2008)........6

Ohio Rev. Code Ann. § 2307.22-.24 (2008)........7

Ohio Rev. Code Ann. § 2323.41 (2008)........6

Okla. Stat. Ann. tit. 23, § 15 (2008)....................7

Okla. Stat. Ann. tit. 63, § 1-1708 (2008)....................6

Or. Rev. Stat. § 31.580 (2008)....................6

Or. Rev. Stat. § 31.610 (2008)....................7

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S.C. Code Ann. § 15-38-15 (2008)....................7

S.D. Codified Laws Ann. § 15-8-15.1 (2008)....................7

S.D. Codified Laws Ann. § 21-3-12 (2008)....................7

Tenn. Code Ann. § 29-26-119 (2008)....................7

Tex. Civ. Prac. & Rem. Code Ann. § 33.013 (2008)....................7

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Utah Code Ann. § 78B-3-405 (2008)....................7

Utah Code Ann. §§ 78B-5-818-820 (2008)....................7

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Wash. Rev. Code Ann. § 4.22.070 (2008)....................7

Wash. Rev. Code Ann. § 7.70.080 (2008)....................7

W.V. Code Ann. § 55-7B-9 (2008)....................7

W.V. Code Ann. § 55-7B-9a (2008)....................7

W.V. Code Ann. § 55-7-24 (2008)....................7

Wis. Stat. Ann. § 895.045(1) (2008)....................7

Wyo. Stat. Ann. § 1-1-109(e) (2008)....................7

OTHER AUTHORITIES

2 Am. Law Inst., *Reporters' Study on Enterprise Responsibility for Personal Injury: Approaches to Legal and Institutional Change* (Apr. 15, 1991)....................16, 18

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 (2000) 2

Editorial, Joseph Nixon, *Why Doctors Are Heading to Texas*, Wall St. J., May 17, 2008, at A9, *abstract available at* 2008 WLNR 9419738................19

Lisa-Marie France, *Recent Developments*, 56 Ark. L. Rev. 703 (2003).....................15

Robert B. Leflar, *How The Civil Justice Reform Act Changes Arkansas Tort Law,* 38 Ark. Law. 26 (Fall 2003) 6

Nat'l Conf. of Comm'rs on Uniform State Laws, Uniform Apportionment of Tort Responsibility Act, 12 U.L.A. 5-21 (Supp. 2003), *summarized at* http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-uatra.asp (adopted by the American Bar Association's House of Delegates on February 9, 2004) 18-19

Courtney A. Nelson, Note, *To Truly Reform We Must Be Informed: Davis v. Parham, The Separation of Powers Doctrine, and the Constitutionality of Tort Reform in Arkansas,* 59 Ark. L. Rev. 781 (2006) 5-6

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 (2001) 25

Restatement (Second) of Torts § 920A cmt. *d* (1979)..13

Restatement (Third) of Torts: Apportionment of Liability § 17 cmt. *a* (2000)...........17

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) 25

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) 24-25

Aaron D. Twerski, *The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics*, 22 U.C. Davis L. Rev. 1125 (1989) 19

QUESTIONS PRESENTED

1. Under the facts of the case, whether the provisions of Act 649 of 2003, including but not limited to those codified at Ark. Code Ann. §16-55-202, that allow a fact-finder to consider or assess the negligence or fault of nonparties, violate the Arkansas Constitution when considered along with the modification of "joint and several" liability in the same act, as codified at Ark. Code Ann. §16-55-201.

2. Under the facts of this case, whether the provisions of Act 649 of 2003, including but not limited to those codified at Ark. Code Ann. §16-55-212(b), that address evidence of damages for the costs of necessary medical care, treatment, or services, violate the Arkansas Constitution.

STATEMENT OF INTEREST

As organizations that represent Arkansas companies and their insurers, *amici* have an interest in supporting laws that provide for a fairer allocation of fault and damages, are consistent with the majority approach throughout the nation, and stimulate job growth and investment. *Amici*'s members also have an interest in ensuring that the civil litigation environment in Arkansas is fair and balanced and reflects sound policy. The subject laws further these goals. Accordingly, *amici* urge the Court to declare the subject provisions of Act 649 of 2003 to be constitutional.

STATEMENT OF FACTS

Amici adopt Respondents' Statement of Facts.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

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. But state legislatures also have an important, overlapping role to play. As a matter of precedent and sound public policy, neither branch of government should have a tort law "monopoly." 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.[1]

This brief will demonstrate that the prerogative of the General Assembly to decide broad public policy is deeply rooted in Arkansas law and has been respected by this Court. The brief concludes that as a matter of precedent and sound public policy this Court should declare the subject provisions of Act 649 of 2003 to be constitutional.

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[1] *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.").

ARGUMENT

I. THIS COURT HAS RESPECTED THE LEGISLATURE'S OVERLAPPING AUTHORITY TO DEVELOP TORT LAW

The Arkansas General Assembly has played a role in the development of tort law policy for many decades. Many tort policy statutes, such as the comparative fault statute, Ark. Code Ann. § 16-64-122, the Uniform Contribution Among Tortfeasors Act, Ark. Code Ann. § 16-61-201, and the Product Liability Act of 1979 are such an established part of Arkansas law that they have been applied without challenge. When civil justice reform laws have been challenged, this Court has respected the separation of powers and declined to sit as a "super legislature."

For example, the Court has repeatedly upheld the Arkansas guest statute, which prohibits a guest from recovering damages from the owner or operator of a vehicle for injury or loss resulting from an accident in which the operator was guilty of no more than simple negligence. *See Roberson v. Roberson*, 193 Ark. 669, 101 S.W.2d 961 (1937) (guest statute did not violate Arkansas Constitution's provision giving every person a legal remedy for all injuries received); *White v. Hughes*, 257 Ark. 627, 519 S.W.2d 70 (1975) (guest statute did not violate Privileges and Immunities Clause of Arkansas Constitution or Equal Protection Clause of United States Constitution); *Davis v. Cox*, 268 Ark. 78, 593 S.W.2d 180 (1980) (guest statute did not violate equal protection provisions of Arkansas or United States Constitutions); *L.D. Delaney v. Mize*, 269 Ark. 194, 599 S.W.2d 710 (1980) (guest statute did not violate Fourteenth Amendment to the United States Constitution). As the Court explained in *Davis*, and repeated in *L.D. Delaney*,

> *It is not our function to rule on the wisdom or practicality of an act of the Legislature*; rather, we must limit ourselves solely to consideration of its

> constitutionality. *Resolving any doubt about our guest statute in favor of constitutionality, as we must*, we cannot say that the statute has no fair and rational relation to the objectives of the Legislature.

Davis, 268 Ark. at 82, 593 S.W.2d at 183 (emphasis added); *L.D. Delaney*, 269 Ark. at 200 (emphasis added), 599 S.W.2d at 714; *see also Harlow v. Ryland*, 172 F.2d 784 (8th Cir. 1949) (upholding Arkansas guest statute).

Similarly, this Court in *Carter v. Hartenstein,* 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed*, 401 U.S. 901 (1971), held that a statute setting a four-year outer time limit (statute of repose) on actions involving improvements to real property did not violate the prohibition against special legislation or equal protection provisions of the Arkansas Constitution.

More recently, in *White v. City of Newport*, 326 Ark. 667, 933 S.W.2d 800 (1996), the Court held that a municipal tort immunity statute did not violate the access to courts or prohibition against limiting amount of recovery for injuries or death provisions of the Arkansas Constitution. The Court said, "*[T]he legislature must be permitted to alter the common law when it stands in the way of a reasonable public policy objective.* The common law is not a static or a fixed code, forever unchangeable by the representatives of the people." 326 Ark. at 672, 933 S.W.2d at 803 (emphasis added); *see also Fritzinger v. Beene,* 80 Ark. App. 416, 97 S.W.3d 440 (2003) (statute capping municipal liability did not violate right to remedy provision of Arkansas Constitution).

In other recent decisions, the Court has upheld the entirety of the Medical Malpractice Reform Act of 1979 as well as specific provisions of the Act. *See Davis v. Parham*, 362 Ark. 352, 208 S.W.3d 162 (2005) (Medical Malpractice Act in its entirety

declared constitutional; two-year statute of limitations did not violate prohibition against special legislation, open courts, or equal protection provisions of Arkansas Constitution); *Whorton v. Dixon*, 363 Ark. 330, 214 S.W.2d 225 (2005) (precluding medical care providers from having to give expert testimony against themselves did not violate prohibition against special legislation in Arkansas Constitution or equal protection provisions of Arkansas or United States Constitutions); *Eady v. Lansford*, 351 Ark. 249, 92 S.W.3d 57 (2002) (requirement that an informed consent plaintiff support claim with expert testimony did not violate prohibition against special legislation in Arkansas Constitution or equal protection provisions of Arkansas or United States Constitutions); *Raley v. Wagner*, 346 Ark. 234, 57 S.W.3d 683 (2001) (two-year statute of limitations did not violate equal protection or due process provisions of Arkansas or United States Constitutions); *Adams v. Arthur*, 333 Ark. 53, 969 S.W.2d 598 (1998) (Act did not violate equal protection provisions of Arkansas or United States Constitutions); *Haase v. Starnes*, 323 Ark. 263, 915 S.W.2d 675 (1996) (burden of proof requirement did not violate right to contract under the United States Constitution and did not violate the prohibition against special legislation provision of the Arkansas Constitution); *see also Owen v. Wilson*, 260 Ark. 21, 537 S.W.2d 543 (1976) (two-year statute of limitations for medical malpractice actions did not deprive plaintiffs of due process or any remedy under the Arkansas or United States Constitutions).

"The ease with which the *Davis* [C]ourt disposed of each constitutional challenge makes clear the extent of the Arkansas Supreme Court's deferential attitude toward legislation on matters it considers to be of broad public policy." Courtney A. Nelson, Note, *To Truly Reform We Must Be Informed: Davis v. Parham, The Separation of*

Powers Doctrine, and the Constitutionality of Tort Reform in Arkansas, 59 Ark. L. Rev. 781 (2006). Act 649 of 2003, the Civil Justice Reform Act, represents the latest legislative development in Arkansas tort law policy. The Act should be upheld.

II. THE SUBJECT PROVISIONS OF ACT 649 OF 2003

Act 649 of 2003 changes several elements of tort law, but the Act is "not a revolution in Arkansas tort law." Robert B. Leflar, *How The Civil Justice Reform Act Changes Arkansas Tort Law,* 38 Ark. Law. 26, 28 (Fall 2003). "[R]ecent tort legislation in some other states has been considerably more radical." *Id.* The subject appeal involves two mainstream reforms with respect to collateral source evidence and joint liability. The overwhelming majority of states have enacted laws addressing these issues and some states have abolished joint liability by judicial decision.[2]

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[2] For state laws reforming the collateral source rule, see Ala. Code §§ 6-5-520, 6-5-522; 6-5-545, 12-21-45; Alaska Stat. § 09.55.548; Ariz. Stat. § 12-565; Ark. Code Ann. § 16-55-212; Cal. Civ. Code § 3333.1; Colo. Rev. Stat. § 13-21-111.6; Conn. Gen. Stat Ann. § 52-255a; Del. Code Ann. tit. 18, § 6862; Fla. Stat. Ann. § 768.76; Haw. Rev. Stat. Ann. § 663-10; Idaho Code Ann. § 6-1606; 735 ILCS 5/2-1205; Ind. Code Ann. § 34-51-2-8; Iowa Code Ann. §§ 147.136, 688.14; Me. Rev. Stat. Ann. tit. 24, § 2906; Mass. Gen. Laws Ann. ch. 231, § 60G; Mich. Comp. Laws § 600.6303; Minn. Stat. Ann. § 548.36; Mo. Rev. Stat. § 490.715; Mont. Code Ann. § 27-1-308; Neb. Rev. Stat. § 44-2819; Nev. Rev. Stat. Ann §§ 41.141, 41A.045; N.J. Stat. Ann. § 2A: 15-97; N.Y. Civ. Prac. L. & R. § 4545; N.D. Cent Code § 32-03.2-06; Ohio Rev. Code Ann. § 2323.41; Okla. Stat. Ann. tit. 63, § 1-1708; Or. Rev. Stat. § 31.580; Pa. Cons. Stat. Ann. tit. 40, § 1303.508; R.I.

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Gen. Laws § 9-19-34.1; S.D. Codified Laws Ann. § 21-3-12; Tenn. Code Ann. § 29-26-119; Utah Code Ann. § 78B-3-405; Wash. Rev. Code Ann. § 7.70.080; W.V. Code Ann. § 55-7B-9a. For state laws abolishing or modifying joint liability, see Alaska Stat. § 09.17.080; Ariz. Stat. § 12-2506; Ark. Code Ann. §§ 16-55-201 *et seq.*; Cal. Civ. Code § 1431.2; Colo. Rev. Stat. § 13-21-111.5; Conn. Gen. Stat. Ann. § 52-572h; Fla. Stat. Ann. § 768.81; Ga. Code Ann. § 51-12-33; Haw. Rev. Stat. Ann. § 633-10.9; Idaho Code Ann. § 6-803; 735 ILCS 5/2-1117-1118; Ind. Code Ann. §§ 34-44-1-1 *et seq.*; Iowa Code Ann. § 668.4; Ky. Rev. Stat. Ann. § 411.182; La. Civ. Code arts. 1804, 2323-2324; Mass. Gen. Laws Ann. ch. 231B §§ 1 -2; Mich. Comp. Laws §§ 600.6304, 600.6312; Minn. Stat. Ann. § 604.02; Miss. Code Ann. § 85-5-7; Mo. Rev. Stat. § 537.067; Mont. Code Ann. §§ 27-1-703 *et seq.*; Neb. Rev. Stat. § 25-21,185.10; N.H. Rev. Stat. Ann. § 507:7-e; N.J. Stat. Ann. § 2A:15-5.3; N.M. Stat. Ann. § 41-3A-1; N.Y. Civ. Prac. L. & R. §§ 1601-1602; N.D. Cent Code § 32-03.2-02; Ohio Rev. Code Ann. §§ 2307.22-.24; Okla. Stat. Ann. tit. 23, § 15; Or. Rev. Stat. § 31.610; S.C. Code Ann. § 15-38-15; S.D. Codified Laws Ann. § 15-8-15.1; Tex. Civ. Prac. & Rem. Code Ann. § 33.013; Utah Code Ann. §§ 78B-5-818-820; Vt. Stat. Ann. tit 12, § 1036; Wash. Rev. Code Ann. § 4.22.070; W.V. Code Ann. §§ 55-7B-9, 55-7-24; Wis. Stat. Ann. § 895.045(1); Wyo. Stat. Ann. § 1-1-109(e); *Brown v. Keill*, 580 P.2d 867 (Kan. 1978); *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992); *Bartlett v. New Mexico Welding Supply, Inc.*, 646 P.2d 579 (N.M. App.), *cert. denied*, 648 P.2d 794 (N.M. 1982), *superseded by statute*, N.M. Stat. Ann. § 41-3A-1.

First, Act 649 provides that evidence for the costs of necessary medical care, treatment, or services shall include only those "costs actually paid" by the plaintiff or on the plaintiff's behalf and costs "which remain unpaid and for which the plaintiff or any third party shall be legally responsible." Ark. Code Ann. § 16-55-212(b). Traditionally, the collateral source rule "operates to exclude evidence of payments received by an injured party from sources 'collateral' to (other than) the wrongdoer, such as private insurance or government benefits, received on account of the decedent's death in determining the amount of the damages sustained by that injured party for which the wrongdoer is liable." *Bell v. Estate of Bell*, 318 Ark. 483, 490, 885 S.W.2d 877, 880 (1994).[3] As we will show later, this Court and others, as well as most commentators, have acknowledged problems with the traditional rule; the Act addresses those criticisms.

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[3] This Court has recognized four exceptions where collateral source evidence may be introduced: "(1) to rebut the plaintiff's testimony that he or she was compelled by financial necessity to return to work prematurely or to forego additional medical care; (2) to show that the plaintiff had attributed his condition to some other cause, such as sickness; (3) to impeach the plaintiff's testimony that he or she had paid his medical expenses himself; (4) to show that the plaintiff had actually continued to work instead of being out of work, as claimed." *Montgomery Ward & Co., Inc. v. Anderson*, 334 Ark. 561, 566, 976 S.W.2d 382, 384-385 (1998). "The Court has also allowed evidence of collateral source evidence when the plaintiff opens the door to his or her financial condition." 334 Ark. at 566, 976 S.W.2d at 385.

Second, Act 649 replaces "deep pocket" joint liability with "fair share" several liability except in instances in which the party and another person were acting in concert or the other person was acting as the party's agent or servant. *See* Ark. Code Ann. §§ 16-55-201, 16-55-205.

Act 649 allows the jury to consider the fault of all persons or entities who contributed to the plaintiff's harm, such as settling tortfeasors and nonparties (e.g., negligent employers). This approach ensures that blame for the harm will be placed where it belongs. To keep a plaintiff from being ambushed at trial, the Act requires the defending party to (1) notify the plaintiff at least 120 days before trial if the defendant intends to attribute fault to an "empty chair," and (2) inform the plaintiff of the basis for believing the nonparty to be at fault. *See* Ark. Code Ann. § 16-55-202(b).

Finally, Act 649 provides a mechanism by which fault attributed to an insolvent defendant can be reallocated to other defendants. If the court determines that any defendant's several share will not be reasonably collectible, the court is to increase by up to twenty percent the share of a defendant found to be at least fifty percent at fault, and to increase by up to ten percent the share of a defendant found to be more than ten percent but less than fifty percent at fault. *See* Ark. Code Ann. § 16-55-203. The fault share of minor actors is not to be increased. *See id.*

III. ACT 649 OF 2003 IS NOT IN CONFLICT WITH THE ARKANSAS CONSTITUTION

Petitioners here may adopt a "kitchen sink" approach and claim that the subject Act's collateral source and joint liability provisions violate one or more of the following provisions of the Arkansas Constitution: (1) Art. V, § 32, which provides in pertinent part that "no law shall be enacted limiting the amount to be recovered for injuries

resulting in death or for injuries to persons or property"; (2) the "open court" or "right to a remedy" clause in Art. II, § 13 ("Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character; he ought to obtain justice freely, and without purchase; completely, and without denial; promptly and without delay; conformably to the laws."); and (3) the separation of powers provisions in Art. IV, § 2 ("No person, or collection of persons, being one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted.") and Amendment 80, § 3 (the Arkansas Supreme Court "shall proscribe the rules of pleading, practice and procedure" for Arkansas courts). As will be discussed below, these provisions either are not applicable to the subject provisions or are not violated by them.

A. Petitioners' Challenges Are Not Applicable Here

1. Art. V, § 32 (Limits on Recoveries)

The history of Art. V, § 32 establishes that the provision was copied from the Pennsylvania Constitution to prevent the enactment of substantive caps on compensatory damages. As this Court explained in *Little Rock and Fort Smith Ry. Co. v. Barker and Wife*, 39 Ark. 491, 511 (1882),

> [I]n some of the States, statutes limited the amount of damages to be recovered, where the death of a human being is the subject of an action. But our Constitution provides that "no act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property, etc.["] (Art. 5, sec. 32.) *The matter of damages is therefore left to juries and the courts.* (Emphasis added).

Neither statute at issue here was written to express a substantive limitation on damages. The "matter of damages" continues to be "left to juries and the courts." *Id.* The jury is allowed to award the amount it believes is appropriate for the costs of necessary medical care, treatment, or services, *see* Ark. Code Ann. § 16-55-212(b), and is free to assign fault as it determines to be appropriate. *See* Ark. Code Ann. §§ 16-55-201.[4]

Petitioners would stretch Art. V, § 32 beyond its purpose and historical moorings to prohibit any limitation on the type of evidence regarding elements of damages (e.g., medical damages) and to prevent the legislature from enforcing the jury's decision as to several shares rather than have it overridden by joint liability. The language of the Arkansas Constitution does not support Petitioner's expansive reading. Art. V, § 32, should be read for what it is — a prohibition against substantive caps on damages — and not stretched into something far more restrictive. *See Shipp v. Franklin*, 370 Ark. 262, 264, 258 S.W.3d 744, 746-747 (2007) ("Any doubt as to the constitutionality of a statute must be resolved in favor of its constitutionality.") (citation omitted).

By way of example, Arizona has a constitutional prohibition against limits on damages virtually identical to Art. V, § 32, yet the Arizona Supreme Court has repeatedly refused to construe that provision to tie the legislature's hands as Petitioners seek here. *See Eastin v. Broomfield*, 570 P.2d 744 (Ariz. 1977) (upholding abrogation of collateral

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4 For these reasons, any potential challenge under Arkansas Constitution Art. II, § 7 (right to jury trial) should be viewed as flimsy, at best. *See, e.g., Marsh v. Green*, 782 So. 2d 223 (Ala. 2000); *Heinz v. Chicago Road Inv. Co.*, 549 N.W.2d 47 (Mich. App. 1996), *appeal denied*, 567 N.W.2d 250 (Mich. 1997).

source rule in medical liability actions); *State Farm Ins. Cos. v. Premier Manufactured Sys., Inc.*, 172 P.3d 410 (Ariz. 2007) (upholding statute abolishing joint liability); *Jimenez v. Sears, Roebuck & Co.*, 904 P.2d 861 (Ariz. 1995) (upholding statute abolishing joint liability); *Dietz v. General Elec. Co.*, 821 P.2d 166 (Ariz. 1991) (upholding statute requiring apportionment of fault to nonparties). The Kentucky Supreme Court reached the same conclusion in *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 578 (Ky. 1995).

Furthermore, in Pennsylvania, where the Arkansas provision originated, that state's prohibition against limits on damages apparently was not viewed as a viable challenge in *Germantown Sav. Bank v. City of Philadelphia*, 512 A.2d 756 (Pa. Commw. Ct. 1986) (upholding statute requiring deduction of compensation received from insurance companies in municipal liability actions), *aff'd*, 535 A.2d 1052 (Pa.), *appeal dismissed*, 486 U.S. 1049 (1988). In fact, our research found *no cases* interpreting constitutional prohibitions against limits on damages to be in conflict with collateral source or joint liability reform legislation.

2. Art. II, § 13 (Right to a Remedy)

Likewise, other state courts of last resort have quickly disposed of claims that similar statutes violated right to remedy provisions like Art. II, § 13. These courts include the Supreme Courts of Alabama, *see Marsh v. Green*, 782 So. 2d 223, 232 (Ala. 2000) ("there was no violation of the right-to a remedy" as to a collateral source rule reform in civil tort cases); Florida, *see Pinillos v. Cedars of Lebanon Hosp. Corp.*, 403 So. 2d 365, 368 (Fla. 1981) (access to courts challenge regarding collateral source offset statute applicable to medical liability was "without merit"); Illinois, *see Unzicker v. Kraft*

Food Ingredients Corp., 783 N.E.2d 1024, 1037 (Ill. 2002) (the right to a remedy "is merely an expression of philosophy and not a mandate that a certain remedy be provided in any specific form." In deciding to abolish joint liability for expenses other than medically-related costs for defendants found to be less than twenty-five percent at fault; the legislature did not abolish a remedy; "[r]ather the legislature merely determined how judgments would be paid and determined that minimally responsible defendants should not be required to pay entire judgments."), and Missouri, *see Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo.) (medical liability reform law requiring apportionment of fault to include percentage allocated to released parties did "not erect a condition precedent or any other procedural barrier to access to the courts"), *cert. denied*, 506 U.S. 991 (1992). This Court would be taking an extreme and virtually unprecedented approach if it held otherwise.

3. Art. IV, § 2 (Separation of Powers), and Amendment 80, § 3 (Pleading, Practice, and Procedure)

The collateral source rule and joint liability doctrine are not found in the Arkansas Rules of Evidence or Civil Procedure, but are common law rules influenced by public policy that can be changed by statute. *See Bohannon v. Johnson Equip. Co., Inc.*, 2008 WL 2685719 (E.D. Ark. June 16, 2008) (apportion of fault to nonparties does not conflict with Rule 4, because a designated nonparty is not subject to liability, making the filing and service of a third party complaint unnecessary); *see also Bernier v. Burris*, 497 N.E.2d 763 (Ill. 1986) ("It is well recognized that the collateral-source rule 'is of common law origin and can be changed by statute.'") (quoting Restatement (Second) of Torts § 920A cmt. *d* (1979)). The subject provisions are entirely different than other reforms this Court has struck down as *directly* conflicting with Civil Rules of Procedure

or Evidence. *See Summerville v. Thrower,* 369 Ark. 231, 253 S.W.3d 415 (2007); *Weidrick v. Arnold,* 310 Ark. 138, 835 S.W.2d 843 (1992), *State v. Sypult,* 304 Ark. 5, 800 S.W.2d 402 (1990).

This Court should follow the lead of the majority of state courts of last resort that have dismissed challenges alleging that similar statutes violated separation of powers provisions like Art. IV, § 2 and Amendment 80, § 3. These courts include the Supreme Courts of Alabama, *see Marsh*, 782 So. 2d at 232 (holding that collateral source rule reform statute "does not violate the separation of powers" and explaining, "Whether it was expedient or wise for the legislature to enact this statute is not the judiciary's concern."); Florida, *see Pinillos*, 403 So. 2d at 368 (separation of power challenge regarding collateral source offset statute applicable to medical liability was "without merit"); and Illinois, *see Unzicker*, 783 N.E.2d at 1042 (statute abolishing joint liability for expenses other than medically-related costs for defendants found to be less than twenty-five percent at fault was "not a legislative remittitur," but "merely determines when a defendant can be held liable for the full amount of a jury's verdict and when a defendant is liable only in an amount equal to his or her percentage of fault.").[5]

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[5] One case to the contrary, the Kentucky Supreme Court's decision in *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 578 (Ky. 1995), should not be viewed as persuasive by this Court because the holding is a distinct minority position and, unlike this Court, the Kentucky Supreme Court has traditionally refused to approve legislative tort policy judgments.

B. <u>The Overall Legislative Judgment Here Is Not Arbitrary</u>

Even if this Court finds the above or other provisions of the Arkansas Constitution to apply, the provisions of Act 649 of 2003 still pass constitutional muster. Contrary to Petitioners' assertion that this Court should apply "strict scrutiny" review, this Court has *consistently applied* a deferential "rational basis" review to civil justice reform legislation, including open court (Art. II, § 13), special legislation (Amend. 14), equal protection (Art. II, § 3; U.S. Const. Amend. 14), and due process (Art. II, § 8; U.S. Const. Amend. 14) challenges, *see Davis*, 362 Ark. at 363, 208 S.W.3d at 169; *Eady*, 351 Ark. at 256, 92 S.W.3d at 61; *Raley*, 346 Ark. at 242, 57 S.W.3d at 688; *Adams*, 333 Ark. at 89, 969 S.W.2d at 616; *Owen*, 260 Ark. at 26, 537 S.W.2d at 545; *Carter,* 248 Ark. at 1176, 455 S.W.2d at 921, and an Art. V, § 32 challenge, *see White*, 326 Ark. at 672, 933 S.W.2d at 803. The challenging party must show that the act is "not rationally related to achieving *any* legitimate objective of state government under any reasonably conceivable state of facts." *Whorton*, 363 Ark. at 333, 333 n.2, 214 S.W.2d at 228 n.2 (emphasis added). In addition, "[i]t is well settled that there is a presumption of validity attending every consideration of a statute's constitutionality. . . . Any doubt as to the constitutionality of a statute must be resolved in favor of its constitutionality." *Shipp v. Franklin*, 370 Ark. 262, - S.W.3d - (2007) (citation omitted). The subject provisions satisfy this test.

<u>First</u>, the legislature explained in the Emergency Clause to the Act that conditions "such as the application of joint and several liability" were impacting the availability and affordability of health care in the state. *See* Lisa-Marie France, *Recent Developments*, 56 Ark. L. Rev. 703 (2003). The Act is clearly related to achieving the legislature's

legitimate policy objectives. Arguments by Petitioners that may address the specific approach taken "deal with the wisdom of legislative policy rather than constitutional issues." *Marsh*, 782 So. 2d at 231.

Second, the specific reforms chosen by the legislature find strong support. As this Court said in *Bell v. Estate of Bell*, 318 Ark. at 490, 885 S.W.2d at 880, "the injured party who is compensated for his injury by collateral sources as well as by the wrongdoer receives a double recovery. For that reason, *the collateral source rule has been criticized by commentators who point out that it is incongruous with the compensatory goal of the tort system.*" (Emphasis added) (internal citation omitted).

The California Supreme Court also has said that "most legal commentators ha[ve] severely criticized the rule for affording a plaintiff a 'double recovery' for 'losses' he had not in reality sustained." *Fein v. Permanente Med. Group*, 695 P.2d 665, 686 (Cal.), *appeal dismissed*, 474 U.S. 892 (1985). In addition, the Arizona Supreme Court has recognized, "In a day of increased insurance protection, this rule has allowed plaintiffs to effectuate double and even triple recovery as a result of injuries received by them." *Eastin*, 570 P.2d at 751; *see also* 2 Am. Law Inst., *Reporters' Study on Enterprise Responsibility for Personal Injury: Approaches to Legal and Institutional Change* 182 (Apr. 15, 1991) ("We recommend virtually complete reversal of the collateral source rule wherever such an approach is feasible.").

By scaling down potential plaintiff over-compensation, and addressing problems raised by this Court and others, Act 649 should "reduce tort liability insurance premiums, which is one of the primary goals of tort reform and a legitimate objective." *Imlay v. City of Lake Crystal*, 453 N.W.2d 326, 332 (Minn. 1990).

Similarly, Act 649's joint liability provision is sound. The rule of joint liability, commonly called joint and several liability, provides that when two or more persons engage in conduct that might subject them to individual liability and their conduct produces a single, indivisible injury, each defendant will be liable for the total amount of damages. Unrestrained joint liability is unfair and blunts incentives for safety, because it allows negligent actors to under-insure and puts full responsibility on those who may have been only marginally at fault. "The clear trend over the past several decades has been a move away from joint and several liability." Restatement (Third) of Torts: Apportionment of Liability § 17 cmt. *a* (2000).

The Kansas Supreme Court studied these issues in *Brown v. Keill*, 580 P.2d 867, 874 (Kan. 1978), and concluded that the underpinnings of joint liability are "no longer compelling" since the "all or nothing rule" of contributory negligence was abandoned in favor of comparative fault:

> There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss. Plaintiffs now take the parties as they find them. If one of the parties at fault happens to be a spouse or a governmental agency and if by reason of some competing social policy the plaintiff cannot receive payment for his injuries from the spouse or agency, there is no compelling social policy which requires the codefendant to pay more than his fair share of the loss. The same is true if one of the defendants is wealthy and the other is not. Previously, when the plaintiff had to be totally without negligence to recover and the defendants

had to be merely negligent to incur an obligation to pay, an argument could be made which justified putting the burden of seeking contribution on the defendants. Such an argument is no longer compelling because of the purpose and intent behind the adoption of the comparative negligence statute.

The Tennessee Supreme Court reached the same conclusion in *McIntyre v. Balentine*, 833 S.W.2d 52, 58 (Tenn. 1992), finding that the adoption of comparative fault for plaintiffs "renders the doctrine of joint liability obsolete." The court said,

> [T]he contributory negligence doctrine unjustly allowed the entire loss to be borne by a negligent plaintiff, notwithstanding that the plaintiff's fault was minor in comparison to defendant's. Having thus adopted a rule more closely linking liability and fault, it would be inconsistent to simultaneously retain a rule, joint and several liability, which may fortuitously impose a degree of liability that is out of all proportion to fault.

Id.; *see also Bartlett v. New Mexico Welding Supply, Inc.*, 646 P.2d 579 (N.M. App.), *cert. denied*, 648 P.2d 794 (N.M. 1982) (judicial adoption of comparative fault resulted in the abolition of joint liability), *superseded by statute*, N.M. Stat. Ann. § 41-3A-1. For additional support for joint liability reform, see 2 Am. Law Inst., *Reporters' Study on Enterprise Responsibility for Personal Injury: Approaches to Legal and Institutional Change* 157 (Apr. 15, 1991); Nat'l Conf. of Comm'rs on Uniform State Laws, Uniform Apportionment of Tort Responsibility Act, 12 U.L.A. 5-21 (Supp. 2003), *summarized at* http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-uatra.asp (adopted by

the American Bar Association's House of Delegates on February 9, 2004); Aaron D. Twerski, *The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics*, 22 U.C. Davis L. Rev. 1125 (1989).

Finally, the subject provisions promote the State's interest in fostering a legal environment that is fair and attractive to existing and potential employers/taxpayers. The provisions at issue in Act 649 are not an isolated or aberrant phenomenon, but rather parallel similar developments in the law in other states. Arkansas is not isolated in the economy; it must compete with nearby states (the vast majority of which have adopted laws similar to those at issue here) and other countries (most of which have tort laws which are substantially more restrictive than Arkansas). If the state's legal climate is not competitive, job-creators and service providers will go elsewhere. *See, e.g.*, Editorial, Joseph Nixon, *Why Doctors Are Heading to Texas*, Wall St. J., May 17, 2008, at A9, *abstract available at* 2008 WLNR 9419738.

IV. THE VAST MAJORITY OF STATE LEGISLATIVE POLICY DECISIONS REGARDING COLLATERAL SOURCE BENEFITS AND JOINT LIABILITY HAVE BEEN UPHELD

Nationwide, the vast majority of courts have upheld laws like those at issue here.

A. Collateral Source Laws Upheld

- **Alabama:** *Marsh v. Green*, 782 So. 2d 223 (Ala. 2000) (collateral source rule reform did not violate the right to trial by jury, due process, equal protection, access to courts, right to remedy, or separation of powers); *Richards v. Michelin Tire Corp.*, 786 F. Supp. 964 (S.D. Ala. 1992) (abrogation of collateral source rule declared constitutional).

- **Alaska:** *Reid v. Williams*, 964 P.2d 453 (Alaska 1998) (abrogation of collateral source rule did not violate due process or equal protection).

- **Arizona:** *Eastin v. Broomfield*, 570 P.2d 744 (Ariz. 1977) (abrogation of collateral source rule in medical liability actions was not unconstitutional special legislation, did not violate prohibition against abrogation of right of action or prohibition against limits on damages, and did not violate due process or equal protection); *Duarte v. State*, 971 P.2d 214 (Ariz. App. 1998) (statute granting the state a setoff for an inmate's incarceration costs in prisoner litigation did not violate prohibition against abrogation of right of action or equal protection).

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

- **Connecticut:** *Fleming v. International Transport, Inc.*, 1992 WL 310591 (Conn. Super. Oct. 16, 1992) (unpublished) (collateral source offset statute not unconstitutional).

- **Florida:** *Blue Cross and Blue Shield of Fla., Inc. v. Matthews*, 498 So. 2d 421 (Fla. 1986) (collateral source offset statute applicable to personal injury suits arising from automobile accidents did not violate equal protection); *Pinillos v. Cedars of Lebanon Hosp. Corp.*, 403 So. 2d 365 (Fla. 1981) (collateral source offset statute applicable to medical liability actions did not violate equal protection, access to courts, or separation of powers).

- **Illinois:** *Bernier v. Burris*, 497 N.E.2d 763 (Ill. 1986) (modification of collateral source rule in medical malpractice actions did not violate equal protection or due process and was not prohibited special legislation); *Witherell v. Weimer*, 515 N.E.2d 68 (Ill. 1987) (following *Bernier*).

- **Iowa:** *Lambert v. Sisters of Mercy Health Corp.*, 369 N.W.2d 417 (Iowa 1985) (abrogation of collateral source rule for medical liability claims did not violate equal protection); *Rudolph v. Iowa Methodist Med. Center*, 293 N.W.2d 550 (Iowa 1980).
- **Michigan:** *Heinz v. Chicago Road Inv. Co.*, 549 N.W.2d 47 (Mich. App. 1996) (statute providing for admissibility of collateral source payments did not constitute unconstitutional taking of property and did not violate equal protection or right to jury trial), *appeal denied*, 567 N.W.2d 250 (Mich. 1997).
- **Minnesota:** *Imlay v. City of Lake Crystal*, 453 N.W.2d 326 (Minn. 1990) (collateral source offset statute did not violate equal protection); *Johnson v. Farmers Union Cent. Exch., Inc.*, 414 N.W.2d 425 (Minn. App. 1987) (retroactive application of statute abrogating the collateral source rule was not unconstitutional).
- **Nebraska:** *Prendergast v. Nelson*, 256 N.W.2d 657 (Neb. 1977) (medical liability reform law providing that credit shall be given for nonrefundable medical insurance benefits, less premiums paid, did not impair obligation of contract).
- **Ohio:** *Savage v. Correlated Health Servs., Ltd.*, 591 N.E.2d 1216 (Ohio 1992) (collateral source offset statute applicable to medical malpractice actions did not violate due process or equal protection); *Morris v. Savoy*, 576 N.E.2d 765 (Ohio 1991); *Hodge v. Middletown Hosp. Ass'n*, 581 N.E.2d 529 (Ohio 1991).
- **Pennsylvania:** *Germantown Sav. Bank v. City of Philadelphia*, 512 A.2d 756 (Pa. Commw. Ct. 1986) (statute requiring 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).

- **Rhode Island:** *Drysdale v. South County Hosp. Health Care Sys.*, 2005 WL 373330 (R.I. Super. Jan. 5, 2005) (unpublished) (abrogation of collateral source rule in medical malpractice actions did not violate equal protection).

- **Tennessee:** *Baker v. Vanderbilt Univ.*, 616 F. Supp. 330 (M.D. Tenn. 1985) (abrogation of collateral source rule in medical malpractice actions did not violate equal protection or prohibition against special legislation).

B. Joint Liability Reform Laws Upheld

- **Alaska:** *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002) (comparative allocation of fault between parties and nonparties did not violate due process).

- **Arizona:** *State Farm Inc. Cos. v. Premier Manufactured Sys., Inc.*, 172 P.3d 410 (Ariz. 2007) (statute abolishing joint liability applied to strict products liability actions and did not violate anti-abrogation or prohibition on limitations of damages); *Jimenez v. Sears, Roebuck & Co.*, 904 P.2d 861 (Ariz. 1995) (statute abolishing joint liability did not violate anti-abrogation or prohibition on limitations of damages); *Neil v. Kavena*, 859 P.2d 203 (Ariz. App. 1993) (retroactive application of statute abolishing joint liability was not unconstitutional); *Church v. Rawson Drug & Sundry Co.*, 842 P.2d 1355 (Ariz. App. 1992) (statute abolishing joint liability did not violate equal protection, due process, or separation of powers); *Dietz v. General Elec. Co.*, 821 P.2d 166 (Ariz. 1991) (statute requiring apportionment of fault to nonparties did not violate anti-abrogation or prohibition on limitations of damages).

- **California:** *Evangelatos v. Superior Ct.*, 753 P.2d 585 (Cal. 1988) (Fair Responsibility Act, which abolished joint liability for noneconomic damages, did not violate equal protection).

- **Colorado:** *Salazar v. American Sterilizer Co.,* 5 P.3d 357 (Colo. App. 2000) (apportionment of fault to nonparties did not violate due process or equal protection); *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo., on Nov. 15, 1987*, 720 F. Supp. 1465 (D. Colo.1989) (statute did not violate due process or equal protection).
- **Connecticut:** *Caman v. City of Stamford*, 746 F. Supp. 248 (D. Conn. 1990) (abolition of joint liability in municipal liability cases did not violate equal protection).
- **Florida:** *Smith v. Dept. of Ins.*, 507 So. 2d 1080 (Fla. 1987) (statute which generally abolished joint liability except in cases involving intentional torts, certain statutory causes of action, and causes of action where plaintiff's damages did not exceed $25,000 did not violate due process, equal protection, or access to courts).
- **Illinois:** *Yoder v. Ferguson*, 885 N.E.2d 1060 (Ill. App. 2008) (abolition of joint liability for expenses other than medically-related costs for defendants found to be less than 25% at fault did not violate due process or equal protection); *Unzicker v. Kraft Food Ingredients Corp.*, 783 N.E.2d 1024 (Ill. 2002) (statute did not violate right to remedy, special legislation, equal protection, separation of powers, or due process); *but see Best v. Taylor Mach. Works, Inc.*, 689 N.E.2d 1057 (Ill. 1997) (overturning comprehensive tort reform law in its entirety, including abolition of joint liability, as violating Illinois Constitution's prohibition against special legislation).
- **Iowa:** *Baldwin v. City of Waterloo*, 372 N.W.2d 486 (Iowa 1985) (abolition of joint liability for defendants determined to be 50% or less at fault did not violate due process).
- **Michigan:** *Smiley v. Corrigan*, 638 N.W.2d 151 (Mich. App. 2001) (statute abolishing joint and several liability and allowing apportionment of fault to nonparties

did not violate due process or equal protection); *McCoy v. Monroe Part West Assocs.*, 44 F. Supp. 2d 910 (E.D. Mich. 1999) (statute abolishing joint liability not unconstitutional).

- **Minnesota:** *Imlay v. City of Lake Crystal*, 453 N.W.2d 326 (Minn. 1990) (statutory limit on municipal joint liability did not violate equal protection).
- **Missouri:** *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo.) (statute requiring apportionment of fault to released parties did not violate equal protection, open courts, right to remedy, or due process), *cert. denied*, 506 U.S. 991 (1992).
- **North Dakota:** *Haff v. Hettich*, 593 N.W.2d 383 (N.D. 1999) (abolition of joint liability except in concert of action cases and allowing apportionment of fault to nonparties did not violate due process); *Kavadas v. Lorenzen*, 448 N.W.2d 219 (N.D. 1989) (statute did not violate equal protection).

In contrast to these cases, Petitioners seek to convince this Court to use an expansive view of the Arkansas Constitution to sit as a "super legislature," relying on cases that represent the distinct minority view. Petitioners' plea brings to mind 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.

Lochner-like decisions 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* 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); 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."). This Court should reject Petitioners' invitation. *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).

CONCLUSION

For these reasons, *amici* ask this Court to declare the subject provisions of Act 649 of 2003, including but not limited to those codified at Ark. Code Ann. §§ 16-55-201, 16-55-202, and 16-55-212(b), to be constitutional.

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